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Mead as (Mostly) Moot: Predictive Interpretation in Administrative Law

Ryan D. Doerfler

MEAD AS (MOSTLY) MOOT: PREDICTIVE INTERPRETATION IN ADMINISTRATIVE LAW

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In National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court explained that, within the domain of unclear agency-administered statutes, a federal court is subordinate to an administering agency. When an administering agency speaks authoritatively, federal court practice reflects this. When an agency speaks only informally, however, federal court practice does not. Specifically, when construing an agency-administered statute absent an authoritative agency interpretation, a federal court errs, given its subordinate status, when it exercises* independent judgment *concerning what interpretation is best. Instead, that subordinate status requires a court to* predict *what authoritative interpretation the administering agency would adopt—just as a federal court would* predict *how a state's highest court would answer some unsettled question of state law. Adhering to this predictive approach requires in turn that a court assign significant—in most cases dispositive—evidentiary weight to agency interpretations contained within certain legally nonbinding instruments, in particular legal briefs. This is because the non-authoritative interpretations contained in such instruments will most often constitute the best available evidence concerning what an administering agency would say if it were to speak authoritatively. This conclusion is surprising given the central holding of* United States v. Mead Corp. *that interpretations contained in nonbinding instruments are not entitled to controlling deference under* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. *What this article will suggest is that the central holding of* Mead *ought to be mostly moot since, even where controlling deference is not owed de jure, it is most often owed de facto.*

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INTRODUCTION

When making sense of unclear administrative statutes, courts operate as subordinates. While "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[1] the tasks of enacting and executing it are, as a rule, left to the other branches.[2] And, beginning with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[3] courts have come to regard the task of construing an unclear[4] term or provision within an agency-administered statute less as

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

2 *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 19 (1962) ("[T]he policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the [democratic] system."); Felix Frankfurter, Associate Justice, The Benjamin N. Cardozo Lecture: Some Reflections on the Reading of Statutes (Mar. 18, 1947), *available at* http://mtweb.mtsu.edu/cewillis/Hermeneutics/Frankfurter%20Reading%20Statutes.pdf ("In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not.").

3 467 U.S. 837 (1984).

4 While both courts and commentators typically treat "ambiguity" as a blanket term for textual unclarity, strictly speaking, "ambiguity" constitutes only a subset of unclarity. A text is "ambiguous" only insofar as it admits of more than one distinct meaning (e.g., a text in which the term "bank" might refer to a riverbank or a financial bank). By contrast, a text is also unclear if it is "vague," i.e., insofar as its precise extension is uncertain (e.g., a text in which it is unclear whether the extension of the phrase "the elderly" includes individuals who are sixty-two years old). *See, e.g.*, Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, *in* THE OXFORD

one of "say[ing] what the law is"[5] than as some mixture of declaring what the law shall be and carrying it into effect.[6] Understanding that mixed task as one principally assigned to the relevant administering agency,[7] courts have, in turn, taken up the now familiar practice of deferring to an agency's reasonable interpretation where unclarity exists within a statute that an agency administers.[8] Because agencies, not courts, have "primary interpretive authority" within that domain,[9] that courts afford *Chevron* deference to agency interpretations is, according to this picture, simply a reflection of those courts' subordinate status.[10]

While the way that courts behave when agencies speak—authoritatively, at least—respects the hierarchical relationship between them, what this Article will suggest is that the way that courts behave when agencies have yet to speak does not. More specifically, what this Article will argue is that, when acting in the absence of an authoritative agency interpretation, courts err, in light of their status as interpretive subordinates, in exercising *independent judgment* as to what interpretation they think would be best. Instead, that subordinate status compels courts to *predict* what authoritative interpretation the relevant

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HANDBOOK OF LANGUAGE AND LAW 128, 128–29 (Peter M. Tiersma & Lawrence M. Solan, eds., 2012). As a doctrinal matter, *Chevron* commands deference in cases of vagueness and ambiguity alike. *See* 467 U.S. at 843 ("[I]f 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) (footnote omitted)). As a matter of principle, however, one could at least argue that a claim of implicit delegation is far more plausible with respect to instances of vagueness (e.g., whether "bank" refers to a credit union) than with respect to instances of ambiguity (e.g., whether "bank" refers to a riverbank or a financial bank).

5 *Marbury*, 5 U.S. at 177.

6 John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617–18 (1996) ("*Chevron* is grounded in the modern constitutional principle that Congress can delegate significant 'legislative' policymaking discretion to agencies . . . ."); *see also* A.T. Massey Coal Co. v. Holland, 472 F.3d 148, 168 (4th Cir. 2006) ("Once that gap was created, the agency was left with an open policy space, which was the quintessence of legislative-type action to which *Chevron* deference was due." (citation omitted)).

7 *See Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." (footnote omitted)).

8 *See id.* at 843 ("[I]f 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."(footnote omitted)).

9 Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1273 (2002).

10 *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) ("*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative . . . ."); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron* . . . because of 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." (emphasis added) (citation omitted)).

agency would put forward. Adhering to this predictive approach requires in turn that courts assign significant—in most cases dispositive—evidentiary weight to agency interpretations contained within certain legally nonbinding instruments, in particular legal briefs and, at least potentially, certain non-legislative rules. Because the non-authoritative interpretations contained in such instruments most often constitute the best available evidence concerning what an agency would do if it were to speak authoritatively, courts will rarely have epistemic justification to predict a change in interpretive course. This conclusion is surprising in part because of the way it interacts with the central holding of *United States v. Mead Corp.*[11] that the interpretations contained in such instruments are not to receive deference under *Chevron*.[12] What this Article will suggest is that the central holding of *Mead* ought to be regarded as mostly moot since, even where deference is not owed de jure, it is more often than not owed de facto.

In arguing for the near mootness of *Mead*, this Article will draw upon the symmetry between the role of federal courts with respect to questions of administrative and state law, respectively.[13] As the Supreme Court observed in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[14] federal courts occupy a subordinate role in the administrative and the state law context alike.[15] In the state law context, where highest state courts retain primary interpretive authority, federal courts adhere to a set of practices calibrated to ensure maximum fidelity to those highest state courts, subject to fairness and resource constraints. First and most straightforward, where the relevant state's highest court has spoken authoritatively on some question of state law, federal courts will act in accordance with that state court's ruling, regardless of any prior, conflicting rulings either on the part of that state court or any federal court.[16] Second, where the relevant state's highest court has yet to speak on some unsettled question of state law, federal courts will, where practicable, provide that state court the opportunity to do so.[17] While in the past state courts relied upon various abstention doctrines to provide this opportunity, more recently, certification—along with its

11 533 U.S. 218, 229–33 (2001).

12 *See id.*; *accord* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

13 Within legal scholarship, this symmetry has been explored most thoroughly by Kenneth Bamberger and Kathryn Watts. *See* Bamberger, *supra* note 9; Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 NW. U. L. REV. 997 (2007).

14 545 U.S. 967.

15 *See id.* at 983–84 (drawing analogy between federal courts' respective role in the two contexts).

16 *See infra* Part I.A.

17 *See infra* Part II.A.1.

perceived lower attendant costs—has come to be the preferred device.[18] Third and final, where impracticable to provide that opportunity to speak, rather than exercising independent judgment, federal courts confronted with an unsettled question of state law will limit themselves to predicting how the relevant state's highest court would rule.[19]

As this Article will discuss, federal court practice in the administrative law context largely mirrors that in the state law context—with one significant exception. As in the state law context, federal courts will defer to the primary interpreter—here, administering agencies—when that interpreter speaks authoritatively on an interpretive question.[20] Likewise, as in the state law context, federal courts will, through adherence to the rule on remand and application of the primary jurisdiction doctrine, provide the relevant interpretive authority the opportunity to speak on a question of interpretation that it has yet to address where it would be practicable to do so.[21] Where administrative and state law practice diverge, however, and where, this Article will argue, federal courts deviate from their role as subordinate, is in circumstances where providing that opportunity to speak is impracticable. As mentioned above, rather than limiting themselves to prediction, courts in such circumstances exercise independent judgment in answering the interpretive questions before them.[22] In so doing, courts substitute what they deem good policymaking for fidelity to rule, bringing about in turn the various costs that result from having competing rather than cooperative interpretive bodies. These adverse consequences are all the greater as a result of a significant asymmetry between the administrative and the state law context, with the asymmetry being that, unlike in the state law context, where evidence is often sparse concerning how a given state court would proceed, in the administrative law context, evidence of what a given administering agency would do is readily available in the form of interpretations contained in nonbinding instruments, in particular legal briefs.[23] As a result, whereas the difference between prediction and the exercise of independent judgment is plausibly insubstantial in a number of state law cases, the difference between the two in administrative law contexts is inarguably significant. Ironically, then, although the administrative law context is the one in which it is possible to predict with significant accuracy, it is the context in which federal courts abandon the approach.

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18 *See id.*
19 *See infra* Part II.B.1.
20 *See infra* Part I.B.
21 *See infra* Part II.A.2.
22 *See infra* Part II.B.2.
23 *See infra* Part II.B.2.c.

This Article will consist of two parts. In Part I, it will articulate the rationales for regarding federal courts as subordinates within the state and the administrative law context, respectively. In so doing, it will discuss the, at this point, uncontroversial practice whereby federal courts defer to the official determinations of state courts and agencies within their respective domains of authority. In Part II, it will discuss the ways in which subordinate federal courts behave in the absence of such authoritative pronouncements. First it will outline the parallels between the various abstention doctrines and certification in the state law context and remand and primary jurisdiction in the administrative law context as methods to provide the relevant authority the opportunity to speak authoritatively on a particular matter when it has yet to do so. Second, it will discuss the asymmetry between the behavior of federal courts in the administrative and the state law contexts when providing that opportunity to speak would be impracticable, observing that whereas federal courts limit themselves to predicting how the relevant authority would rule in the state law context, said courts permit themselves to exercise independent judgment in the administrative law context, thereby engaging in insubordination.

I. PRIMARY INTERPRETIVE AUTHORITY AND PROVISIONAL PRECEDENT

As the Supreme Court observed in *Brand X*, federal courts operate as subordinates in the state and the administrative law contexts alike. In that case, the Court was presented with the question of whether federal courts owe deference to an interpretation of an unclear regulatory statute by an administering agency even where prior, conflicting judicial interpretations exist. Over a vociferous dissent from Justice Scalia, who deemed both "bizarre" and "probably unconstitutional" the prospect of agencies "revers[ing] or ignor[ing]" judicial determinations not to their liking,[24] the Court ruled that deference was owed even in these circumstances.[25] In response to Justice Scalia's objections, the Court observed that, just as there is nothing "bizarre" about the prospect of a ruling by a state's highest court taking precedence over an earlier, conflicting federal court determination in a matter of state law, neither should there be anything unsettling about the prospect of an agency's interpretation of a statute it administers—at least where unclear—supplanting an earlier judicial one.[26] As the Court observed, because in both contexts the primary interpretive authority rests not with the

24 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1017 (2005) (Scalia, J., dissenting).

25 *Id.* at 985.

26 *Id.* at 983–84.

federal judiciary but, instead, with some other decision-maker, determinations by the federal judiciary in either context are correctly understood as *provisional*, with the state court or agency, respectively, retaining the authority to shape the law in the way that it sees fit.[27]

That federal courts operate as subordinates in both the state and the administrative law context is thought to follow from a core constitutional value in each case. In the context of state law, the constitutional value in question is federalism.[28] In the administrative law context, it is the separation of powers.[29] Whatever the constitutional basis, insofar as one concedes that federal courts operate as subordinates in each context, one is committed straightaway to the conclusion that any determinations issued by those courts are provisional, to be supplanted if and when the relevant decision-maker speaks in its authoritative capacity.[30]

A. *State Courts*

That state courts retain primary interpretive authority with respect to questions of state law is a familiar principle, one that, in the words of Justice Ginsburg, "reflects the core of federalism."[31] While a federal court may be routinely asked to *apply* state law in order to resolve cases properly before it on the basis of, for example, diversity jurisdiction, such a court is to refrain from *declaring* state law out of respect for our

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27 *Id.*; *accord* Bamberger, *supra* note 9, at 1310–15 (outlining theory of "provisional precedent" for administrative law context modeled federal court handling of unsettled questions of state law).

28 *See, e.g.*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 723 (1996) ("Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." (citations omitted)); Hanna v. Plumer, 380 U.S. 460, 474–75 (1965) (Harlan, J., concurring) (characterizing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), "as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems").

29 *See, e.g.*, Legal Authority of the Department of the Treasury to Issue Regulations Indexing Capital Gains for Inflation, 16 Op. O.L.C. 136, 139 n.5 (1992) ("*Chevron* . . . sounds in the separation of powers under the Constitution and thus is an important limitation on judicial power." (citation omitted)); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 994 (3d ed. 2000) (remarking that *Chevron* deference is "premised on important separation-of-powers principles").

30 *See, e.g.*, Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 778 (2005) (Stevens, J., dissenting) (recognizing that, since "the Colorado Supreme Court is the ultimate authority on the meaning of Colorado law," Supreme Court's state law determination is necessarily "provisional"); Watts, *supra* note 13, at 1015 ("[B]y delegating interpretive authority to an agency, Congress intends the agency to act as the 'authoritative interpreter' of ambiguity in the statute. If an agency fails to exercise its congressionally-delegated interpretive powers, the courts remain free to impose their own interpretation in the interim. But if the agency later elects to exercise its congressionally-delegated powers to select a contrary construction, Chevron commands that the courts apply the agency's construction, so long as it is reasonable." (footnote omitted)).

