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PERSPECTIVE

The worst deference doctrine few have heard of: *Brand X*

By Adi Dynar

Federal administrators must love Darth Vader's iconic — and ominous — line, "I'm altering the deal. Pray I don't alter it any further." That's because the *Brand X* deference doctrine lets them.

Deference doctrines require judges to abdicate their duty of independent judgment and instead be biased in favor of government litigants and against non-government litigants. The 2005 Supreme Court case of *National Cable & Telecommunications Association v. Brand X Internet Services* spawned a brand-new deference doctrine that has come to be known as "*Brand X* deference." You might have heard of deference doctrines like *Chevron*, *Auer* or *Kisor*. But *Brand X* is the worst deference doctrine few have heard of. It empowers agencies to overrule federal-court decisions by unilaterally altering the meaning of statutes the courts have already interpreted. The late Justice Antonin Scalia said it best in a 2012 case: *Brand X* in a "poof" expands or abridges executive power, enables or disables "administrative contradiction of the federal courts," and penalizes individuals for following court precedent in ordering their lives and civic duties.

That is exactly what happened to California couple, Howard and Karen Baldwin, who sent their tax refund claim to the IRS in June 2011. Two months later, the IRS changed its interpretation of a statute that Congress has not amended since the 1954 codification of federal income tax laws. Based on its one-sided change, the agency refused to issue a refund to the Baldwins. The Baldwins sued the IRS and luckily the district court saw through IRS's after-the-fact deal switch and declined to defer to IRS's interpretation. But in a strange turn of events, the 9th U.S. Circuit Court of Appeals reversed the district court's decision, deferring to IRS's statutory interpretation under *Brand X*. The IRS's changed 2011 interpretation contradicted a 1992 decision of the 9th Circuit, decisions from several other circuits, and a centuries-old common-law rule. None of that mattered to the 9th Circuit, however. Under the *Brand X* doctrine, the court deferred to the IRS's decision to overrule federal-court decisions and excise a well-settled common-law rule.

Typically, circuit-court cases decided by three-judge panels (as almost all cases are) can be overruled only by an *en banc* court of appeals (i.e., an 11-judge panel in the 9th Circuit), by the Supreme Court, or — in terms of their future effect on other parties — by a properly enacted statute. *Brand X* is an exception to that rule. It incentivizes agencies to target court decisions they do not like, reach an opposite conclusion via regulation, and then demand — and receive — an approving pat on the back from the courts.

Fortified by *Brand X*, the IRS put the Baldwins in a no-win predicament — follow court precedent and thereby violate federal regulations or follow federal regulations that did not exist at the time they mailed in their tax-refund claim and thereby violate court-set precedent. When longstanding legal principles established by the courts get in the way, agencies can switch them off at will with impunity. Enabling agencies to willfully disregard the rule of law — while everyone else is required to obey — is the central feature of the *Brand X* doctrine.

Courts usually do not overturn previous court decisions without compelling reasons for doing so. Under *Brand X*, however, federal agencies can overrule court decisions for cursory reasons. More importantly, *Brand X* requires federal judges to be biased in favor of the federal-agency litigant. And it divests the federal judiciary — and Congress — from performing functions that the Constitution separately vests in them. It is the judiciary's duty and province to say what the law is, and it is Congress' job to make the laws. Article II agencies, thanks to *Brand X*, however, sit as a super court of appeals with authority to overrule decisions of Article III courts, and a super legislature to rewrite laws written by the Article I Legislature. *Brand X* thus lobs a grenade into the due-process, judicial-independence, and separation-of-powers guarantees that infuse the Constitution.

Several jurists — including *Brand X*'s author Justice Clarence Thomas — have called upon the Supreme Court to nix *Brand X*. And there is an ever-louder chorus of frustration rising from the appellate courts urging the high court to do the same. The Supreme Court should take the Baldwins' case and recommit the nation to adhering to the rule of law. There is much more at stake in *Baldwin v. U.S.* than the amount of the Baldwins' rejected tax refund. ■

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