DOES THE U.S. SUPREME COURT'S JUDGMENT IN NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION V. BRAND X INTERNET SERVICES, 545 U.S. 967, 125 S. Ct. 2688, 2700-2701, 162 L. Ed. 2d 820, 838-839 (2005) (BRAND X), IMPACT DEFERENCE AND *STARE DECISIS* IN CLASSIFICATION LITIGATION

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INTRODUCTION

As has often been stated by the courts, the starting point for interpreting a statute is the language of the statute itself. When the language of a statute is plain and unambiguous, absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. See Consumer Products Safety Comm'n v. G.T.E. Sylvania, Inc., 447 U.S. 102, 108 (1980).

There is no question that the judiciary is the final authority on issues of statutory construction when the terms of a statute are plain and unambiguous. However, "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language." United States v. Turkette, 452 U.S. 576, 580 (1981). Indeed, few phrases in a complex scheme of regulation are

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so clear as to be beyond the need for interpretation when applied in a real context. See National Railroad Passenger Corp., et al. v. Boston and Maine Corp., et al., 503 U.S. 407, 418 (1992); Helvering v. Reynold, 313 U.S. 428 (1941) (the word "acquisition" may be unambiguous in other transactions, but its meaning in the statutory setting under consideration was far from clear). Thus, "**authoritative administrative constructions should be given the deference which they are entitled**, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." Id. (emphasis added), citing Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978); Commissioner v. Brown, 380 U.S. 563, 571 (1965).

Where there has been express delegation of authority to the agency to elucidate a specific statutory provision by regulation and the legislature has explicitly left a gap for an agency to fill, any ensuing regulation is binding unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. Even in the absence of an express delegation of authority on a particular question, agencies charged with applying a statute necessarily make a variety of interpretive choices, and while not all of those choices bind judges to follow them, they may influence the courts facing questions the agencies have already answered.

The Supreme Court has recognized two different levels of deference which depend on statutory circumstances and agency action. Judicial responses to such agency action must differentiate between the two. In this regard, the Court's decisions in Skidmore v. Swift & Co., 323 U.S. 134 (1944) (Skidmore); Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (Chevron), provide guidance as to the best way to deal with the great variety of ways in which the laws invest the Government's administrative agencies with discretion, with procedures for exercising that discretion, and in giving meaning to Acts of

Congress.

First, in Skidmore, the Supreme Court found that agency rulings, interpretations and opinions constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The Court held that the weight to be accorded to an administrative judgment "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." Skidmore, 323 U.S. at 140.

In Chevron, the Supreme Court identified a category of interpretive choices distinguished from those discussed in Skidmore by an additional reason for judicial deference, recognizing that Congress engages not only in express, but also implicit, delegation of specific interpretive authority. Implicit delegation of interpretive authority can be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute or filling in a space in the enacted law, even one about which Congress did not intend a particular result.

To address this category of delegation, in Chevron, the Supreme Court established a two-prong test for determining the appropriateness of deferring to an agency construction. First, the court must determine if Congress has explicitly spoken on the issue. If the statute is silent or ambiguous on a particular issue, then Congress is implicitly delegating the power to the administrative agency to fill in the gaps to the statute. The court must then determine if the agency's construction of the statutory provision is reasonable or permissible. Thus, Chevron

instructs that, if a statute is silent or ambiguous with respect to specific points in issue and circumstances imply that Congress expects the administering agency to fill the gap, a reviewing court is obliged to accept the agency's interpretation if it is reasonable.

A very good indicator of delegation to the agency meriting Chevron treatment is express legislative authorizations to engage in the rule-making or adjudication process that produces the regulations or rulings for which deference is claimed. The overwhelming number of cases applying Chevron deference have reviewed the fruits of notice-and-comment rule-making or formal adjudication. There appears to be no time limitation on when an agency may construe a statute and obtain a degree of deference to its construction. Deference may extend to agency regulations which are promulgated after litigation has been initiated. In this regard, the Supreme Court's judgments in Smiley v. Citibank (South Dakota), 517 U.S. 735 (1996) (Smiley), and Brand X are instructive.

In Smiley, the Supreme Court reviewed a regulation promulgated by the Comptroller of the Currency construing the term "interest" in the National Bank Act. The notices for public comment on the proposed regulation dealing with the subject before the court were not published until after the dismissal of the petitioner's complaint. Id. at 739-740. In determining that the regulation, which was promulgated after initiation of the lawsuit, was entitled to Chevron deference, the Court stated:

> We accord deference to agencies under Chevron, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather 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. See Chevron, supra, at 843-844, 104 S. Ct., at 2782. **Nor does it matter that the regulation was prompted by**

> **litigation, including this very suit.** Of course we deny deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212, 109 S. Ct. 468, 473-474, 102 L. Ed.2d 493 (1988) [(Bowen)]. **The deliberateness of such positions, if not indeed their authoritativeness, is suspect. But we have before us here a full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation**, see 5 U.S.C. § 553; Thompson v. Clark, 741 F.2d 401, 409 (C.A.D.C.1984). **That it was litigation which disclosed the need for the regulation is irrelevant**.