31 Bush v. Gore, 531 U.S. 98, 142 (2000) (Ginsburg, J., dissenting).

system of dual sovereignty.[32] Put simply, as to questions of state law, state courts are "the only tribunal[s] empowered to speak definitively."[33] As this Article will discuss below, the task of applying while refraining from declaring state law becomes somewhat complicated when a federal court is presented with a question of state law to which existing state court precedent provides no clear answer.[34] However, when state courts have spoken clearly, the duty of federal courts is straightforward: federal courts must, barring exceptional circumstances, defer to the state court interpretation.[35] This remains true even where conflicting federal precedent exists with respect to the state law question at issue.[36] Federal courts must regard any prior, conflicting federal precedent as having been merely "provisional" in character.[37] To do otherwise would, after all, be to "declare" state law,[38] thereby usurping the state court's legitimate interpretive authority, upsetting in turn our system of "cooperative judicial federalism."[39]

B. *Agencies*

That agencies retain primary interpretive authority with respect to unclear terms or provisions within the statutes that they administer is, at this point, a familiar principle as well.[40] In *Chevron*, the Supreme Court first held that courts are to defer to an agency interpretation of such a term or provision, subject to the condition that an agency's

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32 *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1461 (1997) ("*Erie*'s dual command—that federal courts *apply* but not *declare* state law . . . ." (emphases added)).

33 Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959).

34 *See supra* notes 22–27 and accompanying text; *see also infra* notes 35–40 and accompanying text.

35 *See, e.g.*, Kokins v. Teleflex, Inc., 621 F.3d 1290, 1295 (10th Cir. 2010) ("To properly discern the content of state law, [the Court of Appeals] 'must defer to the most recent decisions of the state's highest court.'" (quoting Wankier v. Crown Equip. Corp., 353 F.3d 862, 866 (10th Cir. 2003))); Bueno v. Hallahan, 988 F.2d 86, 88 (9th Cir. 1993) (per curium) (observing that a federal court "must defer to the state court's interpretation of state law" (citation omitted)).

36 *See, e.g.*, *Wankier*, 353 F.3d at 866 ("[W]hen a panel of this Court has rendered a decision interpreting state law, that interpretation is binding on district courts in this circuit, and on subsequent panels of this Court, *unless an intervening decision of the state's highest court has resolved the issue*." (emphasis added) (citations omitted)); DeWeerth v. Baldinger, 38 F.3d 1266, 1273–74 (2d Cir. 1994) ("The very nature of diversity jurisdiction leaves open the possibility that a state court will subsequently disagree with a federal court's interpretation of state law.").

37 Bamberger, *supra* note 9, at 1308 ("[O]nce a state exercises its primary authority to make such a decision or amendment, the federal interpretation is no longer binding. Its precedential value is, literally, *provisional*." (emphasis added) (footnote omitted)).

38 Erie R.R Co. v. Tompkins, 304 U.S. 64, 78 (1938).

39 Lehman Bros. v. Schein, 416 U.S. 386, 391(1974).

40 *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 823 (2006) (characterizing *Chevron* as "the most cited case in modern public law").

interpretation falls within the bounds of reasonability.[41] As the Court reasoned, "if the [agency administered] statute is silent or ambiguous with respect to [a] specific issue,"[42] that silence or ambiguity is best interpreted as an "implicit"[43] delegation by Congress to the relevant agency to "fill any gap" created thereby.[44] Thus, if confronted with an ambiguous provision within an agency-administered statute, "a court may not substitute its own [interpretation] of [the] statutory provision for a *reasonable* interpretation made by the administrator of an agency."[45]

At least on its face, this imputation to Congress of a blanket intent to delegate might seem plainly incompatible with the Congress's explicit instruction that courts "decide all relevant questions of law, [and] interpret . . . statutory provisions"[46] when confronted with an agency-administered statute.[47] More fundamentally, one might think that adopting a general practice of deferring to agency interpretation of ambiguous statutory terms constitutes a dramatic abdication by the judiciary of its basic "duty," assigning to agencies the paradigmatically judicial task of stating the law.[48] However, as Justice Scalia has observed, one need see no abdication here:

> An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency. When the former is the case, what we have is genuinely *a question of law*, properly to be resolved by the

41 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984).

42 *Id.* at 843.

43 *Id.* at 844.

44 *Id.* at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

45 *Id.* at 844 (emphasis added).

46 5 U.S.C. § 706 (2012) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

47 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 241–42 n.2 (2001) (Scalia, J., dissenting) (observing that the language of § 706 "would seem to mean that all statutory ambiguities are to be resolved judicially" (citation omitted)); Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2640 (2003) ("Arguably, Section 706 of the Administrative Procedure Act is a broad statement delegating that authority to courts, contrary to the rule adopted in *Chevron*." (footnotes omitted)).

48 Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2074–75 (1990) (characterizing *Chevron* as a "counter-*Marbury*, for the administrative state"); *see also* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 436 (1995) ("Always, there has been strong authority for what we could call the *Marbury* view of administrative law . . . . Under this view, no deference in interpretation is called for: Interpretation is just lawfinding, and courts rather than bureaucrats are given the power to find federal law."); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 283 (1986) ("[T]he executive branch . . . is displacing the judiciary in its traditional and jealously guarded law-declaring function." (footnote omitted)).

> courts. When the latter is the case, what we have is *the conferral of discretion upon the agency*, and the only question of law presented to the courts is whether the agency has acted within the scope of its discretion—i.e., whether its resolution of the ambiguity is reasonable.[49]

According to Justice Scalia, then, insofar as unclarity within an agency-administered statute is best understood as a "conferral of discretion upon the agency,"[50] the resolution of such unclarity is not, as in the ordinary case, an act of *interpretation*, i.e., one of attempting to discern the meaning of the term or provision that Congress intended, but, rather, an act of *policy making*, i.e., one of deciding what the meaning of the unclear term or provision shall be.[51] Unconstrained by the norm of interpretive fidelity[52]—again, there is, by stipulation, no congressionally intended meaning to which an agency could be faithful[53]—the "interpreting" agency is thus free, subject to the constraint of textual fit, to adopt whatever interpretation it believes, in light of present knowledge and circumstances,[54] will best advance its

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49 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (emphases added).

50 *Id.*

51 *See supra* note 6 and accompanying text.

52 *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001) ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents." (footnote omitted)); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature. . . . The judicial task is to discern and apply a judgment made by others, most notably the legislature." (footnote omitted)).

53 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984) (holding deference appropriate because "Congress did not have a specific intention" as to the meaning of the relevant term); *see also* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1024 ("After *Chevron*, it no longer makes sense to speak . . . of a statute administered by an agency as having a single 'most natural or logical' meaning.").

54 With an emphasis placed upon "present." *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations . . . ." (first alteration in original) (citations and internal quotation marks omitted) (quoting *Chevron*, 467 U.S. at 863–64)); Scalia, *supra* note 49, at 517 ("[T]here is no longer any justification for giving 'special' deference to 'long-standing and consistent' agency interpretations of law. That venerable principle made a lot of sense when we assumed that both court and agency were searching for the one, permanent, 'correct' meaning of the statute; it makes no sense when we acknowledge that the agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose."). The Court's remarks in *Brand X* notwithstanding, it remains at least somewhat controversial whether a mere "change in administration" constitutes a sufficient basis for a change in an agency's interpretation. *Compare, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their

overall policy agenda.[55] As a result, when a court defers to an agency's reasonable interpretation of an unclear statutory term or provision, far from abdicating its duty to "say what the law is,"[56] that court is, in compliance with Congress's intent,[57] appropriately ceding to the technically expert and politically accountable agency[58] the mixed, decidedly non-judicial task of declaring what the law shall be and determining how best to carry that law into effect. The only task left to the judiciary, then, is that of determining the "scope of [the agency's] discretion,"[59] i.e., the bounds of the "policy space"[60] within which an agency may exercise its judgment.[61]

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votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."), *with* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 552 (2009) (Breyer, J., dissenting) ("Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations . . . ?"). The extent to which the Court's 2009 decision *Fox* settles the matter remains uncertain. *E.g.*, *Fox Television Stations*, 556 U.S. at 515 ("[An agency] need not demonstrate to a court's satisfaction that the reasons for [a] new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates."). *See* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 129 (2011) ("A majority in Fox refused to subject an administrative reversal to heightened scrutiny, but a different coalition of five Justices indicated that at least some agency reversals require more rigorous review.").

55 *See* Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 SUP. CT. REV. 1, 5 ("[S]tandard principles of administrative law so as to permit the executive to interpret ambiguous provisions as he sees fit, so long as his interpretation is reasonable.").

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

57 *See* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 17, 21 (1985) ("Sometimes the most faithful reading of a statute is that the legislature intended to make no decision on a particular substantive issue and to leave that issue to administrative creativity. In such a situation, a court's refusal to use independent judgment actually fulfills Congress' intent." (footnote omitted)).

58 *See Chevron*, 467 U.S. at 865 (contrasting judges, who "are not experts in the field, and are not part of either political branch of the Government," with agencies, who possess "great expertise" and are part of the politically accountable Executive Branch). As Randolph May argues, the political accountability rationale of *Chevron* plausibly applies with less force to independent agencies than to ordinary executive agencies. *See* Randolph J. May, *Defining Deference Down: Independent Agencies and* Chevron *Deference*, 58 ADMIN. L. REV. 429, 448 (2006) ("[F]or independent agencies, the political accountability link to the President emphasized in *Chevron* is absent."). *But see Fox Television Stations*, 556 U.S. at 523 (plurality) ("The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction." (citations omitted)). Whatever the force of Mr. May's argument, it is surely the case that even independent agencies are held to a greater degree of political accountability than is a federal judiciary with salary protection and life tenure. *See* U.S. CONST. art. III, § 1.

59 Scalia, *supra* note 49, at 516.

60 E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 11–12 (2005) ("Post-Chevron, statutes no longer possess a single prescriptive meaning on many questions; rather, they describe what I call a 'policy space,' a range of permissible interpretive discretion, within which a variety of decisions that the agency might make would be legally defensible to varying degrees.");

Whether operating within a policy space is best understood as a legislative activity, an executive activity, or some combination of the two,[62] what is relevant for present purposes is that, according to the rationale of *Chevron*, the resolution of unclarity within agency-administered statutes—as opposed to statutes more generally[63]—is best understood as something other than the quintessentially judicial activity of "say[ing] what the law is."[64] As a result, rather than a shirking of its judicial duty, the adoption of the practice of deferring to agency interpretation in this context can thus be characterized as a good faith attempt by the Court to comply with the negative implication of the famed *Marbury* pronouncement, namely that courts do best to refrain

see also, e.g., Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 601 (2009) (arguing that a court's role is merely to determine a "statute's "zone of ambiguity," the set of interpretations which the statute does not clearly prohibit"); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1145 (2012) (arguing that a court's role is merely to determine a statute's "'*Chevron* space,'" i.e., "the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority").

61 *See, e.g.*, Stephenson & Vermeule, *supra* note 60, at 601 ("If [an] agency promulgates an interpretation within [the identified] zone . . . then under Chevron the reviewing court must uphold the agency's interpretation, even though it differs from the court's most-preferred construction . . . ."); Strauss, *supra* note 60, at 1145 ("Faced with the exercise of such authority, the natural role of courts, like that of referees in a sports match, is to see that the ball stays within the bounds of the playing field and that the game is played according to its rules. It is not for courts themselves to play the game. From a finding of law that Congress has validly allocated authority to a noncourt body, it follows ineluctably that that other body has the authority to decide the issues allocated to it, subject to such judicial supervision as oversight entails.").

62 *Compare, e.g.*, Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (characterizing an agency's "adoption of a [legislative] rule [a]s an exercise of the executive rather than the legislative power"), *with* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) (referring to agency activity as "quasi legislative" in character).

63 While some argue that "*Chevron* is best taken as a vindication of the realist claim that resolution of statutory ambiguities often calls for judgments of policy and principle," Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2610 (2006); *see also* Krzalic v. Republic Title Co., 314 F.3d 875, 877 (7th Cir. 2002) (Easterbrook, J.) (characterizing *Chevron* as "in effect equating statutory interpretation to policymaking" (citation omitted)), courts continue to regard fidelity the governing norm when interpreting the ordinary statute. *See infra* notes 64, 154 and accompanying text.

64 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). In other words, something other than discerning the "best," in the sense of the *most faithful*, interpretation of a given legal text. *See generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (discussing the norm of interpretive fidelity generally). The contrast is, in this context, most often brought to the fore in discussions of the (ir)relevance of consistency of an agency's interpretation to the question of whether that interpretation warrants deference. *See* Barnhart v. Walton, 535 U.S. 212, 226 (2002) (Scalia, J., concurring) ("I do not believe, to begin with, that particular deference is owed to an agency interpretation of longstanding duration. That notion is an anachronism—a relic of the pre-*Chevron* days, when there was thought to be only one 'correct' interpretation of a statutory text. A 'longstanding' agency interpretation, particularly one that dated back to the very origins of the statute, was more likely to reflect the single correct meaning. But once it is accepted, as it was in *Chevron*, that there is a range of permissible interpretations, and that the agency is free to move from one to another, so long as the most recent interpretation is reasonable its antiquity should make no difference." (citations and internal quotation marks omitted)).

from engaging non-judicial activities where possible,[65] in particular where Congress has specifically intended—albeit implicitly and, indeed, fictionally[66]—that courts leave such activities to another decision-maker.[67]

Once one understands the interpretation of an unclear term or provision within an agency-administered statute as a policymaking task, a policymaking task delegated by Congress not to the judiciary but to the administering agency, the Court's holding in *Brand X* that a federal court must defer to a reasonable agency interpretation of some such term or provision notwithstanding any prior, conflicting judicial interpretation becomes straightforward enough. Just as a federal court lacks the authority to declare state law, so too does it lack the authority to declare federal law where Congress has specifically assigned that authority to another decision-maker. Under these circumstances, a court's insistence that its own prior, conflicting decision ought to take precedent over a later decision by the congressionally designated decision-maker would fly in the face of the separation of powers twice-over, conflicting first with the general presumption that courts are to refrain from acts of policymaking where possible and second with Congress's authority to allocate decision-making authority where it sees fit.

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65 *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" (quoting TVA v. Hill, 437 U.S. 153, 195 (1978))); Laurence H. Silberman, Chevron—*the Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) ("[U]ndeniably whether one is examining the Constitution or legislation, with respect to a given case, one often encounters ambiguities. *Chevron*'s rule . . . is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary." (footnote omitted)); Note, *Justifying the* Chevron *Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2045 (2010) ("Chevron deference is best understood as maintaining the traditional constitutional balance in which policy discretion is kept out of the hands of the politically unaccountable judiciary . . . ."); *cf.* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.1, at 380 (6th ed. 2012) (recognizing "strong presumption against the federal courts fashioning common law to decide cases").

