statutory interpretations if the statute is ambiguous, a *Brand X* analogy in the *Christopher* context would allow an agency to return to court with an interpretation that had previously failed *Skidmore* deference and still receive *Auer* deference so long as it had applied its interpretation prospectively.

A second difficulty may arise in determining when an interpretation is truly new. A great deal may turn on this question: if an interpretation came before the conduct at issue, it would receive *Auer* deference; otherwise, *Skidmore*. Agencies may frequently argue that their current position falls within the scope of an earlier interpretation, with those opposing the agencies arguing that the agency's position is a novel interpretation. But this difficulty is not new in administrative law — agencies are obliged to announce when they have changed their policy, or else they risk having the new policy voided as arbitrary and capricious; courts, in turn, must determine when that obligation has been triggered.[88] That task may be difficult, but it is no more so after *Christopher* than before.

The Court in *Christopher* appeared to be almost openly hostile to *Auer* deference, devoting five pages of analysis to explaining the doctrine's various shortcomings and determining that it did not apply[89] — a point the dissent conceded in a single sentence.[90] But beneath the rhetoric, the Court crafted a modest exception to *Auer* that should make the doctrine fairer while preserving its many benefits.

C. Internal Revenue Code § 6501(a)

Chevron *Deference.* — Home Concrete & Supply, LLC, probably never imagined it would need to know Chevron as anything other than an oil company. Yet by filing its tax return, Home Concrete stepped into one of the thorniest areas of administrative law. Last Term, in *United States v. Home Concrete & Supply, LLC*,[1] the Supreme Court held that the government is subject to a three-year, rather than a six-year, statute of limitations on assessing a deficiency when a taxpayer overstates costs on a tax return. In doing so, a plurality of the Court held that it did not need to defer to Treasury Department regulations that ran contrary to earlier Supreme Court precedent in *Colony, Inc. v. Commissioner*.[2] *Home Concrete* therefore limited the reach of the Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[3] which held that precedent forecloses fu-

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[88] *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009).
[89] *Christopher*, 132 S. Ct. at 2165–69.
[90] *Id.* at 2175 (Breyer, J., dissenting).
[1] 132 S. Ct. 1836 (2012).
[2] 357 U.S. 28 (1958).
[3] 545 U.S. 967 (2005).

ture agency statutory interpretations only when the earlier court had found the relevant language unambiguous.[4] Read narrowly, *Home Concrete* betters the *Brand X* analysis by eschewing rigid adherence to previous assessments of statutory ambiguity. For better or worse, it will likely do little more — but its reasoning reinforces the changes the past decade has brought to the doctrine spelled out thirty years ago in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[5]

The only two certainties in life may be death and taxes, but Stephen Chandler and Robert Pierce wanted to avoid the latter. In 1999, they engaged in a series of transactions to minimize their tax liability from the sale of Home Oil and Coal Company, of which they were the sole shareholders; these maneuvers included the creation of a pass-through entity called Home Concrete & Supply.[6] Home Concrete then sold most of its assets to a third party.[7] On its tax returns in April 2000, Home Concrete adjusted its basis (the initial cost of the assets) to include the costs of its partners, Chandler and Pierce — reducing its gross income, and therefore its tax liability, from the sale by overstating its costs.[8] More than three years later, the Internal Revenue Service (IRS) found that these transactions were "an economic sham," which made the basis adjustments unlawful, and sought to increase the participants' tax liability accordingly.[9] Home Concrete deposited the amount demanded,[10] then sued in the Eastern District of North Carolina along with coplaintiffs Home Oil, Chandler, Pierce, and their spouses to recover that amount, arguing that the three-year general statute of limitations in Internal Revenue Code § 6501(a) time-barred the IRS's adjustment.[11] In response, the United States argued that the proper time limit was found in § 6501(e)(1)(A), which triggers a six-year statute of limitations when a taxpayer "omits from gross income an amount properly includible . . . in excess of 25 percent of the amount of gross income."[12] Both parties moved for summary judgment on the issue.[13]

Judge Flanagan of the Eastern District of North Carolina granted summary judgment for the United States and denied the plaintiffs'

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[4] *See id.* at 982–83.

[5] 467 U.S. 837 (1984).

[6] *See* Home Concrete & Supply, LLC v. United States, 634 F.3d 249, 251–52 (4th Cir. 2011).

