

4-30-2012

## A Concrete Shoe for *Brand X*?

David J. Shakow

*University of Pennsylvania Law School*

Follow this and additional works at: [http://scholarship.law.upenn.edu/faculty\\_scholarship](http://scholarship.law.upenn.edu/faculty_scholarship)



Part of the [Administrative Law Commons](#), [Law and Economics Commons](#), and the [Taxation-Federal Commons](#)

---

### Recommended Citation

Shakow, David J., "A Concrete Shoe for *Brand X*?" (2012). *Faculty Scholarship*. 410.  
[http://scholarship.law.upenn.edu/faculty\\_scholarship/410](http://scholarship.law.upenn.edu/faculty_scholarship/410)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

## A Concrete Shoe for *Brand X*?

By David J. Shakow



David J. Shakow

David J. Shakow is counsel in the Philadelphia office of Chamberlain, Hrdlicka, White, Williams & Aughtry and is professor emeritus at the University of Pennsylvania Law School.

The Supreme Court's decision in *Home Concrete* raises new questions about the deference to be given to administrative pronouncements that conflict with prior judicial decisions. Unfortunately, the opinions of a divided Court leave practitioners to puzzle over the boundaries of its decision.

Copyright 2012 David J. Shakow.  
All rights reserved.

The Supreme Court has decided *Home Concrete*<sup>1</sup> and handed taxpayers a victory by holding that the statute of limitations was not increased from three to six years for taxpayers who overstated their bases in assets.

The case involved a son-of-BOSS tax shelter that improperly inflated the basis of assets. Under section 6501(e)(1)(A), the statute of limitations for assessing a deficiency against a taxpayer is extended from three to six years when she omits from gross income an amount in excess of 25 percent of the gross income stated on the return. The question was whether the reduction of gross income that results from the offset of the inflated basis against an amount realized on a disposition of the asset extends the statute of limitations under section 6501(e)(1)(A).

The question was complicated by two special circumstances. First, in 1958 the Supreme Court in *Colony Inc. v. Commissioner*<sup>2</sup> interpreted identical language in the 1939 code to mean that the ex-

tended statute of limitations did not apply. But in 2010, while *Home Concrete* was in litigation, the government issued regulations stating that the extended statute applied.<sup>3</sup>

Once the regulations were issued, the *Chevron*<sup>4</sup> doctrine of administrative law was called into play. *Chevron* requires courts to defer to an administrative interpretation of a statute unless the statute is unambiguous (*Chevron* step one) or, if the statute is ambiguous, to defer to it unless the interpretation is not a permissible interpretation of the statute (*Chevron* step two). In *Mayo*,<sup>5</sup> decided last year, the Court held that *Chevron* applies in tax cases the same way it applies in other areas of administrative law.

Is an administrative agency constrained in its interpretation if a court has already interpreted the statute? In *Brand X*,<sup>6</sup> decided in 2005, the Court held that an administrative pronouncement could override a prior judicial interpretation of a statute. That is, if the administrative pronouncement passed the *Chevron* test, the administrative agency could overturn a judicial decision.

But *Brand X* has never been applied to allow an administrative agency to overturn a decision of the Supreme Court; perhaps such an application is too broad. On the other hand, the Court in *Colony* said, in reference to the statutory language before the Court in that case and in *Home Concrete*, that "it cannot be said that the language is unambiguous." If the Supreme Court says the language is ambiguous, why not allow the administrative agency to clarify it?

Justice Stephen G. Breyer wrote the opinion in *Home Concrete*, with Chief Justice John G. Roberts and Justices Clarence Thomas and Samuel A. Alito in agreement. Justice Anthony M. Kennedy wrote the dissent, with Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan joining him. Justice Antonin Scalia's opinion, concurring in part and concurring in the judgment, was the swing vote.

<sup>3</sup>Reg. section 301.6501(e)-1.

<sup>4</sup>*Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

<sup>5</sup>*Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011), Doc 2011-609, 2011 TNT 8-10.

<sup>6</sup>*National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005).

<sup>1</sup>*Home Concrete & Supply LLC v. United States*, Sup. Ct. Dkt. No. 11-139 (2012), Doc 2012-8781, 2012 TNT 81-11, *aff'g* 634 F.3d 249 (4th Cir. 2011), Doc 2011-2674, 2011 TNT 26-7.

<sup>2</sup>357 U.S. 28 (1958).

The majority found that because the language in *Home Concrete* was identical to the language it interpreted in *Colony*, the same result should apply. It rejected the government's argument (which the dissenters accept) that changes made to related sections of the statute in 1954 require a reconsideration of the meaning of the language before the Court. In addition, it refused to defer to the regulations the IRS finalized in 2010. Breyer argues that in this context, once the Court interprets the statute, there is no other interpretation available for adoption by the agency. In explaining why *Brand X* does not apply, Breyer does not necessarily give special deference to every Supreme Court opinion. Instead, he interprets *Brand X* to mean that deference is to be given to an administrative interpretation only when there is evidence that Congress delegated gap-filling authority to an agency.

