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"Administrative Law is not for sissies—so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture."[1] *The essence of this Note is that courts should treat agency rules that have "the force and effect of law" the same as statutes when courts determine at what point in time an agency rule becomes enforceable. Additionally, is the idea that courts retain the judicial power to interpret the statute. Only after a court has interpreted the statute does it then determine whether the agency action is harmonious with the law. Thus, courts do not abdicate their Article III role when deferring to agency rules in the* Chevron/Brand X *contexts.*

The *Brand X* Problem

The Court's landmark holding in *National Cable & Telecommunications Association v. Brand X Internet Services*[2] creates a conundrum in administrative law. To illustrate, consider the following scenario: First, the agency takes a position that allows certain litigants to adjust their immigration status. Second, a court defers to that agency position. Third, the agency changes its position to no longer allow this particular class of litigants to adjust their status. After the agency changes its tune, a litigant within the class, ostensibly relying on the court's precedent, seeks to have their immigration status adjusted. Meanwhile, the court in a different case, defers to the agency's second interpretation. Which interpretation of the statute should control the litigant's ability to adjust their immigration status: the first court precedent, or the second agency rule?

To illustrate the dilemma with an algebraic flourish: a first-in-time court (T1) is asked to interpret a statute, finds the statute ambiguous, and interprets the statute to mean A. Subsequently, an agency (T2) with the power to promulgate rules under the statute comes along and decides that a better interpretation of the statute is B, not A. Finally, a third-in-time court (T3) comes along and defers to the agency's interpretation (B) as reasonable. Which interpretation, A or B, should control a litigant who files after T2 but before T3?

We know from *Brand X* that an agency's reasonable interpretation is controlling even when it conflicts with a prior court's interpretation of an ambiguous statute.[3] But the scenario above raises several important and problematic questions around retroactivity that *Brand X* does not directly answer. The ques-

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[1] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 DUKE L.J. 511 (1989).

[2] 545 U.S. 967 (2005).

[3] *Id.* at 982-983 ("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.").

tions that arise are when did the law change, and when are litigants subject to that law? Did the law change when the agency changed its interpretation to B, or did it change when the court deferred to the agency's interpretation of B? And who decides?

Two authorities—*Guiterrez-Brizuela v. Lynch*,[4] and *Retroactivity Analysis after* Brand X[5]—take the position that the agency's ability to enforce the rule turns on judicial acquiescence to the new rule. Their propositions boil down to the idea that an agency in the *Brand X* context may not apply its rule until after a court has deferred to the agency's new interpretation of the statute under *Chevron*.[6]

This Note takes a different position: In the *Brand X* context, courts should treat agency rules that have 'the force and effect of law'[7] as essentially that—laws. Because agency rules are essentially laws, when agencies change their "interpretation" of a statute—when agencies change their implementation of the statute—even that interpretation conflicts with a prior court precedent, courts should analyze the agency's change through a lens similar to the legislature passing a law that overrides a contrary prior court decision. Thus when the agency promulgates a new rule at T2, this new rule is enforceable until a court strikes it down. Therefore, litigants should rely on the agency's new rule rather than prior court precedent.

When the agency promulgates a rule, the agency is implementing the law pursuant to its statutory and, for executive branch agencies, constitutional authority.[8] Moreover, agency rules have a similar legal impact as statutes, and courts analyze them under comparable rubrics.[9]

When viewed through the rules-as-laws lens, the *Brand X* problem is not as problematic. Upon this foundation, agencies do not infringe on the courts province to interpret the law when an agency changes its implementation of a statute in a way that is contradicts a court's prior interpretation. This foundation also alleviates the number of hoops that agencies, courts, and litigants must jump through to determine whether the rule can be applied. Once the rule is promulgated it has "the force and effect of law," and it is valid unless, and until, a court strikes the rule down.

There are serious constitutional separation of powers questions that underlie the *Brand X* problem. Those issues are inherent in the modern administrative state. The modern administrative state hinges on the legal fiction that congressional delegation to agencies to promulgate and interpret rules are really agencies exe-

[4] 834 F.3d 1142 (10th Cir. 2016).

[5] James Dawson, Note, YALE J. ON REG. 219 (2014).

[6] *See, e.g., infra* notes 61-63 and accompanying text.

[7] *See, e.g.,* Chrysler Corp. v. Brown, 441 U.S. 281, 296 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'").

[8] *Cf.* Talk America, Inc. v. Michigan Bell Telephone Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring) ("[W]e will defer to an agency's interpretation of the statute it is charged with implementing . . . . When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation).").

[9] *See*, *infra* Part III.

cuting the law,[10] rather than creating the law,[11] and/or interpreting the law.[12] To solve the *Brand X* problem, we must place agency actions, and judicial review of those actions, in the proper constitutional orbit. The purpose of this Note, in part, is to reconcile agency action with the separation of powers ratified in the Constitution that the framers considered necessary to the continued existence of the republic.[13]

I. RETROACTIVITY IN THE *BRAND X* CONTEXT.

A. RETROACTIVITY ANALYSIS AFTER *BRAND X*.

1. Core Position

The core premise of *Retroactivity Analysis after* Brand X[14] is the agency changes the law when it changes its interpretation of a statute.[15] However, because courts are the final authority on statutory interpretation, the new agency interpretation cannot have legal effect until the court ratifies the agency's interpretation.[16] From that premise, *Retroactivity Analysis* takes the position that "when ratifying the agency's T2 interpretation that the law is *B*, T3 federal courts should assume that their decisions apply purely prospectively. Thus, law *A*, and not law *B*, should usually apply to litigants who acted any time between T1 and T3."[17] That encompasses the time between the agency promulgated the new rule (T2) and when the court ruled on the validity of the agency's new rule (T3).