[7] *Id.* at 252.

[8] *See id.*

[9] *Id.*

[10] *Id.* at 252–53.

[11] *Id.*

[12] Home Concrete & Supply, LLC v. United States, 599 F. Supp. 2d 678, 683 (E.D.N.C. 2008) (quoting I.R.C. § 6501(e)(1)(A) (2006)) (internal quotation marks omitted).

[13] *Id.* at 680.

motion, holding that the six-year statute of limitations could apply.[14] The Court held that, as a threshold matter, an overstatement of basis could be an "omission" for purposes of § 6501(e)(1)(A), contrary to the Supreme Court's interpretation of a nearly identical provision in *Colony, Inc. v. Commissioner*.[15] In *Colony*, the Supreme Court found that § 257(c) in the 1939 Internal Revenue Code (now § 6501(e)(1)(A)) did not apply to a taxpayer that had erroneously understated its profits by wrongly increasing its basis in goods sold; rather, the extended time was available only when a taxpayer left an item off its return entirely.[16] The *Colony* Court declared its decision "in harmony with the unambiguous language of § 6501(e)(1)(A) of the Internal Revenue Code of 1954," enacted four years earlier.[17] Noting that *Colony* had found § 257(c) "not unambiguous" but § 6501(e)(1)(A) unambiguous, Judge Flanagan reasoned that the "harmony" between *Colony* and the new provisions must come from the two new subsections added in 1954, not from the language carried over from the previous Code.[18] Judge Flanagan interpreted § 6501(e)(1)(A)(i), the 1954 provision defining gross income as revenues from the sale of goods or services in trade or business, and § 6501(e)(1)(A)(ii), the 1954 safe harbor provision, to mean that "where a taxpayer incorrectly states an overestimated basis in property [rather than goods or services], the taxpayer 'omits' gross income by leaving the amount out of gross income stated on the taxpayer's return."[19] She stopped there, leaving for supplemental briefing the questions of whether and by how much plaintiffs had overstated their basis and whether they qualified for the safe harbor.[20]

The Fourth Circuit reversed.[21] Writing for a unanimous panel, Judge Wynn[22] held that the tax assessments were time-barred.[23] Nothing in *Colony*, the court found, suggested that its holding was limited to the sale of goods in trade or business.[24] Citing the Federal Circuit's decision in *Salman Ranch Ltd. v. United States*,[25] the court

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[14] *Id.* at 687.

[15] 357 U.S. 28 (1958); *see Home Concrete*, 599 F. Supp. 2d at 687.

[16] *Colony*, 357 U.S. at 36. The statute of limitations in § 257(c) was five years, not six. *Id.* at 29.

[17] *Id.* at 37.

[18] *Home Concrete*, 599 F. Supp. 2d at 685.

[19] *Id.* at 687.

[20] *Id.* at 688. Section 6501(e)(1)(A)(ii) excludes from calculation of the adjustment any amount disclosed "in a manner adequate to apprise the Secretary of the nature and amount of such item." I.R.C. § 6501(e)(1)(A)(ii) (2006). Judge Flanagan later found the safe harbor provision inapplicable. *See* Home Concrete & Supply, LLC v. United States, 634 F.3d 249, 253 (4th Cir. 2011).

[21] *Home Concrete*, 634 F.3d at 251.

[22] Judge Wynn was joined by Judges Wilkinson and Gregory.

[23] *Home Concrete*, 634 F.3d at 258.

[24] *See id.* at 255.

[25] 573 F.3d 1362 (Fed. Cir. 2009).

refused to cabin *Colony*'s holding simply because the Supreme Court had mentioned that, of two nearly identical provisions, one was ambiguous and the other was not.[26] Having found *Colony* controlling, the court then rebuffed the IRS's new argument that the court should defer under *Chevron* to a freshly minted Treasury Department regulation[27] interpreting omission under § 6501(e)(1)(A) to include overstatement of basis.[28] First, the court said that the regulation, by its own terms, did not apply to the events in question.[29] Next, the court refused to defer to the regulation because "*Chevron* deference is warranted only when a treasury regulation interprets an ambiguous statute," and *Colony* had declared the language of § 6501(e)(1)(A) unambiguous.[30] Judge Wynn also declined to give the Treasury Department's interpretation retroactive effect as a "clarification" of the law, despite the holding in *Brand X* that an agency interpretation could "displace" a prior judicial construction of an ambiguous statute.[31] To do so, he said, would not only be inappropriate given the statute's lack of ambiguity, but it would also upset established law under *Colony* and subject taxpayers to unexpected liability.[32] Judge Wilkinson wrote separately to observe that the IRS's position had "pass[ed] the point where the beneficial application of agency expertise gives way to a lack of accountability and a risk of arbitrariness."[33] He emphasized that "the last words in law belong to Congress and the Supreme Court."[34] The Fourth Circuit denied rehearing en banc.[35]