66 *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (recognizing fictional nature of *Chevron*'s presumption concerning congressional intent); Scalia, *supra* note 49, at 517 (same).

67 *See* Manning, *supra* note 6, at 626–27 ("Chevron adopts a background presumption [concerning congressional intent] that reconciles now firmly established conceptions of delegation with constitutional structure. It is more consistent with the assumptions of our constitutional system to vest discretion in more expert, representative, and accountable administrative agencies.").

II. ACTING IN THE ABSENCE OF AN AUTHORITATIVE INTERPRETATION

As mentioned above, federal courts have long recognized in the state law context that, where a court occupies a subordinate role in an interpretive hierarchy, its subordinate status ought to shape not only the way that court behaves when its interpretive authority has acted, but also when that authority has yet to do so. When presented with a question of state law to which existing state court precedent provides no clear answer, a federal court will behave in recognition of its subordinate status in one of two ways: First, where practicable, a federal court will attempt, either through abstention[68] or certification,[69] to provide the relevant state court with the opportunity to speak directly and authoritatively on the state law question at issue. Second, where abstention or certification is impracticable, a federal court will attempt to minimize the likelihood of a conflict with a later, authoritative state court ruling by limiting itself to predicting how the relevant state court would decide the matter.[70] By adhering to this dual approach of abstention/certification and prediction, a federal court not only fosters comity with the authoritative state court by deferring to that court's judgment where practicable, but also increases fairness to individual litigants by minimizing the likelihood of inconsistent applications of state law across cases.

By contrast, federal courts have taken their subordinate status into account only partially when presented with a question of interpretation concerning an ambiguous term or provision within an agency-administered statute absent an authoritative interpretation by the administering agency. Federal courts have, in this context, substantially replicated the state law practice of abstention by adhering to the rule on remand by which a court will remand to an agency adjudicatory body in order to provide it the opportunity to address authoritatively an open interpretive question,[71] and to the doctrine of primary jurisdiction,

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68 *See, e.g.*, Johnson v. Collins Entm't Co., 199 F.3d 710, 720 (4th Cir. 1999) (holding abstention required in case involving disputed questions of state gaming law); Catlin v. Ambach, 820 F.2d 588, 591 (2d Cir. 1987) (holding abstention required in case involving interpretation of state education law).

69 *See, e.g.*, Nunez v. Geico Gen. Ins. Co., 685 F.3d 1205, 1210–11 (11th Cir. 2012) (certifying to Florida Supreme Court question concerning interpretation of Florida insurance statute); Barnes-Wallace v. City of San Diego, 607 F.3d 1167, 1170 (9th Cir. 2010) (certifying to California Supreme Court question of California constitutional law).

70 *See, e.g.*, Jaworowski v. Ciasulli, 490 F.3d 331, 335 (3d Cir. 2007) (predicting how New Jersey Supreme Court would interpret New Jersey statute of limitations for personal injury actions); DiBella v. Hopkins, 403 F.3d 102, 111–15 (2d Cir. 2005) (predicting how New York Court of Appeals would interpret New York libel law).

71 *See* Negusie v. Holder, 555 U.S. 511, 523 (2009) (holding that remand to Board of Immigration appropriate, barring exceptional circumstances, where the Board "has not yet exercised its *Chevron* discretion to interpret the statute in question").

pursuant to which a federal court may dismiss or stay a case in order to provide the relevant agency to consider directly the case before the court or a specific issue contained therein.[72] At the same time, federal courts—in combination with Congress and the various regulatory agencies—have failed to replicate in the administrative law context the more efficient state law practice of certification, thereby providing agencies less of an opportunity (at least in this one respect) to speak directly and authoritatively to unanswered interpretive questions within their purview than is provided to their state court counterparts. Much more problematically, federal courts have failed (almost) entirely to replicate in the administrative law context the state law practice of limiting themselves to predicting how the relevant agency would answer a given interpretive question when there is no opportunity to allow the agency to speak directly and authoritatively to the matter. Instead, federal courts have preferred to exercise their own judgment when answering such questions, taking into account (readily available) signals concerning the relevant agency's preferred interpretation only where the court deems the content of those signals to be *persuasive*,[73] i.e., as indicating to the court that the agency's preferred interpretation is the "correct" one.[74] While federal courts have plausibly adhered to the independent judgment approach in an effort to give effect to the Supreme Court's instruction in *Mead* not to accord full *Chevron* deference to agency interpretation contained within instruments lacking "the force of law,"[75] the end result has been not only the aggrandizement of federal courts at the expense of their interpretive superiors, but also the bringing about of unfairness to individual litigants as a result of an

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72 *See, e.g.*, *In re* StarNet, Inc., 355 F.3d 634, 639 (7th Cir. 2004) (Easterbrook, J.) ("Instead of trying to divine how the FCC would resolve the ambiguity created by the word "location," we think it best to send this matter to the Commission under the doctrine of primary jurisdiction."); Syntek Semiconductor Co. v. Microchip Tech. Inc., 307 F.3d 775, 782 (9th Cir. 2002) (referring to Register of Copyright's challenge to validity of copyright registration pursuant to doctrine of primary jurisdiction).

73 United States v. Mead Corp., 533 U.S. 218, 221 (2001) (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

74 Campesinos Unidos, Inc. v. U.S. Dep't of Labor, 803 F.2d 1063, 1070 (9th Cir. 1986) ("Although not binding on this court, the Secretary's interpretation of his own regulation is entitled to some deference, and here *we believe that interpretation to be correct*." (emphasis added)); *see also* Town of Stratford, Conn. v. FAA., 292 F.3d 251, 253 (D.C. Cir. 2002) (reasoning that, where *Chevron* framework inapplicable, "better" interpretation prevails); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1256 (2007) (acknowledging that "most of the Court's post-Mead applications of Skidmore review reflect the independent judgment model"); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1015 (2005) ("[*Mead*] basically instructs courts to exercise independent judgment regarding statutory meaning subject to the weak requirement that they carefully consider agency views for persuasiveness [where *Chevron* does not apply]." (footnote omitted)).

75 *Mead*, 533 U.S. at 221; *accord* Christensen v. Harris Cnty., 529 U.S. 576, 586–87 (2000).

increase in the likelihood of inconsistent application of regulatory statutes across cases.

A. *Abstention/Certification and Remand/Primary Jurisdiction*

One obvious way of avoiding conflict with one's interpretive superior is for one to provide that superior the opportunity to address directly as many questions as possible. In the state law context, federal courts have historically adhered to a number of related abstention doctrines, pursuant to which such a court will, under certain circumstances, dismiss or stay a case involving an unsettled question of state law in order to compel the plaintiff in the case to bring a separate suit in the relevant state court, thereby presenting that court with the opportunity to address the unsettled question of state law directly. Because of the attendant costs of requiring a plaintiff to bring an entirely separate suit, federal courts have, in recent years, come to rely increasingly on certification, a process by which a federal court will request of the relevant state's highest court that it address, through a more focused proceeding, the specific unsettled question of state law that the federal court finds itself confronted with.

In the administrative law context, federal courts largely mirror the state law practice of abstention through adherence to the rule on remand and the doctrine of primary jurisdiction. On the other hand, federal courts, in conjunction with both regulatory agencies and Congress, have thus far failed to adopt a regulatory analogue of certification. Because certification would be no more efficient than abstention in soliciting an agency interpretation through notice-and-comment rulemaking, the practical significance of the absence of regulatory certification is minimal. At the same time, because certification would provide an efficiency advantage over soliciting an agency interpretation through formal adjudication, courts, in conjunction with agencies or Congress, would do best to provide for and to adopt such a practice.

1. Abstention/Certification

When confronted with an unsettled interpretive question, perhaps the surest way for a subordinate federal court to avoid an eventual conflict with the relevant interpretive authority is to provide that

authority with an opportunity to speak first on the matter.[76] In the state law context, a federal court confronted with an unsettled question of state law will, under the appropriate circumstances, provide the relevant state court with the opportunity to address that question in one of two ways. First, a federal court might abstain from deciding the case before it,[77] requiring that the plaintiff in the case to bring a separate suit in the relevant state court, thereby providing that state court with the opportunity to answer any state law questions arising in the case.[78] Second, a federal court might certify the specific state law question it regards as unsettled to the relevant state's highest court,[79] thereby providing that court with the opportunity to rule specifically on that question before proceeding, if necessary, with the remainder of the case.

Both abstention and certification reflect a commitment by the federal judiciary to a system of "cooperative judicial federalism."[80] More specifically, what those practices reflect is the commitment by that judiciary to the position that, as to questions of state law, state courts are the only decision-makers "equipped to rule authoritatively."[81] Given that commitment, federal courts regard any rulings where they might issue concerning unsettled questions of state law that later come into conflict with authoritative state court rulings as having been made in "error," error that can be avoided through abstention or certification.[82] More significantly, recognizing that later conflicting state court rulings will, in light of their authoritative status, bind future litigants, federal courts rely on abstention and, more recently, certification as means of

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76 *See* World Harvest Church, Inc. v. Guideone Mut. Ins. Co., 586 F.3d 950, 952 (11th Cir. 2009) ("The only way we can be sure that the state law questions that underlie those three issues are answered correctly is to certify them to the [state's highest court]." (citation omitted)).

77 Whether a stay by the federal court or a dismissal (with or without prejudice) is appropriate will depend upon the abstention doctrine being invoked. *See* CHEMERINSKY, *supra* note 65, § 12.3, at 836 (contrasting so-called *Pullman* abstention (federal constitutional avoidance), which normally requires the federal court to stay its proceedings pending the determination of the state court proceeding, with so-called *Burford* abstention (interference with complex state regulatory regime), which requires dismissal with prejudice).

78 Assuming it retained jurisdiction, the federal court would, at that point, take up any remaining federal questions. *See* England v. La. State Bd. of Med. Examiners, 375 U.S. 411, 416 (1964) (holding claimant, following state court ruling, entitled to return to federal district court for adjudication of any remaining federal questions).

79 At present forty-five states as well as the District of Columbia and Puerto Rico have adopted certification procedures. *See* 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4248, n.30 (3d ed. 2004).

80 Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

81 Arizonans for Official English v. Arizona, 520 U.S. 43, 75–76 (1997); *see also, e.g.*, La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959) (observing that Louisiana state court as "the only tribunal empowered to speak definitively" on unsettled question of Louisiana state law); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 499–500 (1941) (observing that federal court's answer to an unsettled question of Texas state law "cannot escape being a forecast rather than a determination" because "[t]he last word on the meaning of [that law] . . . belongs neither to [the U.S. Supreme Court] nor to the district court but to the supreme court of Texas").

82 *Arizonans for Official English*, 520 U.S. at 79.

ensuring consistent treatment—and in turn fairness—for individual litigants.[83]

Because of the attendant costs to litigants, both in terms of time and money, the Supreme Court has been reasonably hesitant to recommend that federal courts resort to abstention as a way of minimizing conflict with their state court superiors.[84] This hesitancy has plausibly been enhanced by the concern that a federal court runs afoul of the separation of powers when it refuses to hear a case properly before it pursuant to a congressional grant of jurisdiction.[85] As a result, current Supreme Court doctrine calls for abstention only in "exceptional circumstances"[86] where certain interests in addition to cooperative judicial federalism would be advanced.[87] And even then, the Court instructs that abstention is appropriate only where the attendant costs to litigants would not be undue.[88]

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83 *See, e.g.*, *Thibodaux*, 360 U.S. at 30 ("The consequence of [permitting a federal court to interpret a previously uninterpreted Louisiana statute] would be that this case would be the only case in which the Louisiana statute is construed as we would construe it, whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours."); *Pullman*, 312 U.S. at 500 ("In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." (citations omitted)).

84 *See Arizonans for Official English*, 520 U.S. at 76 ("Attractive in theory because it placed state-law questions in courts equipped to rule authoritatively on them, *Pullman* abstention proved protracted and expensive in practice . . . .").

85 *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of a jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76 (1984) (arguing that various abstention doctrines "could be characterized as a judicial usurpation of legislative authority, in violation of the principle of separation of powers"). *But see* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 574 (1985) (arguing that "the continued existence of measured authority to decline jurisdiction does not endanger, but rather protects, the principle of separation of powers" since "the question whether a court must exercise jurisdiction and resolve a controversy on its merits is difficult, if not impossible, to answer in gross" and "the courts are functionally better adapted to engage in the necessary fine tuning than is the legislature").

86 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976).

87 *See, e.g.*, *Thibodaux*, 360 U.S. at 28 (abstention appropriate where uncertain state statute "intimately involved with sovereign prerogative"); Burford v. Sun Oil Co., 319 U.S. 315, 333–34 (1943) (abstention appropriate where federal court ruling would unduly interfere with complex state regulatory scheme); *Pullman*, 312 U.S. at 500–01 (abstention appropriate where resolution of state law issue could render unnecessary the resolution of a federal constitutional issue).

88 *See, e.g.*, Harris Cnty. Comm'rs Court v. Moore, 420 U.S. 77, 83 (1975) ("We have repeatedly warned, however, that because of the delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court, abstention must be invoked only in 'special circumstances,' and only upon careful consideration of the facts of each case." (citations omitted)); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509 (1972) (recognizing that abstention appropriate only in "narrowly limited special circumstances justifying 'the delay and expense to which application of the abstention doctrine inevitably gives rise.'" (citations omitted) (quoting England v. La. State Bd. Med. Exam'rs, 375 U.S. 411, 418 (1964))).