Thus, we are to understand *Chevron* step one (is the language unambiguous?) simply as an example of a situation when Congress clearly did not delegate gap-filling authority to the agency.<sup>7</sup> But even if the language is ambiguous, the agency apparently can't act unless there is an indication that Congress intended that it exercise its gap-filling authority. And in what might be the most novel point of Breyer's opinion, he quotes *Chevron* to the effect that "if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."<sup>8</sup> In other words, it would appear that if "traditional tools of statutory construction" result in one interpretation of a statute,<sup>9</sup> there is no room for an administrative agency to take a contrary position. If that is the law, it would seem to significantly limit the role of *Chevron* and, even more so, *Brand X*.

Note that while that could be the most novel point in Breyer's opinion, it is not the most novel point of the majority. The section of the opinion in which that discussion is found was the part in which Scalia did not join, thus making it the position of only Breyer and the three Justices who accepted all of his opinion. But Scalia did not

disagree with that discussion because he believed it went too far; instead, as the dissenter in *Brand X*, he believes that any court decision prevents an administrative agency from thereafter requiring that court to interpret the statute otherwise. In other words, if the Third Circuit decides to interpret a statute in a particular way, any contrary interpretation from the administrative agency is properly ignored by the Third Circuit.<sup>10</sup>

Scalia characterized Breyer's position to be that if a pre-*Chevron* holding concludes that a statute is ambiguous, the court must also have found "that Congress wanted the particular ambiguity in question to be resolved by the agency"<sup>11</sup> if the agency is to invoke its *Brand X* "gap-filling" power. Presumably, the reason Scalia limits that approach to pre-*Chevron* decisions is that if a court after *Chevron* characterizes a statute as ambiguous, it is inviting an agency to supply any permissible interpretation in accordance with *Chevron*. But Scalia is not clear on that proposition: Perhaps he would extend the argument to post-*Chevron* cases, too.

As for the dissenters, they take the position that the changes made in 1954 should have put taxpayers on notice that the language interpreted in *Colony* was subject to reinterpretation. Thus, in the absence of any authoritative interpretation of section 6501(e)(1)(A), the government was free to interpret it as it chose. Under that view, the case before the Court did not raise the delicate question whether *Brand X* (under which an administrative agency can overturn a judicial interpretation of a statute) would apply even to a decision of the Supreme Court.<sup>12</sup> Because the dissenters argued that the changes made in 1954 necessarily left the language of section 6501(e)(1)(A) ambiguous, it was open for the IRS to interpret it anew without any constraint from the Court's decision in *Colony*.

The continuing significance of *Home Concrete* is unclear. The Court's decision certainly means that reg. section 301.6501(e)-1, as amended in 2010, is invalid to the extent it conflicts with *Colony*. The more important question is whether the Court has further undermined the rickety *Chevron* structure.<sup>13</sup> Breyer suggests that any administrative agency's attempt to use *Brand X* logic to overturn a pre-*Chevron* decision now faces an additional hurdle.

<sup>7</sup>Slip op. at 9.

<sup>8</sup>Slip op. at 10 (emphasis in original). It is interesting that after reviewing the analysis in *Colony*, Breyer said, "It may be that judges today would use other methods to determine whether Congress left a gap to fill." That leaves yet another area for observers to argue about the precise scope of Breyer's approach.

<sup>9</sup>That the Court in *Colony* said the statutory language is "not unambiguous" is irrelevant, because the Court there was not speaking in the context of *Chevron* (which had not yet been decided). Instead, the fact that the Court in *Colony* interpreted the statute in a particular way meant that any lurking ambiguity is irrelevant for *Chevron* purposes. Slip op. at 10.

<sup>10</sup>Although Scalia is not clear on that point, his argument does not seem to be limited to decisions of the Supreme Court. As he said in his *Brand X* dissent, "When a court interprets a statute . . . its interpretation . . . is the law." 545 U.S. at 1019.

<sup>11</sup>Scalia concurrence, slip op. at 3 (emphasis in original).

<sup>12</sup>See Kennedy dissent, slip op. at 6.

<sup>13</sup>I discussed the uncertain state of *Chevron* jurisprudence in "Who's Afraid of the APA?" *Tax Notes*, Feb. 13, 2012, p. 825, *Doc 2011-27082*, or 2012 TNT 30-11.

The agency would apparently now have to show that Congress delegated gap-filling authority in that circumstance. Presumably, Scalia would sign on to that position, although it is more limited than his approach.

But the logic of Breyer's opinion in *Home Concrete* suggests that administrative actions taken to overturn a post-*Chevron* opinion may also face that additional hurdle. If a court opinion does not explicitly indicate that a statute is ambiguous for *Chevron* purposes, would Breyer insist that a court must determine whether a statute effectively delegates to an agency the power to fill a gap? The logic of his opinion suggests that he would. But would a majority of the Court go along with that approach?

It looks like tax practitioners, like other administrative law practitioners, will have to return to the Supreme Court for more guidance. Tax practitioners — welcome to the wonderful world of *Chevron*.

*Every state in the union.  
Every day of the week.*

Plus Washington, D.C. and the U.S. territories, of course. When you've got *State Tax Today*, you've really got it covered. It's the only complete online daily service for state tax news. To get the daily inside track to essential state documents and to see the in-depth analysis and one-of-a-kind commentary we offer, visit [taxanalysts.com](http://taxanalysts.com).

**state tax today**<sup>®</sup>

**taxanalysts**<sup>®</sup> *The experts' experts.*<sup>SM</sup>