The Supreme Court affirmed.[36] Writing for the Court, Justice Breyer[37] held that the six-year statute of limitations did not apply, which "follow[ed] directly from this Court's earlier decision in *Colony*."[38] To hold otherwise would require effectively overruling *Colony*, which definitively interpreted "materially indistinguishable lan-

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[26] *See Home Concrete*, 634 F.3d at 255 (citing *Salman Ranch*, 573 F.3d at 1373). The Ninth Circuit, the court noted, had reached the same conclusion. *See id.*

[27] Treas. Reg. § 301.6501(e)-1 (2010).

[28] *Home Concrete*, 634 F.3d at 255–56.

[29] *Id.* at 256; *see* Treas. Reg. § 301.6501(e)-1(e)(1) (limiting the regulation's applicability to "taxable years with respect to which the period for assessing tax was open on or after September 24, 2009").

[30] *Home Concrete*, 634 F.3d at 257.

[31] *Id.* (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005)).

[32] *See id.*

[33] *Id.* at 259 (Wilkinson, J., concurring).

[34] *Id.*

[35] Home Concrete & Supply, LLC v. United States, No. 09-2353, 2011 WL 1587997 (4th Cir. Apr. 5, 2011).

[36] *Home Concrete*, 132 S. Ct. at 1844.

[37] Justice Breyer was joined in full by Chief Justice Roberts and Justices Thomas and Alito. Justice Scalia joined for all but Part IV-C.

[38] *Home Concrete*, 132 S. Ct. at 1839.

guage."[39] Contrary to the government's assertions, Justice Breyer concluded that the § 6501(e)(1)(A)(i) restriction of "gross income" to revenues from sale of goods or services in trade or business did not make *Colony* inapplicable.[40] Nor was § 6501(e)(1)(A)(i) superfluous: the new subsection set out how to determine the denominator in calculating whether the omission exceeded twenty-five percent of gross income.[41] And the use of "item," rather than "amount," in another subsection did not suggest that "amount" in § 6501(e)(1)(A) should encompass more than the omission of discrete items; "to rely in the case before us on this solitary word change in a different subsection is like hoping that a new batboy will change the outcome of the World Series."[42]

The Court flatly rejected the government's suggestion that the Treasury Department's regulation was entitled to *Chevron* deference[43]: "*Colony* has already interpreted the statute, and there is no longer any different construction that is consistent with *Colony* and available for adoption by the agency."[44] Then, writing for a plurality only, Justice Breyer explained that even though the *Colony* Court had found the earlier provision ambiguous, deference was not warranted.[45] Silence or ambiguity in a statute provides "at least a presumptive indication" that Congress intended to delegate "gap-filling authority" to the agency — but that presumption can be overcome.[46] The Court's observation, thirty years before *Chevron*, that language was ambiguous did not "reflect[] a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency."[47] Every indication suggested that, despite its "not unambiguous" remark, the *Colony* Court found its holding the only permissible reading of the statute: the plain text and the legislative history strongly favored its interpretation, and the Court had consciously rejected the expert opinion of the IRS Commissioner.[48] *Colony* held that there was "no gap to fill" in the statute, and the Treasury Department regulation had no power to change that interpretation.[49]

Justice Scalia concurred in all but Justice Breyer's discussion of *Brand X* and concurred in the result.[50] Reiterating his dissent in *Brand X*, he insisted that the Court no longer interfere with the work-

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[39] *Id.* at 1840; *see id.* at 1840–41.
[40] *Id.* at 1841–42.
[41] *Id.* at 1842.
[42] *Id.*
[43] *Id.* at 1842–43.
[44] *Id.* at 1843.
[45] *See id.* at 1843–44 (plurality opinion).
[46] *Id.*
[47] *Id.* at 1844.
[48] *See id.*
[49] *Id.*
[50] *See id.* at 1846 (Scalia, J., concurring in part and concurring in the judgment).