The outlook is somewhat rosier with respect to certification. Because it is at least perceived by the Court to have lower attendant costs to litigants as contrasted with abstention,[89] and because it less obviously conflicts with any duty a federal court might have to hear any and all cases properly before it,[90] the Supreme Court has been notably more sanguine with respect to certification as a tool for fostering comity between state and federal courts.[91] The Court expressed its friendliness towards certification most clearly in *Arizonans for Official English v. Arizona*,[92] where it indicated not only that certification had come to supplant abstention as the preferred method of providing a state court the opportunity to address directly an unsettled question of state law,[93] but also that, because of certification's practical advantages vis-à-vis abstention, resort to certification is not limited to the same "unique circumstances" as is—or, perhaps, was—resort to abstention.[94] As to the latter observation, the Court went so far as to suggest that the mere presence of a "[n]ovel, unsettled question[] of state law" might be enough to render certification appropriate in a given case.[95]

2. Remand/Primary Jurisdiction

At least with respect to abstention, federal court practice in the administrative law context largely mirrors that in the state law context. First, in the adjudicatory context, courts adhere to the remand rule by

89 *E.g.*, *Arizonans for Official English*, 520 U.S. at 79 ("[Certification] procedures do not entail the delays, expense, and procedural complexity that generally attend abstention decisions."); City of Hous., Tex. v. Hill, 482 U.S. 451, 470 (1987) ("The certification procedure is useful in reducing the substantial burdens of cost and delay that abstention places on litigants.").

90 *See* Clark, *supra* note 32, at 1550–51 ("[C]ertification would alleviate the separation-of-powers concerns associated with abstention by preventing federal courts from 'declin[ing] the exercise of jurisdiction which is given' by Congress. . . . Federal courts remain free to undertake necessary fact identification both before and after certification, and to apply relevant principles of state law to the facts once the highest state court has supplied the necessary rules of decision." (quoting *Cohens*, 19 U.S. (6 Wheat.) at 406)).

91 Lehman Bros. v. Schein, 416 U.S. 386, 394 (1974) ("State certification procedures are a very desirable means by which a federal court may ascertain an undecided point of state law, especially where . . . the question can be certified directly to the court of last resort within the State."); *see also* Bellotti v. Baird, 428 U.S. 132, 151 (1976) ("Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis.").

92 520 U.S. 43 (1997).

93 *E.g.*, *id.* at 75 ("Certification today covers territory once dominated by a deferral device called '*Pullman* abstention . . . .'").

94 *Id.* at 79 ("Blending abstention with certification, the Ninth Circuit found 'no unique circumstances in this case militating in favor of certification.' Novel, unsettled questions of state law, however, not 'unique circumstances,' are necessary before federal courts may avail themselves of state certification procedures." (footnote omitted) (quoting Yniguez v. Arizonans for Official English, 69 F.3d 920, 931 (9th Cir. 1995))).

95 *Id.*

which a court will remand to an agency adjudicatory body in circumstances where that body failed to address authoritatively a potentially dispositive interpretive question in its initial ruling.[96] In the words of the Court, "This remand rule exists, in part, because 'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.'"[97]

Second, pursuant to the doctrine of primary jurisdiction, a federal court may, under certain circumstances, abstain from deciding a case before it, requiring the litigants to seek administrative resolution either of the entire dispute or of some particular issue.[98] As with the various abstention doctrines in the state law context, primary jurisdiction is a doctrine that federal courts are expected to invoke selectively.[99] Although "[n]o fixed formula exists" concerning when to apply the doctrine,[100] courts are expected to take into account a variety of considerations, including the importance of ensuring uniform resolution of the regulatory issue in question,[101] the extent to which the resolution of that issue would benefit from agency expertise,[102] and the

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96 *See* Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A* Brand X *Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 171 (2012) (noting that the remand rule renders "[t]he analogy [drawn by the Court in *Brand X*] between federal courts construing state law and federal statutes administered by agencies . . . more apt").

97 Negusie v. Holder, 555 U.S. 511, 523 (2009) (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (alteration in original)).

98 *See* Bamberger, *supra* note 9, at 1309 (observing parallel between abstention doctrines in state law context and doctrine of primary jurisdiction in administrative law context); Watts, *supra* note 13, at 1026 (same); *cf.* United States v. Mich. Nat'l Corp., 419 U.S. 1, 4–5 (1974) (observing procedural similarities between primary jurisdiction and *Pullman* abstention). *See generally* Sidney A. Shapiro, *Abstention and Primary Jurisdiction: Two Chips Off the Same Block?—A Comparative Analysis*, 60 CORNELL L. REV. 75 (1974) (comparing abstention and primary jurisdiction pre-*Chevron*).

99 *See, e.g.*, Baykeeper v. NL Indus., Inc., 660 F.3d 686, 692 (3d Cir. 2011) (observing that invocation of primary jurisdiction appropriate only in "exceptional cases"); Access Telecomms. v. Sw. Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998) ("We are always reluctant . . . to invoke [primary jurisdiction] because added expense and undue delay may result." (citation omitted)).

100 United States v. W. Pac. R.R Co., 352 U.S. 59, 64 (1956).

101 Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 303–04 (1976) ("[I]t may be appropriate to refer specific issues to an agency for initial determination where that procedure would secure 'uniformity and consistency in the regulation of business entrusted to a particular agency.'" (quoting Far E. Conference v. United States, 342 U.S. 570, 574 (1952))).

102 Great N. Ry. Co. v. Merchs.' Elevator Co., 259 U.S. 285, 291 (1922) (observing that invocation of primary jurisdiction appropriate when determination requires consideration of "voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts . . . is indispensable, and such acquaintance is commonly to be found only in a body of experts").

likelihood that judicial resolution would interfere with the agency's execution of its overall regulatory mandate.[103]

Given the obvious fit between primary jurisdiction and the theory of interpretive deference articulated first in *Chevron* and again in *Brand X*,[104] it should come as no surprise that courts have deemed it appropriate to invoke the doctrine when confronted with an unclear term or provision within an agency-administered statute, hoping to provide the administering agency with the opportunity to construe that term or provision authoritatively.[105] Because the costs attendant to abstention are, as in the state law context, substantial, courts have rightly seen fit—even in the wake of *Brand X*[106]—to continue to treat primary jurisdiction as the exception rather than the rule.[107] Be that as it may, adherence to the doctrine of primary jurisdiction is the way in which federal courts have recognized most clearly their status as interpretive subordinates when acting in the absence of authoritative agency interpretations.

As discussed above, federal courts acting in the state law context have increasingly come to rely upon certification rather than abstention as the preferred method for providing state courts with the opportunity to speak directly and authoritatively to unsettled questions of state law.[108] For this reason, it is of at least some interest and significance that—although federal courts have long adhered to a regulatory equivalent to state law abstention doctrine in the form of primary jurisdiction—the practice of certification has no obvious analogue in the administrative law context.[109]

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103 United States v. Phila. Nat. Bank, 374 U.S. 321, 353 (1963) ("[Primary jurisdiction] doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." (citations omitted)).

104 *See supra* note 98.

105 *See* Am. Auto. Mfrs. Ass'n v. Mass. Dep't. of Envtl. Prot., 163 F.3d 74, 81 (1st Cir. 1998) ("When the matter at issue is primarily one of statutory interpretation, referral of that matter to the agency with primary jurisdiction may also be generally advisable in precisely those circumstances in which a court would defer to the agency's interpretation pursuant to [*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)]."); *accord* 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 14.3 (3d ed. 1994) ("One of the many effects of *Chevron* is to increase the number of cases in which courts should refer issues to agencies under the primary jurisdiction doctrine.").

106 *See* Watts, *supra* note 13, at 1029 (arguing that *Brand X* recommends "that the primary jurisdiction doctrine should be revitalized").

107 *See supra* note 99.

108 *See supra* notes 89–95 and accompanying text.

109 *See* Watts, *supra* note 13, at 1034–40 (recommending practice of inviting agency amicus briefs in the administrative law context as analogue for state certification practice). Christopher Walker suggests that federal courts' adherence to the remand rule when an agency has yet to exercise its *Chevron* deference, see *supra* notes 96–97 and accompanying text, is best conceived as an analogue to certification (as opposed to abstention). *See* Walker, *supra* note 96, at 172. Even if that is correct, however, it remains the case that the practice of certification has no analogue in the administrative law context where an agency relies—as do most—on notice-and-comment

At least in part, federal courts' failure to adopt a regulatory analogue to certification can plausibly be attributed to the fact that the benefits of certification familiar from the state law context would, in a large class of cases, fail to manifest in the administrative law context. Remember, in the state law context, the principal advantage of certification over abstention is one of efficiency: whereas abstention requires a state court to conduct an entirely separate trial in order to speak directly to the unsettled question of state law at issue, certification allows such a court to do so having conducted only a much more limited inquiry.[110] Contrast this with what a practice of certification would look like in the administrative law context. As discussed in greater detail below, following *Mead*, federal courts will, as a rule, treat as authoritative only those agency interpretations issued pursuant to notice-and-comment rulemaking or formal adjudication.[111] As such, certification in the administrative law context would either take the form of a court-issued petition for rulemaking or a request for an opinion from an agency adjudicator.[112] Setting aside for the moment the option of requesting an opinion from an agency adjudicator, one can observe that certification in the form of a court-issued petition for rulemaking would provide no advantage in terms of efficiency over abstention. Because abstention in this context would take the form of a stay pending a petition for rulemaking issued by the plaintiff, the only functional difference between certification and abstention would be the name of the petitioning party.[113]

In contrast with court-issued petitions for rulemaking, requests for opinions from agency adjudicators would preserve the efficiency advantage normally associated with certification. As in the state law context, certifying a specific interpretive question to an agency adjudicator would allow that adjudicator to speak directly to the

rulemaking as opposed to formal adjudication as a means of articulating interpretations possessing the force of law.

110 *See supra* note 89 and accompanying text.

111 *See infra* note 181 and accompanying text.

112 While Professor Watts recommends the practice of inviting agency amicus briefs as the appropriate analogue for certification, see Watts, *supra* note 13, at 1034–40, that practice would in fact amount to no analogue at all insofar as the agency interpretations contained in the resulting briefs would, per *Mead*, be regarded by the receiving court as non-authoritative. *See id.* at 1040–41 ("[U]nlike the binding views of a state's highest court solicited using state certification procedures in the federalism context—agency views solicited by a federal court in the context of a particular case often will be set forth in an informal format, such as an amicus brief or an advisory opinion, ineligible for Chevron's rule of mandatory deference" (footnotes omitted)).

113 Which is not to say that the different name on the petition may not matter; it is at least plausible that a petition from a federal court would receive greater public attention than one from a private individual, and that an agency would, in part for that reason, be more inclined to respond to a court's petition. *But see infra* notes 215–23 and accompanying text (discussing method for inducing agencies to respond to rulemaking petitions regardless of the identity of the petitioner).

question at issue without the burden of having to conduct an entirely separate adjudication, as would be necessary if the federal court were to dismiss or stay the case pursuant to the doctrine of primary jurisdiction.[114] As a result, that federal courts have thus far failed to act in conjunction with either agencies or Congress to provide for this form of certification cannot be excused on the grounds that doing so would serve little or no purpose.[115] Given the rule on remand described above, the absence of certification only becomes relevant in the somewhat unusual scenario where a court is confronted with an interpretive question pertaining to a statute administered by an agency that relies on formal adjudication as its preferred method of interpretation, but in the context of a case that did not originate in the adjudicatory context.[116] Given the relative scarcity of agencies preferring formal adjudication to notice-and-comment rulemaking as a means of articulating authoritative interpretations,[117] the practical significance of that failure to provide for certification in the adjudicatory context is plausibly minimal. Be that as it may, that courts would have only infrequent opportunity to make use of this device does nothing to suggest that it ought not to be added to the toolkit.

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114 Invocation of primary jurisdiction thus differs from the remand rule, see *supra* notes 96–97 and accompanying text, which permits a federal court to remand a case to an agency adjudicator with instruction to address a specific interpretive question. *See* Walker, *supra* note 96, at 172 (analogizing remand rule to state law certification practice).

115 At least insofar as the resulting advisory opinions were to have binding legal effect on the respective promulgating agencies. *Compare* Fed. Election Comm'n v. Nat'l Rifle Ass'n of Am., 254 F.3d 173, 185 (D.C. Cir. 2001) (holding advisory opinions that "have binding legal effect" on promulgating agency eligible for *Chevron* deference), *with* Mid-Am. Care Found. v. NLRB, 148 F.3d 638, 642 (6th Cir. 1998) ("[C]ourts do not accord *Chevron* deference to non-binding advisory opinions of an administrative agency." (citing Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring))).

116 For example, in a National Labor Relations Act preemption challenge, "a party asserting [preemption] must advance an interpretation of the Act that is not plainly contrary to its language and that *has not been 'authoritatively rejected' by . . . the* [*National Labor Relations*] *Board*." Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 395 (1986) (emphasis added) (quoting Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co., 370 U.S. 173, 184 (1962)).

117 In the decades immediately following the APA's passage in 1946, the majority of agencies relied on adjudication as the preferred means of articulating binding agency policy. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1398 (2004). By the mid-1970s, however, agencies had come to substantially prefer notice-and-comment rulemaking. *See id.*; *accord* J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L REV. 375, 375–76 (1974) (noting that agencies had entered the "age of rulemaking"). And, while concerns with "ossification" and delay has led in recent decades to increasing use by agencies of informal policymaking tools, see Magill, *supra*, at 1391 n.17, 1411 (noting increasing reliance by agencies on nonbinding guidance documents), those agencies continue to rely overwhelmingly on notice-and-comment rulemaking when articulating policies with "the force of law." *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1484 (2005) (observing that "[w]hile some agencies continue to use formal adjudication for the formulation of generally applicable standards, most do not" (footnotes omitted)). Notable exceptions include the National Labor Relations Board and the Federal Trade Commission. Magill, *supra*, at 1399.