Retroactivity Analysis argues that when an agency changes its interpretation of a statute the agency is changing the law rather than clarifying the law.[18] From the premise that the agency's change in interpretation changes the law, *Retroactivity Analysis* takes the position that when *Brand X* applies, the change in the law should not be enforced until a court agrees with the change. That is to say, when an agency changes its interpretation of a statute to one that a court previously interpreted differently, the agency

[10] *See* U.S. Const. art. II. § 3, cl. 5.

[11] *See* U.S. Const. art. I § 1.

[12] *See* U.S. Const. art. III § 1.

[13] *See, e.g.,* THE FEDERALIST NO. 47 (James Madison).

[14] Dawson, Note, *Retroactivity Analysis*, *supra* note 5.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 223.

[18] *Id* at 241-246; *See also* Nat'l Mining Ass'n v Dep't of Labor, 292 F.3d 849, 859-860 (D.C. Cir. 2002).

generally should not be able to enforce its change in the law until the court places its imprimatur on the agency's new interpretation.[19]

2. Presumption against Retroactivity

Retroactivity Analysis suggests courts begin with a presumption of pure prospectivity.[20] Then courts should weigh the *Chevron Oil*[21] balancing test to determine whether to apply the rule retroactively.[22] To make that determination, courts weigh three factors. And if all three factors are met, the rule cannot be retroactively applied.[23] Thus, there is a presumption against retroactivity, and the rule can only be applied retroactively from the time the court rules on it (i.e. between T2 and T3) if the *Chevron Oil* factors are satisfied.

Retroactivity Analysis goes on to suggest that since the Court rejected a case-by-case inquiry (selective prospectivity)[24] the *Chevron Oil* test in the *Brand X* context would apply to the class of litigants similarly situated to the party challenging the retroactive application of the rule.[25] Thus, even if the challenging litigant failed to meet the *Chevron Oil* test, the rule could not be applied retroactively to similarly situated parties so long as the class of litigants the particular litigant represents would generally pass the *Chevron Oil* Test.[26]

B. *GUTIERREZ-BRIZUELA V. LYNCH*

The most prominent skirmish in the *Brand X* conflict is *Gutierrez-Brizuela v. Lynch*.[27] In that case the Tenth Circuit, in an opinion by then-Judge Gorsuch, ruled that when an agency promulgates a rule that is contrary to the controlling law in the circuit, the circuit precedent controls until the agency rule is deemed reasonable.[28] Therefore, the agency can only apply its new rule to conduct that occurs after the court de-

[19] *See* Dawson, Note, *Retroactivity Analysis*, *supra* note 5, at 254-257.

[20] *Id.* at 254.

[21] Chevron Oil v. Huson, 404 U.S. 97 (1971).

[22] Dawson, Note, *Retroactivity Analysis*, *supra* note 5, at 254.

[23] *Id. Chevron Oil*, 404 U.S. at 106-107.

[24] *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993); James B. Dean Distilling Co. v. Georgia, 501 U.S. 529 (1991).

[25] Dawson, Note, *Retroactivity Analysis*, *supra* note 5, at 254.

[26] *Id.*

[27] 834 F.3d 1142 (10th Cir. 2016).

[28] *Id.* at 1148.

fers to the new rule as reasonable.[29] The legal saga that lead to *Gutierrez-Brizuela* borders on epic, so this Note will explain it chronologically.

1. Dueling Statutes

The gravamen of the problem in the *Gutierrez-Brizuela* line of cases are two provisions of immigration law that seem out of tune with one another. The first provision allows the Attorney General to grant lawful status to any illegal alien currently present in the United States, who entered the country unlawfully.[30] The second provision provides that aliens unlawfully present a second time, after being removed a first time for being unlawfully present, are not eligible for a visa unless they remain outside the United States for a period of ten years.[31] In plain English, the first provision allows the Attorney General discretion to grant lawful status to any illegal alien. But the second provision prohibits the Attorney General from granting lawful status to an alien who enters the United States unlawfully a second time, unless that alien stays outside the United States for a period of ten years after their first removal.

2. *Padilla-Caldera I*

The Tenth Circuit first addressed these statutes in *Padilla-Caldera v. Gonzalez*.[32] In *Padilla-Caldera I* the court determined the provision granting the Attorney General discretion to grant lawful status to an illegal alien prevailed.[33] The court utilized the textual canons of statutory construction—that statutes should be read in harmony,[34] and that a specific statute amends a general statute.[35] It is arguable, however, that the court ultimately found the statute ambiguous and looked to its purpose.[36]

3. *In re Briones*

The Board of Immigration Appeals (B.I.A.) subsequently took a different view on the statutory provisions at issue. Its decision *In re Briones*[37] held that the two provisions should be read not to afford the Attorney

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[29] *Id.* at 1144-1145 ("Mr. Gutierrez-Brizuela applied for relief during the period *after* the BIA's announcement of its contrary interpretation in *Briones* yet *before Padilla-Caldera II* declared *Briones* controlling and *Padilla-Caldera I* effectively overruled." (emphasis in original)).

[30] 8 U.S.C. § 1255(i)(2)(A).

[31] *See* 8 U.S.C. §§ 1182(a)(i)(9)(C)(i)-(ii).

[32] 426 F.3d 1294, 1298-1301 (10th Cir. 2005) [hereinafter Padilla-Caldera I], *amended and superseded on reh'g by* 453 F.3d 1237, 1242-1244 (2006) (affirming, in relevant part, the holding of the panel decision).

[33] *Id.* at 1301.

[34] *Id.* at 1298-1299. *See also* ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 39 (2012) (Related-Statutes Canon) [hereinafter Reading Law].

[35] *Id. See also* SCALIA AND GARNER, READING LAW, *supra* note 34, at § 28 (General/Specific Canon).

[36] *See Id.* at 1299 ("[W]hen, as here, the text itself gives no indication of which provision Congress intended to supercede the other, we look to legislative history and the underlying policies of the statutory scheme."). *See also*, *infra* note 44 and accompanying text.

[37] 24 I. & N. Dec. 355 (BIA 2007).