ings of *Chevron*.[51] Before *Brand X*, "the Court had no inkling that it *must* utter the magic words 'ambiguous' or 'unambiguous'" to enable or preclude a later agency interpretation.[52] But in this case, where *Colony* called the language ambiguous, the majority should have squarely applied *Brand X* — and should have simply called the agency's interpretation unreasonable to avoid overturning *Colony*.[53] Instead, Justice Scalia protested, the majority "revis[ed] *yet again* the meaning of *Chevron* — and revis[ed] it *yet again* in a direction that will create confusion and uncertainty."[54] In order to apply *Colony* without invoking *Brand X*, the majority created a new standard for deference, with the focus no longer on whether the language is ambiguous but on whether Congress "wanted *the particular ambiguity in question* to be resolved by the agency."[55] In his view, the interpretive and doctrinal gymnastics the majority performed could have been avoided with a simple step: abandoning *Brand X*.[56] Responding briefly to the dissent, Justice Scalia called for stable and predictable statutory construction for the sake of "private parties subject to [the] dispositions" of Congress or of the Executive.[57]

Justice Kennedy dissented,[58] finding that *Colony* reserved judgment on the meaning of the 1954 Code provision.[59] Like the district court, Justice Kennedy found the two new provisions in the 1954 Code meaningful: they showed Congress's intent to limit *Colony* to cases involving the sale of goods or services and to count omitted amounts, rather than just items, as omissions.[60] This change may have reflected Congress's understandable desire to avoid letting miscalculated inventory costs trigger the extended statute of limitations.[61] The new subsections "strongly favor[ed]" the opposite of *Colony*'s holding, although they did not necessarily "compel" it.[62] Thus, the 1954 provision was sufficiently

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[51] *See id.* ("Once a court has decided upon its *de novo* construction of the statute, there no longer is a different construction that is consistent with the court's holding and available for adoption by the agency." (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1018 n.12 (2005) (Scalia, J., dissenting)) (internal quotation marks omitted)); *see also Brand X*, 545 U.S. at 1014 (Scalia, J., dissenting) ("[T]he Court continues the administrative-law improvisation project it began four years ago in *United States v. Mead Corp.*").

[52] *Home Concrete*, 132 S. Ct. at 1846 (Scalia, J., concurring in part and concurring in the judgment).

[53] *See id.* at 1847.

[54] *Id.*

[55] *Id.*

[56] *See id.* at 1848.

[57] *Id.* at 1849.

[58] Justice Kennedy was joined by Justices Ginsburg, Sotomayor, and Kagan.

[59] *Home Concrete*, 132 S. Ct. at 1849 (Kennedy, J., dissenting).

[60] *See id.* at 1850–51.

[61] *Id.* at 1850.

[62] *Id.* at 1851.

ambiguous — and left sufficiently open by *Colony* — to uphold the Treasury Department's reasonable interpretation under *Chevron*.[63] The majority, Justice Kennedy said, encroached on Congress's ability to leave the resolution of ambiguity to agencies rather than to courts.[64]

Brand X seemed to settle a longstanding question: whether stare decisis trumps *Chevron* deference to agency interpretations that contravene precedent.[65] *Home Concrete*, however, shows that *Brand X* was not the last word. It limits *Brand X* by establishing that, at least when the relevant precedent predates *Chevron*, the declaration that a statute is "ambiguous" may not be enough to invoke *Chevron* deference. Although somewhat confusing, it is a modest improvement on *Brand X*, which awkwardly superimposed *Chevron*'s focus on ambiguity onto decisions preceding *Chevron* itself. But *Home Concrete*'s impact may be broader: it follows the lead of *United States v. Mead Corp.*,[66] which found *Chevron* inapplicable despite statutory ambiguity,[67] and as such it cements and expands the transformation of *Chevron* doctrine.