Id. at 740-741 (emphasis added).

The petitioner in Smiley raised the point that deferring to the regulation in that case involving antecedent transactions would make the regulation retroactive in violation of Bowen. Id. at 745, n.3. The Supreme Court, however, did not find the regulation to be impermissibly retroactive. Instead, the Court acknowledged that "there might be substance to the point if the regulation replaced a prior agency interpretation – which as we have discussed, it did not." Id. The Supreme Court found that: "**Where, however, a court is addressing transactions that occurred at a time when there is no clear agency guidance, it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means**." Id. (Emphasis added). See also, Princess Cruises, Inc. v. United States, 201 F. 3d 1352, 1360 (Fed. Cir. 2000) (where the Federal Circuit found that deference is not affected by the fact that Customs promulgated a regulation formalizing its interpretation of the statute subsequent to imposing a fee on the plaintiff pursuant to that interpretation).

Recently, in Brand X, the Supreme Court held that an agency construction of a statute is deference-worthy even when it is promulgated **after** the judiciary has already construed a statute and even when the agency's construction is inconsistent with judicial precedent on the issue.

The issue presented in Brand X was whether the Ninth Circuit erred when it failed to apply the Chevron deference framework to a challenge of an FCC declaratory ruling that cable companies who provide broadband internet service do not provide telecommunications service under the Communications Act. The Court found that the Ninth Circuit erred by grounding its holding in the *stare decisis* affect of AT&T Corp v. Portland, where the court had previously held that cable modem service was a telecommunications service.

The Supreme Court held that a prior judicial construction of a statute, adopted in the absence of a deference-worthy agency interpretation, is not entitled to *stare decisis* effect when the court later faces the same issue and is presented with a deference-worthy agency interpretation of the issue. The Court explained that:

> . . . allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. Chevron's premise is that it is for agencies, not courts, to fill statutory gaps. . . . The better rule is to hold judicial interpretations contained in precedents to the same demanding Chevron step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore, contains no gap for the agency to fill, displaces a conflicting agency construction.
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> A contrary rule would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute in entitled to Chevron deference would turn on the order in which the interpretations issue: . . . . The Court of Appeals' rule, moreover, would "lead to the ossification of large portions of our statutory law," . . ., by precluding agencies from revising unwise judicial constructions of ambiguous statutes. Neither Chevron nor the doctrine of *stare decisis* requires these haphazard results.
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> The Court of Appeals derived a contrary rule from a mistaken reading of this Court's decisions. . . . **Those decisions allow a court's prior interpretation of a statute to override an agency's interpretation only if the relevant court decision held the statute unambiguous**.

Citations omitted. Thus, the Supreme Court held that where Chevron deference applies, then only a prior judicial pronouncement that the terms of a statute are unambiguous would trump an agency interpretation of a statute.[3]

While ordinarily principles of *stare decisis*[4] and *res judicata*[5] apply where the court has made a determination of fact or law, because of the mechanics of the importing process and the fact that each import entry is considered a separate cause of action, Customs and importers have enjoyed the discretion not to apply a decision of the Court of International Trade to later-imported entries, even of the same merchandise. See Boltex Manufacturing Co., L.P., et. al. v. United States, et. al., 24 CIT 972, 978, 140 F. Supp.2d 1339, 1346 (2000) (Boltex). See also, 19 U.S.C. § 1514 (1994) (providing for filing of a protest for each entry); J.E. Bernard & Co. v. United States, 324 F. Supp. 496, 503 n.9 (Cust. Ct. 1971) (noting that each importation is a separate cause of action). Reasons for this authority, as well as an outline of the nature and history of judicial review of Customs' decisions are found in United States v. Stone & Downer Co., 274 U.S. 225 (1927) (Stone & Downer); Schott Optical Glass, Inc. v. United States, 750 F.2d 62, 64 (Fed. Cir. 1984) (Schott Optical Glass).

Stone & Downer involved importations of wool fleece and yarn. 274 U.S. at 229. A similar case between the same parties with similar merchandise had been decided in the

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[3] Following Brand X, in Warner-Lambert Company v. United States, 425 F.3d 1381, 1386 (Fed. Cir. 2005) (Warner-Lambert), the Federal Circuit held that, "[a]lthough [Brand X] involved Chevron rather than the lesser Skidmore deference, that does not preclude according appropriate weight to the Customs' [classification] ruling."

[4] Under the doctrine of *stare decisis*, courts generally refuse to examine legal issues previously decided in another case.