General discretion to grant lawful status to those aliens who otherwise would be unable to receive lawful status due to § 1182(a)(9)(C)(i).[38] The Board's decision relied primarily upon on policy concerns.[39] While it is true that the B.I.A. undertook a statutory construction analysis,[40] the Tenth Circuit's later analysis relied upon the B.I.A. decision resting on policy concerns, because those concerns are traditionally entrusted to the agency.[41]

4. *Padilla-Caldera II*

In *Padilla-Caldera v. Holder*,[42] the B.I.A. sought to apply the *In re Briones* decision to Mr. Padilla-Caldera of *Padilla-Caldera I* fame.[43] The Tenth Circuit conceded the statute was ambiguous.[44] Then determined the B.I.A.'s *In re Briones* decision was reasonable, and granted the agency *Chevron* deference under the principles of *Brand X*.[45]

5. *De Niz Robles*

The next chapter in the B.I.A.-Tenth Circuit *Brand X* retroactivity odyssey is *De Niz Robles v. Lynch*.[46] Mr. De Niz Robles filed a petition for adjustment of his immigration after the Tenth Circuit's decision in *Padilla-Caldera I*, and before the B.I.A. decided *In re Briones*.[47] The B.I.A. retroactively applied *Briones* to Mr. De Niz Robles and held that he was categorically ineligible for adjustment of his status.[48] The Tenth Circuit rejected the B.I.A.'s decision.[49]

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[38] *Id.* at 370-371.

[39] *Id.* ("[O]ne of the chief purposes of the IIRIRA amendments of 1996 was to overcome the problem of recidivist immigration violations . . . .The enactment of these multifarious provisions . . . reflects a clear congressional judgment that such repeat offenses are a matter of special concern . . . ." (internal citations omitted)).

[40] *See Id.* at 361-362.

[41] *See Gutierrez-Brizuela*, 834 F.3d at 1144 ("[T]he BIA offered its view that—as a matter of policy discretion . . . .").

[42] 637 F.3d 1140, (10th Cir. 2011) [hereinafter Padilla-Caldera II].

[43] *Padilla-Caldera I*, *supra* note 32, was remanded to the B.I.A., and during the intervening period the B.I.A. decided *In re Briones*. The B.I.A. sought to apply the *In re Briones* decision to Padilla-Caldera when the B.I.A. heard that case on remand.

[44] *Padilla-Caldera II*, *supra* note 42, at 1147 ("We have already held that the relevant statutory provisions are in conflict and that the 'the text itself gives no indication of which provision Congress intended to supersede the other.'" (citation omitted)).

[45] *Id.* at 1152-1153.

[46] 803 F.3d 1165 (2015).

[47] *Id.* at 1168.

[48] *Id.*

[49] *Id.* at 1180.

The Tenth Circuit, in an opinion by Judge Gorsuch, reasoned that when an agency acts under color of *Chevron* and *Brand X* (making rules of general applicability that "override" a contrary prior judicial decision), the agency "comes perhaps as close to exercising legislative power as it might ever get."[50] And when the agency acts in a legislative capacity creating a rule of general applicability, there is a presumption of purely prospective application of that rule.[51]

The court rejected the B.I.A.'s contention that since *Briones* was a quasi-judicial decision, the B.I.A. merely "clarified what the law always meant."[52] The court observed that "substance doesn't always follow form."[53] The court said that when an agency acts to overturn a prior court precedent by creating a rule of general applicability, the agency is exercising its quasi-legislative authority, regardless of the proceeding the agency uses to create the new rule.[54] Based on the prospectivity principles of the exercise of legislative authority, the court ruled against the B.I.A.'s retroactive application of *Briones* to Mr. De Niz Robles.[55]

The court also expressed constitutional concerns with the agency's retroactive application of the *Briones* rule. The court stated that there are Due Process concerns in the retroactive application of rules because it penalizes conduct the party had no notice was illegal.[56] Retroactivity violates the fundamental "due process interests of 'fair notice, reasonable reliance, and settled expectations.'"[57]

The court found Equal Protection concerns in similar interests. The court recognized that "permitting retroactivity would undo settled expectations in favor of a new rule of general applicability rendered by a decisionmaker expressly influenced by policy and politics."[58] It allows the party in political power to "punish those who have done no more than order their affairs around existing law."[59] And it gives the party in political power the authority to pick who they want to punish, then create the law to accomplish that end, without affording the disfavored party the opportunity to avoid the gallows.[60]

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[50] *Id.* at 1172.

[51] *Id.*

[52] *Id.* at 1172 (quoting In re De Niz Robles, No. A074 577 772, 2014 Immig. Rptr. LEXIS 5677 (BIA July 11, 2014).

[53] *Id.* at 1173.

[54] *Id.* at 1173-1174.

[55] *Id.* at 1180.

[56] *See Id.* at 1168.

[57] *Id.* at 1169 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)).

[58] *Id.* at 1174.

[59] *Id.* at 1174-1175.

[60] *See Id.* ("[Those in power can choose what to punish] with full view of who will stand to flourish or flounder, . . . able to single out disfavored persons and groups and punish them for past conduct they cannot now alter.").

The court also added one significant "wrinkle."[61] The court stated that "[a]n agency in the *Chevron* step two/*Brand X* scenario may enforce its new policy judgment only with judicial approval."[62] The court reasoned that when an agency operates in the *Brand X* context, it is exercising legislative power, not judicial power, and is thus subject to a presumption against retroactivity.[63] Thus, under *Chevron* the court must go through the *Chevron* analysis to determine if the agency's interpretation is reasonable.