Home Concrete improves upon one of the most troublesome aspects of *Brand X* analysis — distinguishing holdings that found a statute ambiguous or unambiguous. The first step of *Chevron*, determining whether the statute is ambiguous, has never been easy, and "courts have answered the question . . . in a notoriously erratic manner."[68] Often courts will declare a statute ambiguous with little analysis,[69] or suggest that it is unambiguous but continue to *Chevron* Step Two out of caution.[70] Nor may this step be truly necessary, as Professors Matthew Stephenson and Adrian Vermeule argue in asserting that *Chevron*

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[63] *See id.*

[64] *See id.* at 1852.

[65] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 985 (2005) ("[I]t is no 'great mystery' why we are reaching the point here. There is genuine confusion in the lower courts over the interaction between the *Chevron* doctrine and *stare decisis* principles . . . ." (citation omitted) (citing *id.* at 1019 (Scalia, J., dissenting))); *see also, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 915–20 (2001).

[66] 533 U.S. 218 (2001).

[67] *Id.* at 226–27.

[68] Note, "*How Clear Is Clear*" *in* Chevron*'s Step One?*, 118 HARV. L. REV. 1687, 1691 (2005); *see also* Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 792 (2010) (lamenting "*Chevron*'s misguided elevation of the explicit ambiguity determination").

[69] *See, e.g.*, Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2471–72 (2009) (declaring a statute ambiguous with just three sentences of analysis).

[70] *See, e.g.*, Am. Bar Ass'n v. FTC, 430 F.3d 457, 471 (D.C. Cir. 2005) ("We further determine that even if we err in our conclusion that the regulation fails at *Chevron* Step One, we are satisfied that the interpretation afforded by the Commission is not sufficiently reasonable to survive that deference at Step Two.").

analysis involves just one step, rather than two.[71] Indeed, many courts of appeals have applied *Chevron* without clearly separating its two steps.[72] And the idea that a contested statute can be definitively declared unambiguous is undermined somewhat by the fact that many judges doing so disagree among themselves or with other courts.[73] *Brand X* compounded the difficulty, and further undermined the utility, of this analysis by asking courts to determine not just whether a statute is ambiguous but also whether a previous court found it ambiguous.[74]

Home Concrete makes (somewhat) clear that the magic words "ambiguous" or "not unambiguous" are not always sufficient to apply *Brand X*, at least not when the previous decision precedes *Chevron*.[75] The plurality recognized that courts do not determine ambiguity in a vacuum; their decisions may be shaped by the doctrinal consequences.[76] *Home Concrete* establishes that courts need not search for words that often are not there — or rely on words that, "*mirabile dictu*,"[77] are. Instead, courts will have to determine whether the earlier court found no gap in the statute left to fill.[78] Judges following *Home Concrete*'s example may look to whether the previous court relied on legislative his-

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[71] *See* Matthew C. Stephenson & Adrian Vermeule, Essay, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009). Professors Stephenson and Vermeule also argue that collapsing the *Chevron* inquiry into one step would not affect *Brand X* analysis. *See id.* at 606 n.32.

[72] *See id.* at 605 & nn.29–30; *see also* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1446 (2005) ("Courts (including the Supreme Court) have refrained from expressly determining whether interpretations of which they approved were 'reasonable' under *Chevron*, 'persuasive' under *Skidmore*, 'correct' as a matter of statutory construction, all, some, or one of the above.").

[73] *Cf.* Smiley v. Citibank, 517 U.S. 735, 739 (1996) (noting that, in light of disagreements within and among state supreme courts on an interpretation, "it would be difficult indeed to contend that the word 'interest' in the National Bank Act is unambiguous").

[74] *See* Note, *Implementing* Brand X*: What Counts as a Step One Holding?*, 119 HARV. L. REV. 1532, 1532 (2006) (describing a few of the analytical challenges in determining whether a previous court made its holding at Step One of *Chevron*).

[75] In focusing on *Colony*'s "not unambiguous" descriptor of the 1939 Code and ignoring its characterization of the 1954 language as "unambiguous," the Supreme Court departed from the Fourth Circuit's approach. This departure may be because four dissenting Justices believed the later Code's "unambiguous language" meant the opposite of what the Fourth Circuit thought it did, further underscoring the futility of many ambiguity determinations.

[76] *See Home Concrete*, 132 S. Ct. at 1844 (plurality opinion); *see also* Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 810 (2002) ("Many different considerations can be brought to bear in determining . . . whether a statute is clear or ambiguous . . . ."); Note, *supra* note 74, at 1537 ("When the word ['ambiguous'] took on new significance, courts likely changed how they used it."). *But see Home Concrete*, 132 S. Ct. at 1847 (Scalia, J., concurring in part and concurring in the judgment) ("Post-*Chevron* cases do not 'conclude' that Congress wanted the particular ambiguity resolved by the agency; that is simply the *legal effect* of ambiguity . . . .").

