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PERSPECTIVE

Brand X deference advances 'administrative absolutism'

By Mark Chenoweth

When Justice Clarence Thomas dissented from the denial of certiorari last week in *Howard and Karen Baldwin v. U.S.*, he lamented that "*Brand X* has taken this Court to the precipice of administrative absolutism." Given that Thomas himself authored *NCTA v. Brand X Internet Services* in 2005, the case that launched the *Brand X* judicial deference doctrine, this turnabout is worth examining more closely.

Brand X deference is a species of *Chevron* deference, the Supreme Court-invented rule that federal judges "generally must adopt an agency's interpretation of an ambiguous statute if that interpretation is 'reasonable.'" But *Brand X* takes deference a step further by applying even when a federal court has already interpreted the ambiguous statute in question. Under its rule, "a court must abandon its previous interpretation in favor of the agency's interpretation unless the prior court decision holds that the statute is unambiguous."

At first blush it may not be readily apparent why this rule of interpretation treads ever closer to the edge of unlimited administrative power. But Justice Thomas points out that *Brand X*: (1) violates a judge's duty under Article III of the Constitution; (2) is contrary to the Administrative Procedure Act; and (3) deviates from traditional approaches to statutory interpretation. Since *Brand X* dispenses with these three checks on executive power, it enables administrative absolutism.

Thomas begins by noting that *Brand X* violates Article III because it "compels judges to abdicate the judicial power without constitutional sanction." The Constitution vests judicial power in the courts and fiercely protects judicial independence so that judges can apply their independent judgment to legal questions, including to resolve ambiguities in legal texts. But *Brand X* prevents judges from using — indeed compels them to violate their duty to use — their own independent judgment.

The judge's role in the checks-and-balances system is to ensure that the law as passed by the legislature prevails. Otherwise, the executive makes law outside constitutionally prescribed channels. Upholding the statutory interpretation most in line with what the people's representatives passed is how judges ensure legislative supremacy (and retain a democratic pedigree). If judges instead bow to an agency's plausible (but inferior) construction of the statute, they give effect to the unelected administrative agency's will over the elected legislature's law.

As Justice Thomas puts it, *Brand X* "exacerbates" the "constitutional deficiencies of *Chevron*" and wreaks "heightened constitutional harms." It forces judges to "surrender their independent judgment … despite a controlling precedent." It thus "gives agencies the power to effectively overrule judicial precedents." *Brand X* even "gives the Executive the ability to neutralize a previously exercised check by the Judiciary." It thus enforces judicial acquiescence to the Executive's disregard for judicial precedent.

Thomas next argues that *Brand X* deference contradicts the APA. Passed in 1946, the APA provides specific directions to the judiciary about the role the legislature expects judges to fill in interpreting statutes. For example, it instructs that "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." 5 U.S.C. Section 706. That text is a far cry from asking judges to defer to agency interpretations. Yet *Chevron* ignored the APA and created a deference regime "rest[ing] on the fiction that silent or ambiguous statutes are an implicit delegation from Congress to agencies."

Thomas further points out that *Brand X* runs counter to traditional methods of statutory interpretation. Federal courts have historically given weight to longstanding executive interpretations that date from a statute's passage and stay consistent. But *Brand X* "mandates deference to an executive interpretation that is neither contemporaneous nor settled." In fact, if the discarded precedent was long settled or else adopted a long-settled understanding, then *Brand X* gives federal agencies vast license to unsettle statutory meanings that had been fixed — stare decisis be damned.

Under *Brand X*, "agencies are free to invent new (purported) interpretations of statutes and then require courts to reject their own prior interpretations." So not only does judicial review itself no longer rein in wayward interpretations, but the absence of any threat of meaningful judicial review empowers agencies to adopt venturesome interpretations.

Thomas's dissent makes a strong case that *Brand X* runs contrary to Article III, the APA, and traditional methods of statutory interpretation. But does that really mean that administrative absolutism is in the offing? Well, these constitutional and statutory safeguards against an overreaching executive have been historically effective. Taking them away may not guarantee that administrative tyranny will ensue, but it does put in place the preconditions.

One could just trust that an agency, or an administration, will not abuse unchecked power that *Brand X* puts at its disposal. But that was not the Founders' mindset. As James Madison wrote: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. … experience has taught mankind the necessity of auxiliary precautions." Federalist No. 51.

Sweeping away Madison's "auxiliary precautions" is risky. Forcing judges to favor administrative interpretations over their own has pernicious consequences for citizens like the Baldwins. With a level playing field in federal trial court, their (better) statutory interpretation prevailed, the trial judge found their witnesses credible, and they prevailed. Then, after the IRS invoked *Brand X* on appeal at the 9th U.S. Circuit Court of Appeals, the Baldwins lost.

The IRS won when it should not have, which bespeaks an arbitrariness and oppressiveness consistent with absolutism. The circuit judges failed in their duty to exercise independent judgment and deferred to the legal interpretation of one of the parties before the court — the IRS. When deference does that it denies due process of law and a fair trial to the other side. As this case makes unmistakably clear then, not only has *Brand X* brought the court to the brink of administrative absolutism, but the edge has already crumbled under the Baldwins' feet.

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