6. *Gutierrez-Brizuela*

That brings us to *Gutierrez-Brizuela v. Lynch*.[64] Here the B.I.A. sought to apply *Briones* to a petition filed by Mr. Gutierrez-Brizuela after the B.I.A. decided *Briones*, but before the Tenth Circuit deferred to *Briones* in *Padilla-Caldera II*.[65] *Gutierrez-Brizuela* starts with the proposition that *Briones* did not have legal effect in the Tenth Circuit until the court determined its validity under the judicial review umbrella of *Chevron* and *Brand X*.[66] The court reasoned that *Padilla-Caldera I* was still good law in the Tenth Circuit at the time Mr. Gutierrez-Brizuela filed his petition because he filed the petition before *Padilla-Caldera II*. Since the court determined that *Briones* was not the law in the Tenth Circuit until *Padilla-Caldera II*, the court then undertook a *Chenery II*/*Stewart Capital* retroactivity analysis to determine that *Briones* should not apply to Mr. Gutierrez-Brizuela.[67]

The court also undertook a significant constitutional analysis in the case. The court outlined several Due Process and Equal Protection concerns it saw in what it believed would be a retroactive application of the *Briones* rule. It reinforced "[t]he due process and equal protection concerns that animated our holding in *De Niz Robles*."[68]

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[61] *Id.* at 1174 n.7.

[62] *Id.*

[63] *Id.*

[64] 834 F.3d 1142 (10th Cir. 2016).

[65] *Id.* at 1144-1145.

[66] *Id.* at1145 ("Take the rule first. *De Niz Robles* held that *Briones* was not legally effective in the Tenth Circuit until this court discharged its obligation under *Chevron* step two and *Brand X* to determine that the statutory provisions at issue were indeed ambiguous.").

[67] *Id.* at 1144-1149.

[68] *Id.* at 1146.

II. THE PROBLEMS WITH *RETROACTIVITY ANALYSIS AFTER* BRAND X AND *GUTIERREZ-BRIZUELA*

A. PROBLEMS WITH *RETROACTIVITY ANALYSIS AFTER* BRAND X

1. Problems with Balancing Tests

i. The Balancing Test

The *Chevron Oil*/*Beam* hybrid balancing test does not remedy the issues *Retroactivity After* Brand X seeks to ameliorate. Balancing tests do not provide bright line rules for litigants to follow. Thus, litigants are in no better position to predict whether they will be subject to the retroactive application of the rule than they would be in the absence of the hybrid balancing test contemplated by *Retroactivity Analysis*.[69] Under *Retroactivity Analysis*'s balancing test, litigants are required to know the court's old interpretation, the agency's new interpretation, and how the court may apply the *Beam* balancing test in *Brand X* cases.

ii. Clear Statement Rule

Retroactivity Analysis after Brand X also draws a comparison to the Court's clear statement rule for retroactive application.[70] The clear statement rule in *Bowen* is not applicable to the *Brand X* problem because *Bowen* refers to a rule's application to activities before the rule came into effect.[71] *Brand X* arises in situations after the rule that conflicts with a prior interpretation is validly promulgated, but before a court reviews the new rule's validity in light of the old interpretation. The rule itself is applied prospectively based on when it was promulgated.

2. The Role of Agencies and the Role of the Courts

This Note also disagrees with *Retroactivity Analysis's* "clarify or change the law" analysis.[72] This Note reads *Retroactivity Analysis* to implicitly accept the dissent in *Brand X's* characterization that *Brand X* functionally allows agencies to "overrule" prior court precedents, and in doing so agencies unconstitutionally infringe upon the specific separations of power in the constitution.[73] And that *Retroactivity Analysis* argues that the new T2 rule is presumptively not effective until the court at T3 defers to the agency's T2 rule.[74] Thus, the rule's application is considered retroactive to the litigant between T2 and T3. This Note disagrees with that characterization of agency actions.

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[69] *Cf.* WARD FARNSWORTH, THE LEGAL ANALYST § 17 (2007) (discussing the legal economics of rules versus standards); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (discussing the benefits of bright line legal rules over judicial balancing tests).

[70] Dawson, Note, *Retroactivity Analysis*, *supra* note 5, at 231-232. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 288 (1988).

[71] *See, e.g.,* Caring Hearts Personal Home Services, Inc. v. Burwell, 824 F.3d 968 (10th Cir. 2016) (rebuking HHS for attempting to apply rules promulgated in 2012 to activity that lawfully took place in 2008).

[72] *See* Dawson, Note, *Retroactivity Analysis*, *supra* note 5 at 241-246.

[73] *See Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting).

[74] Dawson, Note, *Retroactivity Analysis*, *supra* note 5 at 254-257.

When the agency changes its rule, the agency changes its implementation of the law. It is not altering the fundamental meaning of the law. The statute still says what is says, and the agency's implementation must be consistent with what it says.[75] Courts ultimately interpret the law by determining what the law says, then apply that meaning to determine whether the agency's implementation is reasonable within that interpretation.[76]

The proposition that the political branches may functionally "overrule" prior judicial decisions is an unremarkable one.[77] Congress occasionally passes laws that ostensibly overrule prior court decisions.[78] At times the Court will implore Congress to take such actions.[79] And courts are not required to determine the "overruling" law's validity before it can be enforced.[80]

If you start from the premise that agency rules with the "force and effect of law" are essentially laws, then it is an unremarkable extension of that premise to say that agencies can promulgate rules that contradict prior court precedents. And based on the premise, the agency's change in the rule should be applied in the same manner that a legislative change in the law is. That is, the law is valid *until* a court strikes it down. When the agency creates a new rule at T2, the new rule is just that—a new rule—and it is valid unless, and *until*, a court strikes it down.

This Note also disagrees with *Retroactivity Analysis's* juxtaposition between the *Erie* doctrine,[81] which requires federal courts to defer to authoritative state law,[82] and the *Chevron* doctrine, where federal courts are not.[83] *Retroactivity Analysis* states that "under *Brand X*, a T3 federal court is *not* obligated to defer to the T2 agency interpretation, and may instead reject any agency interpretation it finds unreasonable."[84]

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[75] *See Chevron*, 467 U.S. at 842-843.

[76] *See Id.* at 843 n.9. ("The judiciary is the final authority on issues of statutory construction . . . . 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.").