[77] *Home Concrete*, 132 S. Ct. at 1847 (Scalia, J., concurring in part and concurring in the judgment).

[78] *See id.* at 1844 (plurality opinion).

tory or rejected agency interpretations — though *Home Concrete* makes clear that other factors could inform the conclusion.[79] Especially with a pre-*Chevron* decision, in which a court may have called a statute ambiguous to hedge its conclusion, or called it unambiguous for emphasis, making the presence of magic words decisive is unwise.[80] *Home Concrete* relieves courts from an often artificial or impossible inquiry and an undesirable dependence on "magic words."[81]

Home Concrete therefore calls for a more realistic inquiry than what *Brand X* prescribed, but not necessarily a simpler one. As Justice Scalia observed, implementing *Home Concrete* will be no easy task for lower courts.[82] Justice Breyer suggested that whether an earlier court looked to plain text and legislative history, as well as whether it consciously rejected an agency's expert opinion, could both be factors in deciding whether to apply *Brand X*.[83] But, he said, "[i]t may be that judges today would use other methods to determine whether Congress left a gap to fill."[84] Lower courts deciding *Brand X* questions, therefore, face a significant challenge in assessing whether previous courts definitively interpreted statutes and foreclosed contrary agency interpretations, since *Colony*'s explicit statement that the language was not unambiguous did not suffice. Muddled as it is, however, *Home Concrete*'s plurality opinion is not necessarily much more confusing, or less predictable, than the analysis it replaced: as the foregoing discussion contends, applying *Brand X* is more complicated than its relatively straightforward rule suggests (as is true for *Chevron* generally).[85] And certainty about whether *Chevron* applies does not always translate to certainty about outcome: Justice Scalia's proposed invalidation of the Treasury regulation at *Chevron* Step Two demonstrates that even when *Chevron* applies it is not a "blank check" for the agency.[86]

On balance, therefore, *Home Concrete* is a useful update to *Brand X*, and the circumstances of the case suggest it will be no more than that. *Home Concrete* seems limited to relatively rare cases in which an agency interpretation conflicts with an earlier court decision, and possibly only to cases in which the earlier decision predates *Chevron*. Its search for "gap-filling authority," rather than ambiguity, seems to be

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[79] *See id.*

[80] For an argument that pre- and post-*Chevron* precedents should be analyzed differently when agency interpretations conflict with them, see Merrill & Hickman, *supra* note 65, at 915–20.

[81] *Cf., e.g.*, Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011) ("Congress, of course, need not use magic words in order to speak clearly on this point.").

[82] *Cf.* Bressman, *supra* note 72, at 1474 (discussing confusion over *Mead*).

[83] *See Home Concrete*, 132 S. Ct. at 1844 (plurality opinion).

[84] *Id.*

[85] *See* Note, *supra* note 74.

[86] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 233 (2006).

merely an awkward way to circumvent *Colony*'s inconvenient (and pre-*Chevron*) designation of the statutory language as ambiguous without explicitly disagreeing with the earlier Court. By stating that "[t]here is no reason to believe that the linguistic ambiguity noted by *Colony* reflects a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency,"[87] the plurality suggests its analysis may not apply to post-*Chevron* precedents. And the plurality does not independently assess whether the statutory language left a gap; the question, as Justice Breyer defined it, "is whether the Court in *Colony* concluded that the statute left such a gap,"[88] which does not suggest that the plurality intended to reshape *Chevron* analysis generally. Justice Scalia's opinion frames the question similarly, if critically, by stating that "the pre-*Chevron* Court must in addition have found that Congress wanted *the particular ambiguity in question* to be resolved by the agency."[89] Moreover, few future decisions are likely to face the peculiar constraints of *Home Concrete*, which not only sought to respect taxpayer reliance but also had to thread the needle between two Court precedents, *Brand X* and *Colony*, that pointed toward opposite outcomes.[90] Finally, just three Justices signed on to Justice Breyer's administrative law reasoning, creating a plurality opinion that exacerbates the difficulty of understanding *Home Concrete*[91] but makes a broad reading of it less likely.[92] The limiting language and peculiar circumstances of the case therefore suggest that *Home Concrete* will have modest effect.

