The Brand X Constitution

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ABSTRACT

In recent years, the Supreme Court’s claim to be the final, definitive interpreter of the Constitution has come under sustained attack from across the political spectrum from scholars pushing for a more “popular” constitutionalism. This Article contributes to “popular constitutionalism” by deploying recent developments in the Supreme Court’s own administrative-law doctrine against it. Together, these Chevron-related developments form the Brand X model, which stands broadly for the proposition that, where an agency uses transparent, deliberative means to adopt a reasonable interpretation of a statute it administers, the courts should defer to this interpretation regardless of whether it contradicts judicial precedent. Translating this Brand X model into a constitutional setting, this Article claims that courts should uphold reasonable, explicit constitutional constructions that are embedded in focused federal legislation even in the teeth of contrary Supreme Court precedent. In effect, this proposal would require the Supreme Court to extend about as much deference to select legislative precedents as it now indulges to its own judicial precedents. Adopting this approach would expand in a limited and controlled way the voice of the public, Congress, and the President (though the veto power) in constitutional construction. The most fundamental reason to pursue this change is that choosing among reasonable constitutional constructions is a political task that depends on the decision-makers’ value judgments and assessments of legislative fact. In a representative democracy, the problem of making policy choices within the space of legal reason should be committed to public judgment rather than nine life-tenured judges.

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But Congress may not legislatively supercede our [Supreme Court] decisions interpreting and applying the Constitution.¹

According to today’s [Brand X] opinion, the agency is … free to take … action that the Supreme Court found unlawful.²

I. INTRODUCTION

The first quote above comes from 2000’s Dickerson v. United States, in which the Supreme Court recently reminded everyone that, as far as the Court is concerned, the Constitution means whatever a majority of the Court last said it means.³ Over the last ten years, academic opinion has veered strongly against this claim of judicial interpretive supremacy – a rapidly expanding literature supports one form or another of “popular constitutionalism.” Proponents of this approach hale from across the political spectrum and vary with regard to just how “popular” they want their Constitution to be, but they all share the view that extra-judicial constitutional interpretations should play a greater role in determining operative constitutional meaning than judicial supremacy admits.⁴ As Dickerson indicates, however, a growing pile of books

³ Dickerson, 530 U.S. at 437.
⁴ LARRY D. KRAMER, THE PEOPLE THEMSELVES, 248 (2004) (“The point, finally, is this: to control the Supreme Court, we must first lay claim to the Constitution ourselves. That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means.”); NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION, 238-39 (2004) (“No single institution, including the judiciary, has the final word on constitutional questions,” which are instead resolved by “coordinate construction” among the branches, which bring differing institutional capabilities to this process.); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, 187 (1999) (extolling a “populist constitutional law” that “creates space for a politics oriented by the … principles [of the Declaration of Independence] by taking constitutional law away from the courts”); Jeremy Waldron, The Core Case Against Judicial Review, 115 YALE L. J. 1346 (2006) (contending that, in a society with “good working democratic institutions” and in which most citizens “take rights seriously,” there is no reason to think that judicial review protects rights better than legislatures); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L. J. 1943, 1947 (2003) (arguing that Congress, when exercising its § 5 power to enforce the rights guaranteed by the Fourteenth Amendment, enjoys “equal interpretive authority” with the Supreme Court); Keith E.
and law review articles condemning the Court’s supremacist ways has not stopped it from reiterating that it is in charge of constitutional meaning.

One of the most enjoyable (and powerful) moves in argument is to deploy an adversary’s own moves against it. In this spirit, this Article advances the case for an incremental form of popular constitutionalism by using the logic of the Court’s own doctrines against it. More specifically, this Article contends that, after decades of difficult development, the Court’s own administrative-law model for resolving statutory ambiguity suggests a novel yet simple means to implement an attractive, mild form of popular constitutionalism.5

We might call this model Brand X constitutionalism in honor of the source of the second opening quote above, 2005’s National Cable & Telecomm. Ass’n v. Brand X Internet Serv.6 In Brand X, the Court held – de facto if not quite de jure – that agencies can trump judicial precedents thanks to the force of

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5 The idea of drawing descriptive or normative parallels between principles of constitutional construction and administrative law’s principles of statutory construction is not new. In particular, scholars have noted the similarity of Thayer’s clear-error standard for judicial review of legislation, see infra note 13, to the Chevron doctrine’s strongly deferential approach to judicial review of agency statutory constructions. See, e.g., Thomas W. Merrill, Marbury v. Madison as the First Great Administrative Law Decision, 37 J. MARSH. L. REV. 481, 521-22 (2004) (suggesting that Thayer and Chevron offer a sound model for judicial review of legislation for constitutionality); Nicholas S. Zeppos, Deference to Political Decisionmakers and the Preferred Scope of Judicial Review, 88 NW. L. REV. 296, 299 (1993) (describing this parallel). See also Rachel E. Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 COLUM. L. REV. 237, 322-23 (2002) (suggesting that administrative-law model of deference should apply to judicial review of other branches’ constitutional interpretations). Administrative law principles have, however, evolved quickly over the last five years. See Brand X, 545 U.S. at 982-83 (holding that a Chevron-eligible agency statutory construction may trump judicial precedent); United States v. Mead Corp., 533 U.S. 218 (2001) (holding that Chevron deference applies only where an agency invokes delegated power to imbue its statutory interpretation with the “force of law”). In light of these changes, this Article submits that administrative law now suggests a much more nuanced and attractive model for constitutional interpretation.