[77] *See, e.g.,* Arbaugh v. Y. & H. Corp., 546 U.S. 500 (2006) (holding that the employee numerosity requirement in Title VII is not jurisdictional, but Congress is free to change that if it so wishes).

[78] *See, e.g.,* Civil Rights Act of 1991, § 109(a), 105 Stat. 1077, codified at 42 U.S.C. § 2000e(f) (amending Title VII to include in the definition of "employee" U.S. citizens who work in foreign countries. This law essentially overruled *EEOC v. Arabian American Oil Co.,* 499 U.S. 244 (1991) which held that Title VII did not apply in foreign countries).

[79] *See, e.g.,* Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 201-204, 211 (2009) (questioning the continued constitutional validity of the Voting Rights Act in light of changed circumstances).

[80] *Cf., e.g.,* Gozlon-Peretz v. U.S., 498 U.S. 395, 404 (1991) ("It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.").

[81] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[82] Dawson, Note, *Retroactivity Analysis*, *supra* note 5 at 238-241.

[83] *See Chevron*, 467 U.S. at 842-843.

[84] Dawson, Note, *Retroactivity analysis*, *supra* note *5.* at 223 (emphasis in original).

While this assertion is theoretically true, it does not reflect the practical realities of *Chevron*.[85] While the authority of the agency is more circumscribed than that of the legislature,[86] the agency's powers are, in practice, reviewed through a similar judicial lens.[87]

The point is, the fact that a federal court *can* strike down a rule does not mean the rule is not valid until after a court reviews it. Just as the fact that a federal court can strike down a law does not mean that judicial review of a statute is required before the law can be enforced.

B. PROBLEMS WITH *GUTIERREZ-BRIZUELA*

While the result for the litigant in *Gutierrez-Brizuela* may be admirable, "the fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case."[88] The problem with the approach in *Gutierrez-Brizeula* is that it places agency rules in a sort of legal purgatory. The rule is promulgated by the agency, but if the rule contradicts a prior judicial precedent in that circuit the rule is not considered lawful—thus cannot be enforced—until after the court grants the rule *Chevron* deference. The problems in this approach generate far more uncertainty for litigants than the uncertainty Mr. Gutierrez-Brizuela faced with the conflicting dispositions of the Tenth Circuit in *Padilla-Caldera I* and the B.I.A. in *Briones*.

1. Due Process Concerns in *Gutierrez-Brizuela*

Gutierrez-Brizuela expressed Due Process concerns, primarily the lack of fair notice to litigants and the ability of the majority to oppress the minority.[89] This Note agrees with those concerns. This Note's disagreement is the point in time when retroactivity takes place. To determine when a rule is retroactive, we must determine the point in time where the rule becomes enforceable. As this Note illustrates, rules should be enforceable at the point they are promulgated.[90]

That is why this Note takes the position that the concerns that "animated the court's holding" in *Gutierrez-Brizuela* are inapplicable to these cases. In this Note's view, the B.I.A.'s *Briones* rule was valid once the B.I.A. handed it down, thus it could be applied to Mr. Gutierrez-Brizuela because he did not file his petition until after *Briones*.

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[85] *See* Barnett & Walker, Chevron *in the Circuit Courts*, *infra* note 123.

[86] Agencies cannot exceed their authority granted to them by the legislature through their enabling statute, while Congress cannot exceed its authority granted to it by the people through the Constitution. Congress's authority is broader, the principles are conceptually similar—each entity's authority to create rules is granted at the enumerated behest of its sovereign superior.

[87] *See* Barnett & Walker, Chevron *in the Circuit Courts, infra* note 123.

[88] Morrison v. Olson, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting).

[89] *Gutierrez-Brizuela*, 834 F.3d at 1146.

[90] *See*, *infra* part III.

2. Other Circuits

Brizuela-Gutierrez is not this issue's first appearance in the federal circuits. This issue reared its head in other circuits. Those circuits took a different approach than the Tenth Circuit. The issue reached the First Circuit,[91] Third Circuit,[92] Fourth Circuit,[93] Sixth Circuit,[94] Seventh Circuit,[95] and Ninth Circuit.[96] In each of those cases, each court reached the opposite conclusion the Tenth Circuit reached in *Brizuela-Gutierrez*. Other recent scholarship is also critical of the Tenth Circuit's retroactivity approach.[97]

3. Forum Shopping

Gutierrez-Brizuela may create the possibility of forum-shopping. Litigants will pick the circuits whose rule favors them. An agency looking to avoid the *Gutierrez-Brizuela* problem will enforce its rule in one of the circuits that decided the question the opposite way. Likewise, challengers who do not want to be subject to an agency rule that contradicts a prior judicial precedent will seek to litigate in the Tenth Circuit. *Gutierrez-Brizuela* also presents problems in questions it left open. Horizontal applications of court interpretations and retroactive rules. Would the Tenth Circuit take the *Gutierrez-Brizuela* approach to a Ninth Circuit precedent?

For example, take a hypothetical where *Padilla-Caldera I* and *II* are litigated in the Ninth Circuit, then *Gutierrez-Brizuela* comes to the Tenth Circuit. Would the Tenth Circuit hold that, for the Due Process and Equal Protections concerns that "animated its holding,"[98] *Padilla-Caldera I* is persuasive and should determine *Gutierrez-Brizuela*'s outcome because the Ninth Circuit did not hand down *Padilla-Caldera II* before Mr. Gutierrez-Brizuela filed his petition? Or would the fact that Ninth Circuit precedent is not binding on the Tenth Circuit change the outcome? In the latter case, Mr. Gutierrez-Brizuela would be out of luck because he filed his petition in the wrong circuit where there was no precedent and thus *Brand X* did not apply, so the new rule simply received *Chevron* deference. And what do you do when there are conflicting rules in the circuits.[99]

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[91] *See* Dominion Energy Brayton Point, LLC. v. Johnson, 443 F.3d 12, 16-17, 18-19 (1st Cir. 2006).

[92] *See* United States v. McGee, 763 F.3d 304, 314-315 (3rd Cir. 2014).