B. *Prediction*

While providing the relevant interpretive authority with an opportunity to speak directly to an unsettled interpretive question is perhaps the surest way for a subordinate federal court to avoid later conflict, sometimes the costs attendant to providing that opportunity outweigh the benefits secured by doing so. As a result, in many if not most circumstances, the most sensible course of action for a subordinate federal court presented with an unsettled interpretive question will be to answer that question directly, albeit provisionally.[118] Be that as it may, that a subordinate federal court will sometimes have to answer such questions on its own does not go to suggest that that court should cease to be concerned with avoiding conflict with later rulings by its interpretive superior. In the state law context, subordinate federal courts have demonstrated a concern for conflict avoidance by refraining from exercising their independent judgment when answering the questions before them, opting instead to resolve such questions by predicting how the relevant state's highest court would do so if it were given the opportunity.[119] By conceiving of their task as one of prediction, subordinate federal courts not only avoid aggrandizing themselves at the expense of their interpretive superiors,[120] but also minimize the likelihood that their determinations will conflict with later determinations by those same superiors.[121] By contrast, in the administrative law context, subordinate federal courts have demonstrated much less of a concern with conflict avoidance, at least overtly embracing the approach of exercising their independent judgment concerning the "best" available answer to the particular

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118 *See* Bamberger, *supra* note 9, at 1308 (observing that "in nearly every instance in which a federal court is faced with an open state law question, it decides it. . . . provisional[ly]").

119 *See* CHARLES ALAN WRIGHT ET AL., 19 FEDERAL PRACTICE AND PROCEDURE § 4507 (2d ed. 1996) (observing that a federal court sitting in diversity jurisdiction "must determine issues of state law as it believes the highest court of the state would determine them"). For obvious reasons, this practice has come to be known as making an "*Erie* guess." *E.g.*, Combs v. Int'l Ins. Co., 354 F.3d 568, 577 (6th Cir. 2004) (observing that, in a "highly uncertain area of state law," a federal court is "forc[ed] . . . to make an educated '*Erie* guess'"); Krieser v. Hobbs, 166 F.3d 736, 739 (5th Cir. 1999) (observing that, when the content of state law is unclear, federal court must make an "*Erie* guess" and determine as best as it can what the state's highest court would decide).

120 *See* Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1046–47 (3d Cir. 1993) ("Because a federal court's prediction of state law, until and unless overruled by the state supreme court, tends to verge on the lawmaking function of the highest state court, it is critical that the federal court do all within its power to view the problem before it as a state court would, and not through the eyes of a court steeped in federal law." (internal quotation marks omitted)).

121 Adherence to the predictive approach minimizes federal court "error," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997), and, hence, future conflict with state court determinations by "insur[ing] that diversity cases will have the same outcome, *as far as possible*, whether they are filed in a state court or a federal court sitting in the territory of that state." Yohannon v. Keene Corp., 924 F.2d 1255, 1267 (3d Cir. 1991) (emphasis added).

interpretive questions put before them.[122] Of even greater consequence, subordinate federal courts acting in the administrative law context have, following *Mead*, made a practice of disregarding direct, though non-authoritative statements on the matter from the agencies with primary interpretive authority concerning the interpretive questions before those courts on the grounds that such statements are not "persuasive."[123] As a result, federal courts have, in the administrative law context, not only increased antagonism between themselves and their interpretive superiors, but also brought about increased unfairness to individual litigants by increasing the likelihood of inconsistent rulings with respect to like cases.

1. State Law

Assuming that abstention or certification is impracticable,[124] a federal court presented with an unsettled question of state law will, in nearly all cases, arrive at an answer by attempting to *predict* what the relevant state's highest court would rule if presented with the question at issue.[125] While the Supreme Court has never squarely endorsed this practice of prediction (as contrasted with the practices of abstention[126] and certification[127]), several of the Court's opinions do suggest that

122 *See supra* note 74 and accompanying text.

123 *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 269 (2006) (declining to defer to nonbinding interpretation promulgated by Attorney General on grounds that Court "do[es] not find the Attorney General's opinion persuasive"); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (refusing to defer to interpretation contained in agency opinion letter on grounds that Court "find[s] unpersuasive the agency's interpretation of the statute at issue").

124 Or that a request for certification has been declined. *See* Marin Tug & Barge, Inc. v. Westport Petroleum, Inc., 271 F.3d 825, 829–30 (9th Cir. 2001) ("The state supreme court declined our request for certification. Accordingly, we must 'predict as best we can what the California Supreme Court would do in these circumstances.'" (quoting Pacheco v. United States, 220 F.3d 1126, 1131 (9th Cir. 2000))).

125 While the overwhelming majority of courts adhere to the predictive approach when an authoritative interpretation of state law is unavailable, see *supra* note 119, a minority of courts adhere to what Bradford Clark refers to as the "static approach." Clark, *supra* note 32, at 1535. Pursuant to that approach a federal court will refuse to recognize any cause of action or defense that is not clearly established by state law. *Id.* at 1536–37. According to Professor Clark, federal courts ought to prefer the static to the predictive approach on federalism grounds. *See infra* note 129. However, as Clark concedes, adherence to the static approach risks both forum-shopping and inequitable administration of state law. *See* Clark, *supra* note 32, at 1542 ("If federal courts employ the static approach, parties benefited by the status quo will inevitably seek to litigate their cases in federal, rather than state, court because federal courts will rule against the proponent of a novel claim or defense unless the party can establish that it has been adopted by an appropriate organ of the state.").

126 *See supra* note 87 and accompanying text.

127 *See supra* notes 91–95 and accompanying text.

prediction is the preferred approach when an authoritative interpretation is unavailable.[128]

Like abstention and certification, prediction by federal courts is a practice rooted in a concern for federalism.[129] In *Erie Railroad Co. v. Tompkins*,[130] the Supreme Court famously held that, except in matters

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128 *See, e.g.*, Salve Regina Coll. v. Russell, 499 U.S. 225, 241 (1991) (Rehnquist, J., dissenting) ("[I]n a case such as this where the state law is unsettled . . . . the courts' task is to try to *predict* how the highest court of that State would decide the question."); West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1940) (observing that state intermediate court pronouncement of state law "is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise").

129 Most federal courts understand the duty to predict how a state's highest court would answer a question of state law that it has yet to address as following straightaway from *Erie*'s federalism-based command that federal courts defer to a state's highest court's state law determinations. *See, e.g.*, Wayne Moving & Storage of N.J., Inc. v. Sch. Dist. of Phila., 625 F.3d 148, 154 (3d Cir. 2010) ("A federal court under *Erie* is bound to follow state law as announced by the highest state court. . . . [W]hen the state's highest court has not addressed the precise question presented, [we] must predict how the state's highest court would resolve the issue." (quoting Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1373 n.15 (3d Cir. 1996)) (internal citations and quotation marks omitted)); Allstate Ins. Co. v. Menards, Inc., 285 F.3d 630, 635 (7th Cir. 2002) ("If the mandate of *Erie* is to be satisfied and the law ultimately employed is to be the law of the state, the federal court, exercising its authority to hear diversity cases, must make a predictive judgment as to how the supreme court of the state would decide the matter if it were presented presently to that tribunal." (footnote omitted)). Professor Clark argues that federalism concerns actually militate against prediction insofar as the resolution of state law uncertainties, however provisional, inevitably involves the exercise of just the sort of policymaking discretion that *Erie* reserved to the states. Clark, *supra* note 32, at 1500 ("The exercise of substantial policymaking discretion is the essence of lawmaking[, and that while] [t]he exercise of such discretion by state courts 'is not a matter of federal concern' because the Constitution imposes few, if any, restrictions on judicial lawmaking at the state level, [t]he exercise of substantial policymaking discretion by federal courts . . . raises serious judicial federalism concerns" (footnote omitted) (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938))). For that reason, Clark recommends, instead of the predictive of approach, that federal courts adhere to the "static approach," refusing to recognize any state law cause of action or defense not obviously recognized by either the state courts or the state legislature. *See id.* at 1540–41 (arguing that the static approach "eliminates the possibility that federal courts will usurp state lawmaking power by erroneously or prematurely making the fundamental policy choices that are necessary to recognize (and apply) novel rules of decision on behalf of a state," and thereby "operates to reserve state lawmaking power to agents of the state by preventing federal courts from circumventing the procedural and political safeguards of federalism" (footnote omitted)). Insofar as one conceives of judicial federalism as establishing within the domain of state law a relationship between state and federal courts of interpretive superior and subordinate, see *supra* notes 31–39 and accompanying text, however, the thought that judicial federalism requires that federal courts refuse to consider how their state court superiors would resolve a question not yet addressed authoritatively becomes somewhat difficult to maintain. *Cf. In re* McDonald, 205 F.3d 606, 612–13 (3d Cir. 2000) ("[W]e should not idly ignore considered statements the Supreme Court makes in dicta. The Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket. 'Appellate courts that dismiss these expressions [in dicta] and strike off on their own increase the disparity among tribunals (for other judges are likely to follow the Supreme Court's marching orders) and frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.'" (second alteration in original) (quoting United States v. Bloom, 149 F.3d 649, 653 (7th Cir. 1998))).

130 304 U.S. 64 (1938).

governed by positive federal law, federal courts are to apply "the law of the state."[131] Recognizing at the same time that the Constitution reserves to the states exclusive authority as to the content of their laws,[132] the Court went on to observe that, in the course of *applying* state law, federal courts must take pains not to "*declare*" it.[133] In an effort to comply with this dual command to apply but not to declare state law, federal courts reject with near uniformity the impulse to rely (explicitly[134]) upon independent judgment when formulating answers to unsettled questions within that domain.[135] Instead, in an effort to minimize any disparity in outcome between federal and would-be state court proceedings, the vast majority of federal courts limit themselves to predicting how a given question would be resolved if it were to proceed through the relevant state court system, including appellate review.[136] By treating would-be state court rulings as the baseline against which to measure their own, federal courts manifest recognition that "[s]tate courts," not federal courts, "are the final arbiters of their own state law."[137] Moreover, by adhering to the predictive approach, federal courts minimize the likelihood of conflict with future authoritative state court rulings,[138] thereby advancing basic fairness interests by ensuring as best as possible consistency in outcomes across individual litigants.[139] Last

131 *Id.* at 78.

132 *Id.* at 78–79 ("[T]he constitution of the United States . . . recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.").

133 *Id.* at 78 (emphasis added).

134 *See infra* note 143 and accompanying text.

135 *See, e.g.*, Nationwide Mut. Fire Ins. Co. of Columbus, Ohio v. Pipher, 140 F.3d 222, 228 (3d Cir. 1998) (Alito, J., concurring) ("Because this is a diversity action, however, we are not free to exercise our independent judgment but must instead predict how the Supreme Court of Pennsylvania would rule."); Kathios v. Gen. Motors Corp., 862 F.2d 944, 949 (1st Cir. 1988) ("[A federal court's] function [in a diversity case] is not to formulate a tenet which we, as free agents, might think wise, but to ascertain, as best we can, the rule that the state's highest tribunal would likely follow." (citation omitted)).

136 *See* WRIGHT ET AL., *supra* note 79, § 4507 (observing that federal courts must do their best to "ensure that the outcome of the litigation be substantially the same as it would be if tried in a state court and subjected to that system's appellate process" in order to prevent forum-shopping).

137 Danforth v. Minnesota, 552 U.S. 264, 291 (2008) (Roberts, J., dissenting).

138 Strictly speaking, a federal court's 'prediction' is not a *prediction* but a *counterfactual* assessment concerning what would have happened if the dispute at issue had been resolved by the relevant state court system, including appellate review. However, the practical effect of making such a prediction is to minimize conflict with later, actual authoritative state court rulings.

139 Given the paucity of available evidence, federal courts tend to be circumspect concerning the accuracy of their state law predictions. *See infra* note 142. Limited as it may be, however, the fact remains that issuing a prediction predicated upon all available evidence, see McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 663 (3d Cir. 1980) (discussing the range of evidence federal court ought to consider when formulating state law prediction), is often the best that a federal court can do in terms of ensuring equitable administration of state law.

and related, by minimizing the likelihood of conflict with *counterfactual* authoritative state court rulings, federal courts that limit themselves to prediction advance the anti-forum shopping rationale[140] underlying in part the decision in *Erie*.[141]

Because a federal court will often find itself with a relatively sparse and inconclusive evidentiary base upon which to draw when engaging in a predictive inquiry, the accuracy of such a court's predictions can be expected to be modest at best.[142] Moreover, and perhaps of greater consequence, because the evidence available in a given case will often be inconclusive, a federal court retains, under the predictive approach, substantial discretion with respect to the conclusions it ultimately arrives at, discretion that, as Professor Clark argues, that court might use to implement its own policy preferences under the guise of "'prediction.'"[143] In this way, the predictive approach threatens, in the worst-case scenario, to simply collapse into the independent judgment approach. Be that as it may, that the predictive approach promises only modest benefits in the best-case scenario and no benefits in the worst does nothing to suggest that federal courts would be better off instead relying upon independent judgment. Rather, all that the above concerns suggest is that the predictive approach is an imperfect solution to the problems that arise when a federal court, acting as an interpretive

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140 *See* Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) ("In essence, the intent of t[he *Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.").

141 *See* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 162 (2003) ("[W]hen facing an unsettled or unclear precedent on an important issue of state law, the federal court must review the law available and predict how the highest court in the state would most likely rule, rather than develop a federal common law rule which might differ from the state law rule and encourage forum shopping." (footnote omitted)).

142 *See, e.g.*, Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 253 (3d Cir. 2010) ("As a federal court sitting in diversity, we are charged with predicting how another court—in this case, the New Jersey Supreme Court—would rule on the record presented to us. Because of the dearth of directly on-point New Jersey case law, this case represents yet another example of how difficult the predictive exercise can be." (citation omitted)); Labiche v. Legal Sec. Life Ins. Co., 31 F.3d 350, 354 (5th Cir. 1994) ("We recognize that the task of predicting the final course to be taken by the supreme court of a state is a difficult one. The Erie guesses made under circumstances such as presented in this case are many times wrong. We have no assurance that the predictions we make today will ultimately fare better than the notable similar forays into diversity jurisdiction that have missed the mark.").