[5] The doctrine of *res judicata* bars litigation by the same parties of the same issues previously adjudicated. See Commissioner v. Sunnen, 333 U.S. 591, 597 (1948).

government's favor. Id. The question before the Supreme Court was the *res judicata* effect of the previous judgment in customs classification cases. The Supreme Court strongly upheld the right of each individual importer and of the Government to present cases without being bound by former adjudications on the same or similar issues. It held that in customs classification cases a determination of fact or law with respect to one importation is not *res judicata* as to another importation of the same merchandise by the same parties. The opportunity to relitigate applies to questions of construction of the classifying statute as well as to questions of fact as to the merchandise. Id. at 236. Therefore, the Court carved out an exception to the doctrine of *res judicata* in classification cases.

The Supreme Court relied on two rationales in support of its holding in Stone & Downer. First, the Court explained that, under the Tariff Act of 1909, the Court of Customs Appeals (the predecessor to the Federal Circuit) was given power to create all of its own regulations and procedures to conduct business in the court. This included the ability to create rules for the conclusive effect of its own classification decisions when it was the final appellate body on customs matters. The Court of Customs Appeals had established the practice that a classification against an importer was not *res judicata* in regard to a subsequent importation involving the same issues of fact and law. Because the Court of Customs Appeals was well within its powers to create this rule and the Supreme Court could find no controlling reason to overturn it, the Court deferred to the established rule.

Second, the Supreme Court found wisdom in the rule itself. In this regard, it observed that, "[t]he business of importing is carried on by large houses between whom and the government there are innumerable transactions as here, for instance, in the enormous

importations of wool, and there are constant differences as to the proper classifications of similar importations. The evidence which may be presented in one case may be much varied in the next." Stone & Downer, 274 U.S. at 235-36. The Court was concerned that a decision would create binding law between one house and Customs that would be applied to another house, without giving the second house a chance to litigate any distinguishing elements. Stone & Downer established that the use of collateral estoppel in classification cases could cause "inequality in the administration of the customs law." Id. at 236. As was stated by the Supreme Court, "[t]he evidence which may be presented in one case may be much varied in the next. The importance of a classification and its far-reaching effect may not have been fully understood or clearly known when the first litigation was carried through . . . ." Id.

For sure, the Supreme Court observed that there should be an end to litigation. In this regard it commented that, "[t]here of course should be an end of litigation as well in customs matters as in other tax cases, but circumstances justify limiting the finality of the conclusion in customs controversies to the identical importation." Stone & Downer, 274 U.S. at 235. Therefore, the Court limited the broader rule of collateral estoppel in customs cases.

Following the Supreme Court's judgment in Stone & Downer, in Schott Optical Glass, the Federal Circuit was required to consider whether the doctrine of *stare decisis* prohibited a plaintiff in a classification case from presenting evidence that a prior judicial decision on an identical classification of similar merchandise was clearly erroneous. There, the plaintiff challenged Customs' decision that seven types of filter glass were properly classifiable as other optical glass. During the trial, the CIT determined that it was bound by its prior decision on the meaning of optical glass for tariff purposes and prohibited the plaintiff from presenting evidence

that the prior judicial decision was clearly erroneous.

On appeal, however, the Federal Circuit reversed the CIT's judgment that *stare decisis* prevented the relitigation of the scope of a tariff term. Schott Optical Glass, 750 F.2d at 64. The Federal Circuit reiterated that, pursuant to Stone & Downer, a party is not barred from relitigating either the meaning of a tariff term or the classification of its goods in a tariff provision. Importantly, the Federal Circuit explained that *stare decisis* does not prevent such review either because "[t]here is a well-recognized exception to *stare decisis*, however: A court will reexamine and overrule a prior decision that was clearly erroneous." Id. (citations omitted).

In addition to the judicial pronouncements in Stone & Downer and Schott Optical Glass, by regulation, Customs has the authority to limit a judicial decision. See 19 U.S.C. § 1625(d) (1993); 19 C.F.R. § 177.10(d) (1998). Section 177.10(d) of the Customs regulations provides that "[a] published ruling may limit the application of a court decision to the specific article under litigation, or to an article of a specific class or kind of such merchandise, or to the particular circumstances or entries which were the subject of the litigation."

Customs' regulatory authority to limit the application of a court judicial decision was approved, as a part of the Customs Modernization Action, when Congress added 19 U.S.C. § 1625(d). Section 1625(d) provides:

> Publication of Customs decisions that limit court decisions:
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> A decision that proposes to limit the application of a court decision shall be published in the Customs Bulletin together with notice of opportunity for public comment thereon prior to a final decision.

19 U.S.C. §1625(d). In addition to apparently codifying section 177.10(d) and, thereby legislatively authorizing Customs to limit the application of a judicial decision, section 1625(d)

imposes a notice and comment requirement whenever Customs proposes to limit a court decision. Thus, while not authorizing the revocation a judicial decision, the legislature arrogates to Customs the power to limit the precedential affect of a judicial decision.

Against the judicial and legislative background summarized above, in my opinion, the Supreme Court's decision in Brand X reinforces pre-existing Customs' jurisprudence.