[93] Fernandez v. Keisler, 502 F.3d 337, 347-349, 352 (4th Cir. 2007).

[94] Metropolitan Hospital v. U.S. Dept. of Health and Human Services, 712 F.3d 248, 255-256 (6th Cir. 2013).

[95] Rush Univ. Med. Ctr. V. Burwell, 763 F.3d 754, 758-760 (7th Cir. 2014).

[96] Medina-Nunez v. Lynch, 788 F.3d 1103, 1104 (9th Cir. 2015).

[97] *See* Daniel Hemel, *The Tenth Circuit vs. Brand X*, Yale J. on Reg.: Notice & Comment (Aug. 24, 2016), http://yalejreg.com/nc/the-tenth-circuit-vs-brand-x/ (last visited Apr. 24, 2017 at 11:56pm).

[98] *See supra* notes 68.

[99] *See supra* notes 91-96 and accompanying text.

Further, what about vertical applications? For example, Supreme Court precedents. It is hornbook law that the circuit courts must strictly adhere to Supreme Court precedent.[100] If an agency rule contradicts a prior Supreme Court precedent, must the agency have that Court say the rule is valid before the agency can enforce the rule? These issues may create quite a legal labyrinth.

These questions also present Due Process and Equal Protection concerns of their own. Under the *Gutierrez-Brizuela* regime, the applicability of rules is dependent not only on which circuit the litigant is in, but also on whether that circuit has previously spoken on the statute at issue. Consider again the *Padilla-Caldera* in the Ninth Circuit hypothetical. In that hypothetical, if Mr. Gutierrez-Brizuela litigates in the Ninth Circuit, he is free and clear of the *Briones* rule because of controlling Ninth Circuit precedent. Whereas, if he litigates in the Tenth Circuit he is out luck because there is no controlling precedent in the Tenth Circuit, thus the agency can enforce the *Briones* rule against him. His ability to be on notice of what the law is depends upon what the agency rule is, what circuit he is in, whether the circuit has spoken on the issue, and when the circuit has spoken on that issue.

This problem also creates Equal Protection concerns. Similarly situated litigants under the umbrella of federal agency jurisdiction are subject to different agency rules based on what circuit they may find themselves in. It is one thing for federal circuits to differ on interpretations of the law, where courts are allowed to experiment with interpretations of a law based on their geographical region.[101] It is a different matter when federal agency enforcement of a generally applicable rule is subject to manipulation based on which circuit a litigant is in. This problem is the type that *Chevron* and *Brand X* aimed to avoid.[102]

C. SEPARATION OF POWERS CONCERNS

1. *Vermont Yankee*

The Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* admonished that "[the APA] established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."[103] *Gutierrez-Brizuela* forces agencies to go to court to have their rules validated before the rule can be enforced. This requirement sounds strikingly like a court imposed rulemaking procedures that *Vermont Yankee* admonished as an invasion of the province of the political branches.[104]

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[100] *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT § 2 (2016) (detailing how lower courts must strictly follow the precedents of higher courts within that jurisdiction).

[101] *See, e.g.,* Jennifer K. Luse et al., *"Such Inferior Courts..."*: *Compliance by Circuits with Jurisprudential Regimes,* 37 AM. POL. RES. 75, 77-78 (2009) (internal citation omitted).

[102] *See Brand X*, 545 U.S. at 980 ("In *Chevron,* this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts.").

[103] 435 U.S. 519, 524 (1978).

[104] *Id.*

2. Diffusion of Accountability

A subtler problem created by *Gutierrez-Brizuela* is one of accountability. Under the *Gutierrez-Brizuela* regime, whether a rule is enforceable is dependent upon the courts. As evidenced by the sequence of events that led up to *Gutierrez-Brizuela*, this process can take years. *In Re Briones* was decided in 2007, *Padilla-Caldera II* in 2011, and *Gutierrez-Brizuela* in 2016. Based on the reasoning in *Gutierrez-Brizuela* it was four-years before the *Briones* rule could validly be applied in the Tenth Circuit. That is longer than a House of Representatives election cycle.[105] If a rule is politically problematic, who does the public blame? Congress has no idea whether a court will strike down the rule. The Executive does not know whether their rule is enforceable. And the courts cannot have a say unless the rule comes to them in the form of a case or controversy.[106]

The issue created here is one of diffusion of power. This diffusion makes it difficult for the people to hold the political branches accountable. This is an example of what Chief Justice Roberts cautioned, that "the diffusion of power carries with it the diffusion of accountability."[107] And that "[w]ithout a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or of pernicious measures ought to fall."[108] The clear chain of command should be that the rule is valid once it is created, and can be applied unless and until a court says the rule is not reasonable.

III. AGENCY RULES VERSUS STATUTES

A. STATUTES

The federal government's power is limited to those powers specifically enumerated to it under the Constitution.[109] Article I of the Constitution grants Congress the power to create laws.[110] Subject to exceptions not relevant here, courts review the constitutionality of statutes for whether there is a rational basis for the legislation.[111] Under the rational basis standard courts will uphold the law so long as there is a plausible justification for the law.[112] If there is a plausible justification, then the court's "inquiry is at an end."[113]

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[105] U.S. Cont. art. I, § 2, cl. 1.

[106] *See* U.S. Const. art. III, § 2, cl. 1. *See also, e.g.,* Summers v. Earth Island Institute, 555 U.S. 488, 492-494 (2009) (explain how and why the case or controversy requirement is a "fundamental limitation" on judicial power).

[107] Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477, 497 (2010).

[108] *Id.* (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

[109] *See, e.g.,* Gibbons v. Ogden, 22 U.S. 1, 33 (1824) ("[T]he constitution of the United States is one of limited and expressly delegated powers, which can only be exercised as granted, or in the cases enumerated.").

[110] U.S. Const. art. I § 1. *Cf.* WILLIAM BLACKSTONE, COMMENTARIES § *44-*46.