143 Clark, *supra* note 32, at 1499 ("Because state law generally fails to provide meaningful guidance regarding what weight, if any, to give such materials, a federal court's 'prediction' of state law frequently devolves into little more than a choice among competing policy considerations." (footnote omitted)).

subordinate, is asked to address an interpretive question absent direct guidance from its interpretive superior.[144]

2. Regulatory Law

A federal court attempting to construe an unclear term or provision within a regulatory statute in the absence of any direct input from the administering agency will, at least nominally, do so as it would any other such term or provision, namely through the application of the traditional tools of statutory interpretation.[145] Whether in so doing such a court could covertly predict how the agency would construe the statute turns out to be a difficult question.[146] Regardless, when construing such a term or provision in the presence of a direct though legally nonbinding indication of the administering agency's preferred interpretation, federal courts have demonstrated a clear willingness to disregard the agency's preference.[147] In an effort to comply with *Mead*'s instruction not to treat as authoritative agency interpretations contained in instruments lacking "the force of law,"[148] federal courts have thus failed to implement—at least in full—the predictive approach in the administrative law context. This is because the full implementation of

144 Professor Clark argues that the predictive approach is at least not preferable to the "static approach," see *supra* note 125, for the reason that both approaches invite forum shopping and, in turn, inequitable administration of state law. *See* Clark, *supra* note 32, at 1541–43. The static approach invites forum shopping for reasons discussed above. *See supra* note 125. The predictive approach, Clark contends, invites forum shopping because litigants will seek to take advantage of federal court predictions that state courts have yet to have the opportunity to test. *See* Clark, *supra* note 32, at 1542. Clark suggests that the threat of forum shopping, and, hence, inequitable administration, is roughly equivalent under either approach. *See id.* at 1543 ("[T]here is no apparent reason to conclude that one form of forum shopping is preferable to the other." (footnote omitted)). To this, two responses: first, in the scenario where federal courts have yet to consider the unsettled question of state law at issue, the risk of forum shopping under the static approach is much greater; this is because the static approach, unlike the predictive approach, renders the outcome in one of the two forums certain. Second and more fundamental, so long as variable federal court predictions yield, in the aggregate, a more accurate forecast of state law than a blanket 'prediction' of stagnancy, the incentive to forum shopping will, *ceteris paribus*, be less under the predictive approach than under the static approach.

145 *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (observing that, in the absence of agency interpretation, interpreting court is left to discern "the *best* reading of the statute"); Molly A. Leckey & Stephanie A. Roy, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Administrative Law*, 72 GEO. WASH. L. REV. 946, 954 (2004) (observing that, outside *Chevron*'s domain, a "court will simply engage in a de novo review of the statute through the use of traditional tools of statutory interpretation").

146 *See infra* notes 166–68 and accompanying text.

147 *E.g.*, Hickman & Krueger, *supra* note 74, at 1275 (observing that, post-*Mead*, federal courts of appeals have rejected nonbinding agency interpretations 39.6% of the time when applying *Skidmore* framework).

148 United States v. Mead Corp., 533 U.S. 218, 221 (2001); *accord* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

the predictive approach in the administrative law context would result in consistent deferral to such non-authoritative agency interpretations, rendering *Mead*'s instruction mostly moot.

a. No Direct Guidance

Absent any direct input from the relevant agency, a federal court will, at least nominally, construe an unclear term or provision contained within a regulatory statute in the same way that it would any other such term or provision, namely through the application of the traditional tools of statutory construction. That a federal court defaults in this context to the traditional tools of statutory construction is problematic for two reasons. First, as suggested above, because this approach involves a federal court exercising its independent judgment concerning how the relevant term or provision is best construed, it in turn involves that court aggrandizing itself at the expense of the agency that retains primary interpretive authority.[149] Second, and perhaps more consequentially, because the traditional tools of statutory construction are tools for maximizing *interpretive fidelity* as opposed to *policy outcomes*,[150] reliance on those tools by federal courts when construing regulatory statutes in the first instances has at least the potential to result in a systematic increase in the likelihood that the interpretations offered by courts will eventually come into conflict with a later, authoritative interpretation by the relevant agency.

As to the second concern, remember again that, at least from the standpoint of an agency, statutory interpretation under *Chevron* is a two-step process: At step one, the agency applies the traditional tools of statutory construction to a given term or provision, determining the range of interpretations that are reasonably available given the statute's text, structure, purpose, etc.; at step two, the agency evaluates that range of reasonably available interpretations in light of its policy goals and preferences, selecting the interpretation that accords with those goals and preferences best.[151] So understood, statutory interpretation as practiced within *Chevron*'s domain is markedly different from that task as practiced without. In the run-of-the-mill case, while considerations of policy may inform a court's interpretation of a given statutory term of provision,[152] a court ultimately regards itself as beholden to the (legislatively embodied[153]) intent of the enacting Congress.[154] When best

149 *See supra* notes 73–75 and accompanying text.

150 *See supra* notes 52–55 and accompanying text.

151 *See supra* notes 60–61 and accompanying text.

152 *See* Scalia, *supra* note 49, at 515 ("[T]he 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, the consideration of policy consequences.").

153 As John Manning observes, both modern textualists and "Legal Process-style" purposivists accept that the "intent" relevant to statutory interpretation is not the subjective intentions of

policy and fidelity to congressional intent call for different results, it is the latter that is thus supposed to prevail.[155] And, for that reason, it is the latter that the ordinary tools of statutory interpretation are calibrated to track.[156]

Because the traditional tools of statutory interpretation are designed to advance the value of fidelity over that of best policy, the practice of federal courts construing unclear regulatory statutes just through the application of those tools systematically increases the likelihood that federal court interpretations will come into conflict with later, authoritative agency interpretations. To see why, consider *AT&T Corporation v. City of Portland*,[157] the decision articulating provisional precedent that the Supreme Court eventually allowed to be supplanted in *Brand X*.[158] In *Portland*, the Ninth Circuit was asked to determine whether broadband internet service is properly characterized as a "telecommunications service" for purposes of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.[159] In making that determination, the Ninth Circuit stated plainly—at the outset—that the task before it was one of faithful interpretation rather than policymaking, remarking:

> The parties, and numerous amici, forcefully urge us to consider what our national policy should be concerning open access to the Internet. However, *that is not our task* . . . . [W]e address the Internet aware that courts are ill-suited to fix its flow; instead, we draw our bearings from the legal landscape, and chart a course by the law's words. To

actual legislators, but rather an "'objectified'" or "constructive" intent derived from legislative text taken in context. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79, 90–91, 102–03 (2006).

154 *See, e.g.*, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) ("Our [interpretive] task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980))); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." (footnote omitted)).

155 *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.").

156 *See, e.g.*, Smith v. United States, 507 U.S. 197, 209 (1993) (Stevens, J., dissenting) (characterizing "canons of statutory constructions" as "tools to be used to divine congressional intent" (emphasis omitted)); NLRB v. United Food & Commercial Workers Union Local 23, 484 U.S. 112, 123 (1987) ("On a pure question of statutory construction, [a court's] first job is to try to determine congressional intent, using 'traditional tools of statutory construction.'").

157 216 F.3d 871 (9th Cir. 2000).

158 *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984–85 (2005) (holding that Ninth Circuit's interpretation of Telecommunications Act in *Portland* does not trump FCC's later, conflicting interpretation).

159 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); *see* 47 U.S.C. § 151 (2012).

> that end, "we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy."[160]

With its task so conceived, the Ninth Circuit went on to determine that broadband service is properly classified as a "telecommunications service" for purposes of the Act as amended, a determination that was ultimately displaced by a later, conflicting determination by the FCC.[161] What is relevant here is not so much the fact of eventual displacement—that can happen with any provisional determination—as the extent to which the Ninth Circuit's methodological approach lends itself to determinations that will eventually be displaced. Whereas courts like the Ninth Circuit seek to avoid "consider[ing] what our national policy should be" in issuing its interpretation of an unclear regulatory statute, it is precisely that consideration that will, under *Chevron*, guide the relevant agency when it gets around to interpreting that very same statute.[162] As a result, while it is understandable that a federal court might wish to avoid engaging in "naked" acts of policymaking[163]—whether for reasons of institutional competence,[164] separation of powers,[165] or both—that such a court bases its interpretation on considerations other than policy makes it all the more likely that that interpretation will come into conflict with the policy-based interpretation put forward by the relevant agency at some later date.

To the Ninth Circuit's credit, that court's approach in *Portland* may have conformed to the predictive approach much more closely in practice than one might have thought on the basis of the court's characterization of its preferred methodology. The court began its opinion by observing that the FCC had "declined, both in its regulatory capacity *and as amicus curiae*, to address the issue before" the court,[166] suggesting that the court was at least open to taking into account any policy positions the FCC might have articulated through a nonbinding instrument such as a legal brief. Moreover, in reaching its ultimate determination, the court reasoned "the definition of cable broadband as a telecommunications service coheres with the overall structure of the Communications Act as amended . . . *and the FCC's existing regulatory*

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160 *Portland*, 216 F.3d at 876 (emphasis added) (quoting United States v. Mohrbacher, 182 F.3d 1041, 1048 (9th Cir. 1999)).

161 *See supra* note 158 and accompanying text.

162 *See supra* notes 49–61 and accompanying text.

163 Mistretta v. United States, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting) (reasoning that non-legislative body's exercise of lawmaking power that is "not ancillary" to exercise of other power but is instead "quite naked" violates separation of powers).

164 *See supra* note 58.

165 *See supra* note 65.

166 AT&T Corp. v. City of Portland, 216 F.3d 871, 876 (9th Cir. 2000) (emphasis added).

regime."[167] Left without any indication from the FCC of any policy judgments not already embodied in current regulations, it is at least possible that, by adopting the interpretation that it deemed to best cohere with those regulations, the court was effectively judging that, given the available evidence, it was most likely that the FCC would classify broadband service as a "telecommunications service" if it were to make that determination.[168]

Whatever was the case in *Portland*, what to take away from the above discussion is that, insofar as a federal court finds itself left to answer an interpretive question absent any direct guidance from the relevant agency,[169] the best available approach is plausibly for that court to rely upon the policy judgments it perceives to be reflected in any indirectly related actions taken by the relevant agency.[170] Such an approach would allow a court to answer the interpretive question before it in a way that, to the best of that court's knowledge, reflects current agency thinking. Moreover, such an approach would help that court to avoid the dilemma it would otherwise face, namely a choice between relying on its own policy judgment—again, unattractive based upon institutional competence and separation of powers concerns—or assigning excessive evidentiary weight to considerations that might inadequately reflect the pragmatic nature of statutory "interpretation" within *Chevron*'s domain.[171] While a court adhering to the predictive approach in such circumstances would have no guarantee that its arrived at interpretation will not come into conflict with a later, authoritative agency interpretation (e.g., an agency might have made policy judgments not yet reflected in any agency action, or that agency

167 *Id.* at 879 (emphasis added).

168 Viewed in this light, the Ninth Circuit's interpretation, although ultimately displaced, might have been as accurate as possible a forecast of the FCC's future course of action, given the limited available evidence. In this respect, that court's position mirrored that of so many federal courts left to forecast state court action on the basis of evidence ranging from scant to nonexistent. *See supra* note 142 and accompanying text.

169 This leaves open the possibility that a federal court has an obligation to *solicit* such direct guidance through, for example, an invitation to file an amicus brief. *See* Watts, *supra* note 13, at 1034 ("Inviting an agency to file an amicus brief, therefore, could be particularly appropriate where a court wants to expeditiously solicit the views of an agency that has not previously set forth any views whatsoever, or where the court needs clarification about an informal interpretation issued by the agency in the past.").

170 In this respect, the 'interpretive' methodology appropriate looks somewhat like the methodology proposed by Ronald Dworkin for resolving so-called "hard cases." *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 84–86 (1977) (arguing that judges ought to resolve "hard cases," i.e., cases not resolvable by appeal to existing legal rules, by appeal to general normative "principles" embodied in the laws); *accord* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1721 (2005) ("Policies, principles, and the like operate as background features which work behind the legal rules: pervading doctrine, filling in gaps, helping us with hard cases, providing touchstones for legal argument, and in a sense capturing the underlying spirit of whole areas of doctrine.").

171 *See supra* note 162 and accompanying text.

might simply revise its policy judgments at some point before it addresses directly the interpretive question at issue), that court would have done as well as possible, given the available information,[172] to minimize the chance of that unattractive outcome.

b. Non-Authoritative Interpretations

Whether federal courts acting in the absence of direct agency guidance in fact adhere to the predictive approach under the guise of applying the traditional tools of statutory construction is an empirical question that is not easily resolved.[173] Much easier to resolve, and of much greater consequence, is that federal courts fail to adhere to the predictive approach, at least in full, when acting in the presence of direct agency guidance when such guidance is contained within an instrument lacking "the force of law."[174] Under current doctrine, an agency interpretation articulated in a legally nonbinding instrument such as a legal brief or non-legislative rule is to be regarded by a federal court as ineligible for deference under *Chevron*.[175] In an effort to give effect to this stated limitation on *Chevron*'s domain, a federal court asked to construe an unclear term or provision within a regulatory statute will, as discussed above, attempt to discern for itself the "best" interpretation of the term or provision at issue, treating any agency interpretation that lacks "the force of law" as merely persuasive authority.[176]

In *Mead*, the Court announced most clearly the now settled principle that only a relatively narrow subset of agency interpretations is

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172 *But see supra* note 169.

173 In part, this is because of the difficulty of determining whether a court operating in such circumstances regards the meaning of the statutory term or provision as sufficiently "silent or ambiguous" to satisfy *Chevron* Step One. *See* Note, *Implementing* Brand X*: What Counts as a Step One Holding?*, 119 HARV. L. REV. 1532, 1532 (2006) (observing that courts seeking to implement *Brand X* face the "challenging" task of discerning whether the earlier court regarded its interpretation as "the only reasonable one").

174 United States v. Mead Corp., 533 U.S. 218, 221 (2001). The appropriateness of prediction in administrative law has received scant attention from courts and scholars alike. *But see In re* StarNet, Inc., 355 F.3d 634, 639 (7th Cir. 2004) (Easterbrook, J.) (invoking doctrine of primary jurisdiction as an alternative to predicting how FCC would resolve uncertainty). For instance, in her article expanding upon the analogy between the state and administrative law context, Professor Watts considers and rejects the predictive approach in a two-sentence footnote, reasoning that adherence to that approach would require courts to consciously take into account electoral outcomes. *See* Watts, *supra* note 13, at 1022 n.144 ("[A] court trying to 'predict' what the EPA might do under a new Republican administration would have to take the President's policy goals and politics into account in arriving at a construction of an ambiguous statutory term."). That Watts takes this prospect to be an obvious objection is odd, given the at least plausible acceptability of agencies relying on electoral outcomes as justification for changes in interpretation. *See supra* note 54. Worse still, Watts fails to even consider the numerous costs inherent to the alternative, i.e., relying on independent judgment.