But like *Chevron*, the transformative power of which was not immediately recognized by all,[93] *Home Concrete* may impact more than just § 6501 of the Internal Revenue Code, as it consolidates the doctrinal transformation that *Mead* began.[94] *Mead* brought the "*Chevron*

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87 *See Home Concrete*, 132 S. Ct. at 1844 (plurality opinion).

88 *Id.*

89 *Id.* at 1847 (Scalia, J., concurring in part and concurring in the judgment).

90 In his *Brand X* concurrence, Justice Stevens remarked that the *Brand X* reasoning "would not necessarily be applicable to a decision by this Court that would presumably remove any preexisting ambiguity." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003 (2005). *Home Concrete* did not mention this opinion, but it is possible that its devotion to stare decisis stemmed in part from special concern for the sanctity of Supreme Court precedent.

91 *See, e.g.*, Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1128 (1980) (arguing that "[e]ach plurality decision . . . represents a failure to fulfill the Court's obligations" to definitively state the law).

92 *See* Marks v. United States, 430 U.S. 188, 193 (1977) (stating that the opinion that concurred in the judgment on the narrowest grounds should control in a plurality decision).

93 *See, e.g.*, *The Supreme Court, 1983 Term — Leading Cases,* 98 HARV. L. REV. 87, 255 (1984) ("*Chevron* may represent only a temporary, though unfortunate, deviation from one of the Supreme Court's own teachings . . . .").

94 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) ("Today's opinion makes an avulsive change in judicial review of federal administrative action."); Merrill, *supra* note 76, at 807 ("*United States v. Mead Corp.* is the U.S. Supreme Court's most important pronouncement to date about the scope of the *Chevron* doctrine.").

Step Zero" question — to what cases *Chevron* applies at all — to the forefront of administrative law, holding that no agency deference is warranted when Congress has not delegated to agencies the power to interpret statutes by issuing rules with the force of law.[95] *Home Concrete* took *Mead*'s core principles — that ambiguity does not always imply congressional intent to delegate, and that this intent, not statutory ambiguity, is the key to deference — and applied them to *Brand X*, at least where the earlier case precedes *Chevron*.[96] This approach will require a messy inquiry into what Congress intended, but this inquiry may be more useful than examining whether the previous court found a statute ambiguous. *Home Concrete* thus carves out another exception to *Chevron*'s familiar two-step. But unlike *Mead*, which at least generally implied that rules issued through notice and comment would receive deference,[97] *Home Concrete* did not expressly define the scope of the exception it creates. If read expansively, *Home Concrete* could alter the *Brand X* analysis for post-*Chevron* cases as well.

For the reasons discussed above, *Home Concrete* will not likely be read so broadly. But *Home Concrete*'s plurality signals the growing force and reach of *Mead*'s approach to administrative law. While Home Concrete and its owners may rest easy, observers of administrative law have reason to be cautious.

D. Voting Rights Act of 1965

Redistricting. — Congress passed the Voting Rights Act of 1965[1] (VRA) to remedy the long history of racial discrimination in voting that had continued to plague the country even after the adoption of the Fifteenth Amendment.[2] Since the VRA's passage, litigants have wielded the two cornerstone provisions of the VRA to ensure that state legislatures' redistricting efforts do not obstruct political access for communities of color.[3] Section 2 allows private individuals to bring

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[95] *See Mead*, 533 U.S. at 227–31.

[96] *Compare Home Concrete*, 132 S. Ct. at 1843 (plurality opinion), *with Mead*, 533 U.S. at 227–31. As Professor Merrill noted, "*Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent." *See* Merrill, *supra* note 76, at 812. Justice Breyer has long advocated this approach. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82 (1986). Justice Scalia and some scholars fiercely object, however. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989) ("*Chevron* . . . replaced this statute-by-statute evaluation (. . . assuredly a font of uncertainty and litigation) with an across-the-board presumption . . . ."); *see also* Bressman, *supra* note 72.

[97] *See Mead*, 533 U.S. at 233.

[1] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

[2] *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966).

[3] *See generally, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (examining litigants' claims that changes to voting laws not directly related to voter qualifications fell within the purview of section 5).