[111] *See, e.g.,* Armour v. City of Indianapolis, 132 S. Ct. 2073 (2012).

[112] *Armour*, 132 S. Ct. at 2080.

B. RULES AND ORDERS

Agency rules are reviewed under the judicial standard of whether or not the rule is arbitrary and capricious.[114] Courts will uphold the agency rule so long as it is reasonable.[115] Courts determine reasonableness by examining: whether the agency followed the guidelines set forth for agency action in the APA and the agency's enabling statute;[116] whether the agency decision reflects the record compiled in the agency proceeding;[117] and whether the agency has given adequate reasons for its decision.[118] Generally speaking, whether the agency has given adequate reasons requires merely that it considers the relevant factors, and that the agency's path can reasonably be discerned.[119]

Agency actions under §§ 556 and 557 (such as B.I.A. adjudications) are reviewed under the substantial evidence test.[120] The test requires a court to uphold an agency decision unless it "cannot conscientiously find that the evidence supporting [the agency's] decision is substantial, when viewing in a light that the record entirely furnishes, including the body of evidence opposed to the [agency's] view."[121] In practice, the substantial evidence operates similarly to (if not more deferential than) the arbitrary and capricious test.[122]

In theory, the standards of review for rules are slightly more stringent than the rational basis test for statutes. The functional difference between legislation being upheld so long as there is some rational basis, and agency rules being upheld so long as it is rational and the agency's path can be reasonably discerned operates like an academic one. Recent empirical evidence on judicial deference to agency actions may bear that out.[123]

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[113] F.C.C. v. Beach Communications, 508 U.S. 307, 314 (1993).

[114] 5 U.S.C. § 706; *See also, e.g.,* Citizens of Overton Park v. Volpe, 401 U.S. 402, 413-414 (1971) ("[T]he existence of judicial review is only the start: the standard for review must also be determined. For that we must look to § 706 of the Administrative Procedure Act.").

[115] *See Chevron*, 467 U.S. at 842-843.

[116] *See, e.g.,* Michigan v. E.P.A., 135 S. Ct. 2699 (2015).

[117] *See, e.g.,* O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951).

[118] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983).

[119] *Id.*

[120] *See* 5 U.S.C. § 706 (2)(E).

[121] Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1952).

[122] *See, e.g.,* Barnett & Walker, Chevron *in the Circuits, infra* note 123 at 41.

[123] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts* 115 MICH. L. REV. at 41 (forthcoming 2017) (finding that when the federal courts of appeals applied *Chevron*, agencies won 81.8% of the time in cases reviewing formal adjudications, and 74.2% of the time in cases reviewing notice and comment rulemaking) [hereinafter Chevron *in the Circuits*].

C. INTERPLAY WITH OTHER AREAS OF THE LAW

Preliminary Injunctions

Another area where agency rules are analogous to statutes is the scope of judicial review during the preliminary stages of litigation. Preliminary injunctions enjoin the application of a rule until there is a final judicial determination on the merits.[124] The party requesting the preliminary injunction must meet a multi-factor test.[125] Preliminary injunctions are used to enjoin statutes.[126] They are also used to enjoin agency rules.[127] If an agency rule that conflicts with a prior judicial interpretation is not enforceable until a court agrees with the new rule, then there would be no need for litigants to request a preliminary injunctions when challenging that agency rule. That, however, is not the current practice.[128]

IV. SOLUTIONS

This Note's solution is that agency rules with the force and effect of law have the same practical effect as statutes, thus one should treat agency rules analogously to statutes for judicial review purposes in the *Brand X* context. When an agency promulgates a new rule that conflicts with a prior court's precedent, the agency rule is enforceable as law *until* a court strikes the rule down as arbitrary and capricious.

A. AGENCY RULES AS LAWS

As noted, rules are essentially statutes, they carry the force and effect of law and should be treated as such.[129] This bright-line rule cuts down on needless litigation, provides certain to litigants, and keeps agencies from expending Treasury funds litigating potential non-issues. When the rule has the force and effect of law, the agency can enforce it prospectively from the point the final rule is published. And if the rule is *ultra vires*, it will be struck down by the courts.

If a new rule is of doubtful validity, then the court may grant a preliminary injunction.[130] This injunction will prohibit enforcement of the rule until there is a judicial determination on the merits.[131] It is quite pos-

[124] Fed. R. Civ. Pr. 65(a). *See also* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978) [hereinafter *Preliminary Injunctions*].

[125] *See, e.g.,* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

[126] *See* Leubsdorf, *Preliminary Injunctions supra* note 114.

[127] *See Winter*, 555 U.S. 7.

[128] *See, e.g.,* TEXO ABC/AGC v. Perez, No. 3:16-CV-1998-L, 2016 U.S. Dist. WL 6947911 (N.D. Tex. Nov. 28, 2016); Nevada v. United States Department of Labor, No. 4:16-CV-00731, 2016 U.S. Dist. WL 6879615 (E.D. Tex. Nov. 11, 2016) (enjoining the D.O.L. final rule that revised 29 C.F.R. Part 541).

[129] *See*, *supra* Part III.

[130] Fed. R. Civ. Pr. 65(a).

[131] *See, e.g., supra* notes 127, 128.

sible that a new agency rule that conflicts with an old court precedent would be more susceptible to meeting the elements required for a court to grant a preliminary injunction.

Courts Role under Chevron

The greater constitutional question is the courts role to interpret the law. The answer here is § 706(2)(A). The reviewing court shall decide "all relevant questions of law, interpret constitutional and statutory provisions, [ ] determine the meaning or applicability of the terms of an agency action[,]" and shall "hold unlawful and set aside agency action . . . found to be—arbitrary, [and] capricious."[132]

This standard is essentially what *Chevron* asks. *Chevron* requires a court to determine "whether Congress has directly spoken to the precise question at issue."[133] If Congress has not, then the court determines "whether the agency's answer is based on a permissible construction of the statute."[134] Courts must make that determination by "employing traditional tools of statutory construction."[135] What this means is that when an agency promulgates a rule, the court first employs the traditional tools of statutory interpretation to interpret the statute.[136] Then, if the court finds the statute is ambiguous, the court upholds the agency interpretation if it is not arbitrary and capricious.[137] That means the agency's interpretation is reasonable within the court's construction of the statute.[138] In the *Brand X* context, if the agency promulgates a rule that is contrary to a prior court precedent interpreting the statute, the prior court's interpretation of the statute is part of the arbitrary and capricious analysis.