175 *See infra* notes 178–83 and accompanying text.

176 *See supra* notes 73–74 and accompanying text.

potentially eligible for deference under *Chevron*.[177] In that case, the Court considered whether a tariff classification ruling by Customs Service characterizing three-ring "day planners" as "[d]iaries . . . bound" for purposes of the Harmonized Tariff Schedule of the United States (HTSUS), thereby rendering day planners subject to a four percent tariff, might warrant deference under *Chevron*.[178] Holding that the classification ruling was not a candidate for *Chevron* deference, the Court reasoned that an agency interpretation of an ambiguous term or provision is a candidate for deference only "when it appears that Congress delegated authority to [that] agency generally to make rules carrying the force of law," and when that agency's interpretation "was promulgated in the exercise of that authority."[179] While the Court was careful to note that procedural formality is not the only indicator of a congressional intent to delegate,[180] *Mead* has largely come to stand for the proposition that only interpretations arrived at through notice-and-comment rulemaking or formal adjudication are eligible for deference under *Chevron*.[181] Its exact contours aside, however, what is clear from the holding in *Mead* is that agencies are not to receive deference under *Chevron* for an interpretation articulated in an instrument clearly lacking the "force of law," such as a legal brief or non-legislative rule.[182]

Rather than instructing courts to disregard entirely interpretations contained within nonbinding instruments, the majority in *Mead* went on to hold that courts are to accord to non-authoritative agency interpretations "respect proportional to [their] 'power to persuade.'"[183]

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177 *Mead*, 533 U.S. at 226–30.

178 *Id.* at 225–26.

179 *Id.* at 226–27.

180 *See id.* at 231 ("[T]he want of that procedure here does not decide the case, for [the Court] ha[s] sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded . . . ." (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–57 (1995))).

181 *See, e.g.*, Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1483 (2011) (characterizing *Mead* as treating "procedural formality as the touchstone for Chevron deference"); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 359 (2003) (characterizing *Mead* as establishing procedural formality as "the trigger for Chevron deference"). *But see* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 219–21 (2006) (describing a series of post-*Mead* court of appeals decisions according *Chevron* deference to agency interpretations not arrived at pursuant to formal procedures).

182 As Cass Sunstein observes, "an agency may make rules that are binding, in the sense that they have the force of law, without notice-and-comment when the rules involve agency procedure or when there is 'good cause' for dispensing with notice-and-comment processes." Sunstein, *supra* note 181, at 223 (footnote omitted) (quoting 5 U.S.C. § 553(b)(3)(B) (2012)).

183 *Mead*, 533 U.S. at 235 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). As the Court went on to explain, a nonbinding interpretation "may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." *Id.*; *see also Skidmore*, 323 U.S. at 140 ("The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

As a result, when a federal court has at its disposal only some such non-authoritative agency interpretation, that court is expected, it would appear, to conduct an independent inquiry (e.g., through the application of the traditional tools of statutory construction[184]) concerning the "best" possible interpretation of the unclear term or provision with which it is presented,[185] taking into account said nonbinding interpretation only insofar as it sheds light on what that "best" possible interpretation might be.[186] Similar to the scenario discussed above,[187] the extent to which such inquiries are truly independent is difficult to discern.[188] At the same time, what is not at all difficult to discern is that, with significant frequency, federal courts interpret ambiguous terms or provisions in ways that are directly contrary to the non-authoritative agency interpretations that those courts have at their disposal.[189]

In another vociferous dissent, Justice Scalia took the majority in *Mead* to task for displacing what he took to be *Chevron*'s general presumption of a congressional intent to delegate with a system under which courts would determine case-by-case and on the basis of a standardless totality of the circumstances test whether Congress intended to delegate interpretive authority to individual agencies seeking deference.[190] As an alternative to this perceived dystopian regime, Justice Scalia argued that the Court ought to have affirmed the principle that he understood *Chevron* to stand for, namely that "all

184 For example, on remand, the Federal Circuit ruled that the three-ring day planners at issue in *Mead* were "neither 'diaries' nor 'bound,'" relying primarily on dictionary definitions of both terms. *See* Mead Corp. v. United States, 283 F.3d 1342, 1346–50 (Fed. Cir. 2002).

185 *See supra* note 74 and accompanying text.

186 *See, e.g.*, Manning, *supra* note 6, at 681 ("Under [*Skidmore*], the agency bears the burden of persuading the court to exercise its independent judgment in the agency's favor. In exercising such judgment, however, the reviewing court must take account of the special resources that the agency brings to the task."); Watts, *supra* note 13, at 1007–08 ("[Within the *Skidmore* framework,] the ultimate responsibility for selecting a preferred construction of the statutory ambiguity rests with the court. Skidmore, therefore, does not displace the independent judgment model. Rather, it merely serves as a tool that courts can use along with other traditional tools of statutory interpretation." (footnotes omitted)).

187 *See supra* notes 166–68 and accompanying text.

188 *See, e.g.*, Hickman & Krueger, *supra* note 74, at 1255, 1281 (articulating alternative conception of *Skidmore*, according to which deference accorded "along a continuum or sliding scale, with the degree of deference varying according to the reviewing court's evaluation of Skidmore's contextual factors," arguing "that the courts of appeals overwhelmingly approach Skidmore in the mode of a sliding scale" (footnote omitted)); Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead *and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 178 (2002) ("[W]hen a court applies the *Skidmore* standard, actual deference is always a distinct possibility even though *Skidmore*'s articulated standard suggests the reviewing court should exercise independent judgment.").

189 *See supra* note 147.

190 *See* United States v. Mead Corp., 533 U.S. 218, 241 (Scalia, J., dissenting) ("The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): . . . 'totality of the circumstances' test.").

authoritative agency interpretations of statutes they are charged with administering deserve deference," no matter, for example, the degree of procedural formality involved in arriving at such an interpretation.[191] Of particular significance, Justice Scalia observed that the interpretation at issue in the case at hand, the Customs Service's construal of "diaries . . . bound," constituted an authoritative agency interpretation, i.e., an interpretation "that represents the official position of the agency,"[192] insofar as that interpretation, originally signed only by the Director of the Commercial Rulings Branch of Customs Headquarters' Office of Regulations and Rulings, had been endorsed in a legal brief filed by the Solicitor General and co-signed by the Treasury's General Counsel.[193] Asserting that an agency interpretation is to be regarded as "authoritative" insofar as it "represent[s] the judgment of central agency management, approved at the highest levels," Justice Scalia remarked that a decision by an agency's general counsel to defend an interpretation in court, let alone a decision by the Solicitor General in conjunction with a general counsel to defend that interpretation before the Supreme Court, surely indicates the interpretation in question represents the agency's authoritative view.[194]

Setting aside the merits of Justice Scalia's critique, what is striking is the extent to which one arrives at a (near) functional equivalent to Justice Scalia's affirmative position insofar as one accepts that federal courts must adhere to the predictive approach—taking into account all available information[195]—when making sense of an unclear regulatory statute in the absence of a controlling agency interpretation. The reason why is straightforward: insofar as one was attempting to predict whether the Department of the Treasury, acting in its capacity as the primary interpretive authority, would classify three-ring day planners as "diaries . . . bound" for purposes of the HTSUS, what better evidence could one imagine than a legal brief filed by the Solicitor General and co-signed by Treasury's General Counsel endorsing that classification?[196]

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191 *Id.*

192 *Id.* at 257.

193 *Id.* at 258.

194 *Id.* at 258 n.6.

195 In other words, information contained in binding and nonbinding interpretations alike.

196 David Barron and Justice (then-Professor) Elena Kagan cautioned that agency heads will often feel compelled, for reasons having to do with morale, solidarity, etc., to affirm the interpretations arrived at by their subordinates, particularly in the context of a final agency action. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 259 (2001) (observing that "[r]atification often will occur within agencies in near automatic fashion"). For that reason, Kagan and Barron caution against regarding an agency's litigating position as the principal indicia of an agency's "official" policy, at least insofar as that "official" policy is supposed to reflect the considered judgment of the agency head. *See id.* at 258–60. What Barron and Kagan fail to explain, however, is why one would not expect this tendency to affirm to

To put the point more generally: under the predictive approach, a federal court will attempt to resolve the interpretive questions before it by asking, "how would the agency answer this question, if it were to do so authoritatively?" As discussed above, in some situations, the agency in question will have failed to speak directly to the interpretive question at issue, leaving the court to predict that agency's likely future behavior on the basis of its indirectly related past actions.[197] At the same time, particularly in light of the ease with which an agency can communicate its views to a court through the use of legal briefs, a court will very often find itself with ready access to remarks from the relevant agency that do address the question at issue directly.[198] And, in the vast majority of those cases, the only epistemically defensible answer a court could give to the question, "What would the agency do?" will be, "What it says it would."[199] As a result, under the predictive approach, *Mead*'s instruction not to accord deference under *Chevron* to agency interpretations contained in instruments lacking "the force of law" would be rendered mostly moot insofar as such interpretations would, barring unusual circumstances, be treated as dispositive evidence for purposes of the court's predictive inquiry.[200]

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manifest in the context of a notice-and-comment rulemaking proceeding or formal adjudication. In other words, even if one accepts that this tendency, assuming it to be real, is unfortunate from the standpoint of wise policymaking, this leaves open the possibility that the influence of that tendency on policymaking decisions is unavoidable. More modestly, even if one assumes, not implausibly, that the tendency to affirm will be at least weaker in the context of a rulemaking proceeding than in a litigation arising out of the final agency action in which the interpretation at issue was articulated, there is very little reason to believe that courts will be well-positioned to discern instances of affirmation that the agency head will "come to regret," so to speak, from those that she will not. And, in those cases where such an assessment would be defensible, i.e., where the assessment would be plausibly characterized as something other than the court substituting its own judgment for the agency's, the evidence establishing the assessment's defensibility would provide a specific basis for predicting a change of agency course. For that reason, any sort of blanket skepticism towards an agency doing 'what is says it would' would be both epistemically unwarranted and practically unnecessary.

197 *See supra* notes 169–70 and accompanying text.

198 *See* Watts, *supra* note 13, at 1034–40 (discussing ready availability of agency views as contained in amicus briefs, particularly via court solicitation).

199 *See* Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 788 (2002) ("Where, however, the court does reach the merits of a statutory interpretation rendered in an informal format, it presumably will have concluded that the action is a reliable predictor of what the agency would do if it were rendering a binding decision.").

200 In the state law context, probably the closest analogue to non-authoritative agency pronouncements is dicta from a state's highest court. Federal courts assign varying weight to such dicta when predicting how a state's highest court would rule. *See* McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 662 (3d Cir. 1980) ("Considered dicta by the state's highest court may also provide a federal court with reliable indicia of how the state tribunal might rule on a particular question. Because the highest state court enjoys some latitude of decision in ascertaining the law applicable to a particular dispute even where there may be dicta in point, however, a federal court should be circumspect in surrendering its own judgment concerning what the state law is on account of dicta. As Professor Charles Alan Wright has written, much depends on the character of the dictum." (footnotes and internal quotation marks omitted) (quoting CHARLES ALAN

c. Prediction and Incentive to Adhere to Formal Procedures

In terms of benefits, the advantages of adhering to the predictive approach are even greater in the administrative than the state law context. First, by framing the inquiry in terms of what it thinks that the agency *would* do, as opposed to what it *should* do, the federal court acting in the administrative law context, as in the state law context, would avoid aggrandizing itself at the expense of its interpretive superior.[201] Second, because the federal court would, in virtue of the ready availability of nonbinding agency interpretations,[202] reliably find itself in a strong epistemic position with respect to what the agency would do, that court would be able to predict with substantial accuracy future agency behavior, thereby significantly reducing the likelihood that its interpretation will conflict with a later, authoritative interpretation.[203] A federal court's epistemic position concerning the future behavior of the primary interpretive authority would, on average, be markedly better in the administrative than the state law context.[204] For that reason, the decrease in likelihood of conflict resulting from adherence to the predictive approach would, on the whole, be substantially greater in the former context than in the latter. Third and finally, because of the high visibility of nonbinding agency interpretations,[205] a federal court adhering to the predictive approach

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WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 58, at 395 (7th ed. 2011) ("Mere obiter may be entitled to little weight, while a carefully considered statement by the state court, though technically dictum, must carry great weight, and may even, in the absence of any conflicting indication of the law of the state, be regarded as conclusive." (footnote omitted))). The willingness of federal courts to dismiss some state court dicta as "mere obiter" plausibly reflects the temptation to make state law under the guise of 'prediction.' *See supra* note 143 and accompanying text. At the same time, one understands the hesitation to assign significant weight to remarks "made in passing." For that reason, federal courts plausibly do treat an agency's nonbinding views specifically endorsed in the context of immediate litigation as that agency's "official" views. United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting). In so doing, federal courts could identify those nonbinding interpretations that reflect current agency thinking while simultaneously ensuring that current agency thinking takes into account any issues raised by the immediate dispute. *See* Watts, *supra* note 13, at 1034 (observing that solicitation of agency views through requests for briefing would serve to clarify agency's informal views in much the same way as certification of state law questions serves to clarify content of state law).

201 A prescriptive, as opposed to predictive, approach would seem to run directly contrary to the more general maxim that "a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30 (1983).

202 *See supra* note 198 and accompanying text.

203 Subject, of course, to the caveat that an agency's interpretations are expected to vary over time as do that agency's knowledge and circumstances. *See supra* note 54 and accompanying text.

204 *See supra* note 198 and accompanying text.