V. COUNTER ARGUMENTS

A. WHY RULES ARE NOT ANALOGOUS TO STATUTES

One could argue that rules are not analogous to statutes because statutes are enacted directly pursuant to the Constitution.[139] It is, however, the role of the judiciary to interpret the law.[140] And the judiciary inter-

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[132] 5 U.S.C. § 706.

[133] *Chevron*, 467 U.S. at 843.

[134] *Id.*

[135] *Id.* at 843 n.9.

[136] *Cf.* SCALIA AND GARNER, READING LAW, *supra* note 34.

[137] *See, e.g.,* Utility Air Regulatory Group v. E.P.A. 134 S. Ct. 2427, 2442-2446 (2014); *Brand X*, 545 U.S. at 982-983.

[138] *Id*. *See also* Rapanos v. United States, 547 U.S. 715, 731-732 (2006) ("The only natural definition of the term "waters," our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court's canons of construction all confirm that "the waters of the United States" in § 1362(7) cannot bear the expansive meaning that the Corps would give it.").

[139] *See* U.S. Const. art. I § 1.

prets the role of the Executive in executing the law to include agency rules.[141] Thus, agency rules are promulgated pursuant to the Executive's constitutional authority to faithfully execute the law.[142] That is constitutionally similar to statutes created by the legislature pursuant to their constitutional authority.[143] Agencies also are enacting rules pursuant to statutory authority given to them by Congress.[144] Thus, agency action may be the type where Executive power is at its zenith.[145]

B. ORIGINALISM

There are valid originalist arguments against the constitutional legitimacy of the administrative state.[146] this Note, however, does not purport to undertake that analysis and undo the modern governmental structure. This Note, for the sake of argument, accepts the validity of the modern administrative state. It seeks only to reconcile the modern administrative state with the "first principles" of separation of powers[147] in the context of the retroactive application of administrative rules that have the force and effect of law. This reconciliation approach is not without precedent[148] among those who eschew the idea of an evolving constitution.[149]

C. RELIANCE INTERESTS

Retroactivity Analysis After Brand X identifies instances where there are significant reliance interests on a court's prior construction of a statute that is "overruled" by an agency.[150] In those cases, however, presumably the agency will have to respond to those interests during the notice and comment period (or in the administrative adjudication). The court issue an injunction the litigant can meet the elements. And

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[140] *Marbury*, 1 Cranch at 177.

[141] *See*, *e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 4 Yale L. J. 126 (2017); John B. Olverson Jr., *Legislation by Administrative Agencies*, 29 Geo. L. J., 637-638 (1941).

[142] *See Utility Air Regulatory Group*, 134 S. Ct. 2427, 2446 (2014) ("Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them. . . . The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration." (internal citations omitted)).

[143] U.S. Const. art. I, § 1.

[144] *See* Louisiana Public Service Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

[145] *See* Youngstown Sheet & Tube Co., v. Sawyer, 343 U.S. 579, 636 (1952) (J. Jackson, concurring).

[146] *See, e.g.,* Dep't of Transportation v. Ass'n of American Railroads, 135 S. Ct. 1225, 1240-1253 (Thomas, J. concurring in judgment) (outlining the originalist position on the "delegation" of power between the branches); *See also* PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

[147] *See* United States v. Lopez, 514 U.S. 549, 552 (1995).

[148] *See, e.g.,* Jay S. Bybee and Tuan N. Samahon, *William Rehnquist, The Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735 (2006).

[149] *Cf.* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

[150] Dawson, Note, *Retroactivity Analysis*, *supra* note 5, at 222-223.

during the merits stage of the litigation those reliance interests can be part of the arbitrary and capricious analysis.[151]

Further, if litigants want to prevent getting caught in the crossfire of an interpretive tug-of-war between the agency and the court, the *Retroactivity Analysis After* Brand X and *Gutierrez-Brizuela* proposals offer no clean solutions. Under the *Retroactivity Analysis* approach, the litigant must decipher how the court would apply the *Chevron Oil*/*Beam* hybrid test to avoid retroactive application of the rule. Under *Gutierrez-Brizuela* the litigant must be aware of what the new agency rule is, what circuit they are in, whether that circuit has spoken on the issue, when the circuit has spoken on the issue, and how the circuit might weigh the *Chenery II*/*Stewart Capital* retroactivity factors. Under their proposals, the litigant would need to know not only what is in the federal register, but also what is in the federal reporter. That takes Justice Jackson's rebuke of implied knowledge of the federal register and multiplies it.[152] In contrast, under this Note's approach the rule is enforceable as soon as it is promulgated, and the litigant need only to look to the agency for guidance, or argue to a court that the rule is invalid.

CONCLUSION

This Note takes the position that agency rules that have the force and effect of law should be considered laws for the point in time they become enforceable. Agency rules with the "force and effect of law" are essentially laws, and that agencies can promulgate rules that contradict prior court interpretations of ambiguous statutes. And the agency's change in the rule should be applied in the same manner that a legislative change in the law is. That is, the law is valid *until* a court strikes it down as *ultra vires*. When the agency creates a new rule at T2, the new rule is just that—a new rule—and it is valid unless, and *until*, a court strikes it down.

[151] Notwithstanding the Court's repudiation of reliance interests in the interpretive rule context. *See* Mortgage Bankers Association v. Perez, 135 S. Ct. 1199 (2015).

[152] *See* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 387 (1947) (Jackson, J. dissenting).