205 A major advantage of relying upon legal briefs as the principal source of an agency's "official" though nonbinding interpretations is that it would ensure the visibility of those interpretations in the context of litigation. This would be particularly so assuming courts to be under a duty to solicit an agency's views in the form of briefing where relevant. *See supra* note 169. Under such a regime, an agency could ensure (so far as it wished) that its nonbinding interpretation be taken into consideration by the court. Moreover, since such an interpretation

would be much less able in the administrative than in the state context to covertly implement its independent judgment concerning the best available interpretation under the guise of predicting the interpretation that would be preferred by the primary interpretive authority.[206] Because the agency's preferred interpretation would be plain to view, any deviation by the court from that interpretation would be apparent. As a result, a court wishing to deviate from a nonbinding agency interpretation would incur the substantial burden of having to explain why the interpreting agency is unlikely to do what it says that it would.[207]

In terms of costs, the principal concern with implementing the predictive approach in the administrative law context is that it might allow an agency to effectively make law without having gone through appropriate deliberation. In his dissenting opinion in *Mead*, Justice Scalia objected that one "practical effect" of the majority's decision would be an "artificially induced increase in informal rulemaking," remarking facetiously that one ought to "[b]uy stock in the GPO."[208] Setting aside the concern about artificiality,[209] Justice Scalia was surely correct to observe that one of the practical effects—and indeed one of the intended consequences—of the decision in *Mead* was to provide an incentive for agencies to engage in "relatively formal administrative procedure[s] tending to foster . . . fairness and deliberation."[210] Under the *Mead* majority's approach, if an agency wants to be confident that it will be able to rely upon its preferred interpretation when its actions are subjected to judicial review, that agency will articulate that interpretation in an instrument having "the force of law." Because an agency can only accomplish this through adherence to fairness and deliberation inducing procedures, the majority's approach thus creates

would be presented by the agency in the context of a brief directed at the specific dispute at issue, there could be no question as to the perceived relevance of the interpretation or to the agency's desire to continue to endorse that interpretation in light of the facts of case at hand.

206 This would be particularly so where the agency's interpretation was presented in the form of a legal brief filed in the litigation at issue. To reject an interpretation in that context would be tantamount to rejecting a state's highest court's answer to a certified question of state law, if the answers to such questions were treated as formally nonbinding. *See* Watts, *supra* note 13, at 1034 (analogizing solicitation of amicus brief from agency to state law certification).

207 To be clear, to say that the non-authoritative interpretation will control in "the vast majority" of cases is not to say that it always will. If, for example, an agency wholly failed to address a significant concern militating against its interpretation, that might be grounds for a court to conclude that the agency would revise its interpretation having gone through the procedural formalities of either notice-and-comment rulemaking or formal adjudication. *See infra* notes 213–14 and accompanying text.

208 United States v. Mead Corp., 533 U.S. 218, 246 (2001) (Scalia, J., dissenting).

209 Once one conceives of the willingness of agencies to engage in formal procedures as, in large part, a function of judicially-set incentives, see *infra* note 211, it becomes a bit difficult to make sense of the notion of a "natural" amount of rulemaking.

210 *Mead*, 533 U.S. at 230 (majority opinion).

substantial incentive to prefer formal, over informal, approaches to decision-making.[211] By contrast, if, as Justice Scalia would have it, an agency could be confident that it would receive full deference for an interpretation articulated in a nonbinding instrument such as a legal brief—instruments that can be produced without adherence to any sort of fairness or deliberation inducing procedures—the concern is that that agency would have little to no incentive to adhere to such procedures when interpreting unclear terms or provisions within the statute(s) that it administers.[212] Because prediction is a near functional equivalent of Justice Scalia's alternative vision of *Chevron*, the same concerns about fairness and deliberation apply to it as well. After all, so long as an agency can be confident that a court will accord de facto deference to an interpretation articulated in a nonbinding instrument—in the name of predicting that agency's future behavior—one can reasonably ask what incentive an agency would have to adhere to burdensome procedures intended to induce fairness and deliberation when arriving at its interpretations.

As to this concern, two responses. First, even if the availability of de facto deference for nonbinding interpretations were to make it possible for an agency to circumvent indefinitely the procedural requirements of notice-and-comment rulemaking and formal adjudication, it would nevertheless be the case that agencies would be required to engage in substantial deliberation. Again, adhering to the predictive approach, what a court presented with a nonbinding interpretation must ask is whether an agency would continue to adhere to that interpretation if it were to address the interpretive question at

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211 As Matthew Stephenson and Miri Pogoriler explain, present practice results in a sort of "pay me now or pay me later" dynamic, such that an agency can "pay" either the cost of procedural formality ex ante or the cost of exacting judicial review ex post. Stephenson & Pogoriler, *supra* note 181, at 1464 ("This 'pay me now or pay me later' principle has gradually emerged as a crucial feature of the doctrine, one that allows courts to avoid direct regulation of agency choice of policymaking form while retaining some form of meaningful check—either ex ante procedural safeguards or ex post judicial scrutiny—on administrative decisions." (footnote omitted)); *accord* Sunstein, *supra* note 181, at 225–26 ("Mead puts agencies to a salutary choice; it essentially says, 'Pay me now or pay me later.' Under Mead, agencies may proceed expeditiously and informally, in which case they can invoke Skidmore but not Chevron, or they may act more formally, in which case Chevron applies. In either case, the legal system, considered as a whole, will provide an ample check on agency discretion and the risk that it will be exercised arbitrarily—in one case, through relatively formal procedures and in another, through a relatively careful judicial check on agency interpretations of law."); *see also* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 534–35 (2006) (suggesting that *Mead* creates for agencies a tradeoff between procedural formality and textual plausibility).

212 The obvious concern is that according deference to non-authoritative interpretations would "undermine [*Mead*'s] doctrinal compromise by enabling agencies to issue [effectively] binding legal norms while escaping both procedural constraints and meaningful judicial scrutiny." Stephenson & Pogoriler, *supra* note 181, at 1464 (discussing *Seminole Rock* deference, which threatens to undermine the "pay me now or pay me later" dynamic for similar reasons).

issue through notice-and-comment rulemaking or formal adjudication.[213] In making that prediction, one of the things that a court must take into account is the fact that interpretations arrived at pursuant to either of these sets of procedures may be rejected by a reviewing court on the grounds that the accompanying reasoning fails to address some significant concern speaking against that interpretation.[214] As such, while it is true as a rule that a nonbinding interpretation contained within an agency legal brief or similar instrument will constitute the best available evidence concerning what an agency would do if it were to adopt an interpretation that was binding, one circumstance in which a court might make an exception to that rule would be one in which the reasoning accompanying a given nonbinding interpretation fails to address some such concern, insofar as the agency would plausibly have to adjust its interpretation in order to take that concern into account. Given that possibility, an agency would thus retain an incentive to consider and address significant concerns pertaining to its preferred interpretation even in a situation where de facto deference was available in principle.

Second and more important, the carrot of interpretive deference is not the only incentive available to courts in terms of inducing agencies to engage in formal procedures. Though relegated to minimal use under prevailing doctrine, courts also have at their disposal the stick of rejecting as "arbitrary" and "capricious"[215] an agency's denial of a petition for rulemaking. Presently, "'an agency's refusal to institute rulemaking proceedings is at the high end of the range' of levels of deference" accorded to agency actions when reviewed for arbitrariness and capriciousness.[216] While a sensible approach in general,[217] under a

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213 *See supra* notes 195–96 and accompanying text.

214 *See, e.g.*, Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 441 (D.C. Cir. 2012) ("A regulation will be deemed arbitrary and capricious, if the issuing agency failed to address significant comments raised during the rulemaking." (citation omitted)); Fox v. Clinton, 684 F.3d 67, 75 (D.C. Cir. 2012) ("[A court] will not uphold an agency adjudication where the agency's 'judgment . . . was neither adequately explained in its decision nor supported by agency precedent.'" (alteration in original) (quoting Siegel v. SEC, 592 F.3d 147, 164 (D.C. Cir. 2010))).

215 5 U.S.C. § 706(2)(A) (2012).

216 Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 919 (D.C. Cir. 2008) (quoting Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4–5 (D.C. Cir. 1987))); *see also Lyng*, 812 F.2d at 5 ("Such a refusal is to be overturned only in the rarest and most compelling of circumstances, which have primarily involved plain errors of law, suggesting that the agency has been blind to the source of its delegated power . . . ." (citations and internal quotation marks omitted)).

217 As the D.C. Circuit explained:

> [I]n a statutory scheme in which Congress has given an agency various tools with which to protect the public interest, [an] agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective. As a corollary of this broad general discretion, [an agency] has considerable latitude in responding to requests to institute proceedings or to promulgate rules, even though it possesses the authority to do so should it see fit.

regime of prediction, an equally sensible exception would be for courts to accord substantially less deference—perhaps going so far as to adopt a presumption *against* reasonability—to a denial of a petition for rulemaking where an agency has previously sought and received de facto interpretive deference for an interpretation adopted pursuant to informal procedures.[218] By according less or no deference to denials of petition in such circumstances, courts could prevent agencies from being able to rely, over the long-term, on prediction as a means of circumventing the procedural requirements of notice-and-comment rulemaking.[219] While an agency could seek the benefit of de facto deference for a nonbinding interpretation in the first instance, going forward, an interested party would, by petitioning that agency to engage in notice-and-comment rulemaking with respect to the interpretive question at issue,[220] be able, with the backing of the reviewing court, to compel that agency to "put its money where its mouth is," so to speak.[221] Importantly, whether to be susceptible to such compulsion would remain within the discretion of the agency.[222] Should an agency desire not to be compelled to engage in rulemaking with respect to a particular interpretative question, that agency would need only refrain from placing its imprimatur on a nonbinding interpretation in the context of litigation.[223]

> Administrative rule making does not ordinarily comprehend any rights in private parties to compel an agency to institute such proceedings or promulgate rules.

Action for Children's Television v. FCC, 564 F.2d 458, 479 (D.C. Cir. 1977) (citations and internal quotation marks omitted).

218 This "one bite at the apple" approach bears some resemblance to Judge Friendly's suggestion, rejected by the Supreme Court, that agencies be permitted to set but not change agency policy via adjudication. *See* Bell Aerospace Co. v. NLRB, 475 F.2d 485, 495–97 (2d Cir. 1973), *rev'd in relevant part*, 416 U.S. 267 (1974).

219 One admitted cost of the above described "one bite at the apple" approach is that it would make it possible for an incumbent administration to insulate to some extent its preferred interpretation of a previously uninterpreted term or provision from revision by later administrations. *Cf.* Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD. 85, 87 (2011) (observing that, under a regime in which courts are somewhat less deferential to inconsistent agency interpretations, an incumbent administration will be able to "lock in" its preferred interpretation). That cost is plausibly less, however, than the cost of permitting agencies to rely upon nonbinding interpretations indefinitely.

220 Insofar as a party wished to do so at the stage of litigation, a stay pursuant to the doctrine of primary jurisdiction would be particularly appropriate.

221 *See supra* note 211.

222 Thus preserving the flexibility interests that motivate the generally deferential approach to judicial review of rulemaking petition denials. *See supra* note 217.

223 As mentioned above, Professor Barron and Justice (then-Professor) Kagan express concern that an agency head will be disposed to reflexively endorse in litigation a nonbinding interpretation promulgated by her subordinate in, e.g., the context of a final agency action. *See supra* note 196. Assuming the reality of this phenomenon, an agency's discretion to "refrain from placing its imprimatur on a nonbinding interpretation" will, in some cases, be somewhat constrained. To be sure, such an inclination to affirm should have little effect in the context of

To be clear, even with the above suggested increase in scrutiny of denials of petitions for rulemaking, agencies would remain able to receive interpretive deference without paying the procedural "cost" over the short- to medium-term. Notice-and-comment rulemaking is a notoriously time-consuming (and costly) procedure.[224] As a result, an agency would be able to rely for months or even years on a nonbinding interpretation after its initial advancement in litigation as it waited for the rulemaking process to play out. What an increase in scrutiny would accomplish, however, is the prevention of agencies from being able to circumvent deliberation and fairness inducing procedures indefinitely. Moreover, it would accomplish this without requiring that courts exercise their independent judgment concerning questions of policy, questions the authority to answer Congress has delegated elsewhere.

CONCLUSION

According to the theory articulated first in *Chevron* and again in *Brand X*, a federal court acts as an interpretive subordinate when it construes unclear term or provision within an agency-administered statute. As the Supreme Court recognized in *Brand X*, appropriate recognition of that subordinate status requires that a court defer to an authoritative agency interpretation of some such term or provision regardless of any prior judicial interpretation. What the Court has thus far failed to recognize, however, is that appropriate recognition of that status requires also that, when acting in the absence of an authoritative agency interpretation, a court limit itself to predicting how the relevant agency would construe the term or provision at issue if it were to do so authoritatively. Because interpretations articulated in legally nonbinding instruments such as legal briefs constitute readily available evidence

dispute in which the agency is not a party. There, the agency would reserve the option of simply declining the court's invitation to submit an amicus brief, thereby remaining neutral as to any previously promulgated nonbinding interpretation, i.e., neither confirming nor denying that any previous interpretation was mistaken. *See* Barron & Kagan, *supra* note 196, at 259 (discussing agency hesitation to admit error). However, in the context of a dispute in which an agency is, for example, defending an enforcement action, the choice of whether to affirm a subordinate's interpretation, e.g., "a decline in the morale and loyalty of employees," *id.*, would be unavoidable. Such are the difficult choices faced by an agency head.

224 *See, e.g.*, David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 283–84 (2010) ("[A]s anyone with experience in federal administrative practice can attest—completing a single 'informal' rulemaking can often take many years and consume a great deal of agency and private resources" (footnote omitted)); Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1498 (2012) ("Every study of economically significant rulemakings has found strong evidence of ossification—a decisionmaking process that takes many years to complete and that requires an agency to commit a high proportion of its scarce resources to a single task." (footnote omitted)).

concerning how an agency would interpret such a term or provision if it were to do so authoritatively, adherence to this predictive approach would result in agencies receiving deference for such nonbinding interpretations in the vast majority of cases. While that result would mostly render moot the Court's instruction in *Mead*—that such nonbinding interpretations are not to be treated as authoritative—it is a result that seems compelled by the Court's more general theory that agencies, not federal courts, retain primary interpretive authority in the domain of agency-administered statutes.