6 545 U.S. 967 (2005).
Chevron deference, which requires courts to defer to an agency’s reasonable construction of a statute it administers under certain conditions.\footnote{See id. at 982-83 (extending Chevron deference to an agency statutory construction that contradicted earlier judicial precedent). For further discussion of the details of Brand X, see infra Part IV.C.} Read in light of its major precursors,\footnote{The two most important Brand X precursors are Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984) (holding that courts should defer to an agency’s reasonable resolution of ambiguity in a statute the agency administers), and United States v. Mead Corp., 533 U.S. 218, 229-30 (2001) (indicating that agency interpretations are most likely to receive Chevron deference where they have been produced through transparent procedures designed to encourage deliberation, e.g., notice-and-comment rulemaking). Given the importance of all three cases to this Article, it might have been entitled “The Chevron Constitution” or “The Mead Constitution.” But Brand X is the most recent of the three cases and offers by far the best title.} Brand X suggests a broad principle: Where a politically accountable body uses transparent, deliberative means to adopt a reasonable interpretation of a law it administers, the courts should defer to this interpretation – regardless of whether it contradicts judicial precedent.

Although there are a number of plausible ways to translate the Brand X principle into constitutional law, this Article defends this one: Courts should uphold reasonable legislative constitutional constructions that are expressly stated in focused legislation. Faithful application of this principle would give select legislative precedents the same level of semi-binding force as the Court extends to its own judicial precedents under current doctrine.\footnote{In essence, the Court purports to follow its own precedents so long as they are reasonable. See, e.g., Payne v. Tennessee, 501 U.S. 808, 828 (1991) (noting that “when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent”) (citation and quotation marks omitted). See generally Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1 (2001) (contending that judicial stare decisis extends Chevron-like rationality review to judicial precedents).} The most spectacular application of this principle would come where Congress enacts – with the consent of the President or overriding a veto\footnote{A quick but important clarification regarding separation-of-powers nomenclature: This Article claims that the Court should show stronger deference to select federal legislative constitutional constructions. One might read this thesis as improperly excluding the “executive” from the constitutional construction process. The President is, however, a legislator thanks to the veto power. Thus, although this Article will, for ease of reference, sometimes refer interchangeably to “legislative” and “congressional” action, it should always be borne in mind that any constitutional construction embedded in a statute can either claim the approval of both political branches or else must represent the overwhelming will of a Congress overriding a veto. For exploration of a more aggressive approach to executive power to construe the Constitution, see generally Paulsen, supra note 4 (claiming that, just as the courts can engage in "judicial review" of the constitutionality of the other branches’ actions, so the President enjoys an analogous power of "executive review").} – a reasonable constitutional construction that contradicts an earlier judicial precedent on the
same point. Applying Brand X constitutionalism to such a clash, the reasonable legislative construction should control. This model thus concedes a limited legislative power to overrule judicial constitutional glosses.11

The possibility of legislative overrides of judicial constitutional precedents flies in the face of modern American judicial dogma, expressed in the Dickerson quote above, that courts are the final and definitive interpreters of the Constitution. Brand X constitutionalism is, however, anything but radical. It draws strength from two hundred years of informed commentary – some of it from the Supreme Court itself – that insists that the political branches should play an active and effective role in developing constitutional constructions that courts should respect. Luminaries from the early days of the Republic such as Jefferson, Madison, and Marshall all made statements to this effect.12 This same general view led James Bradley Thayer, writing at the end of the nineteenth century (in one of the very few law review articles that might fairly be called famous), to contend that courts should apply a “clear error” standard when reviewing congressional legislation for constitutionality.13 In this same vein in recent years, as mentioned above, a backlash against claims of judicial supremacy has spawned a burgeoning field of popular constitutionalism.14 Moreover, although this Article does not focus on comparative constitutional law, it bears remarking that a number of modern democracies have adopted legal regimes that assign the determination of fundamental rights to a “conversation” between the legislative and judicial

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11 The congressional override power this Article suggests is a weak one in the sense that it would leave the Court with the power to trump overrides that it concludes fall outside the space where reasonable minds might disagree. For recent arguments for a stronger congressional override, see Mark Tushnet, Weak-Form Judicial Review and “Core” Civil Liberties, 41 HARV. C.R.-C.L. L. REV. 1, 10 (2006) (suggesting a system in which legislative deliberations “will be informed but not controlled by what the courts have said” and in which “in the end, if enough legislators believe that the court’s constitutional interpretation is not as good as their own,” the legislators’ views will control); Robert Justin Lipkin, Which Constitution? Who Decides? 28 CARDozo L. REV. 1055, 1059-60, 1132 (2006) (contending that Congress, not the Court, should have the final word in constitutional interpretation). The strong override proposal dates back to Chief Justice Marshall himself, who after Justice Chase’s impeachment, suggested that it would be better for Congress to check the judiciary through reversal of opinions than removal of judges. Letter from John Marshall to Samuel Chase (Jan. 23, 1805), in 6 THE PAPERS OF JOHN MARSHALL 347, 347 (Charles F. Hobson ed., 1990).

12 See infra Part II (discussing early views regarding the respective roles of the political and judicial branches in constitutional construction).

13 James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARv. L. REV. 129, 143-45 (1896) (contending that courts should only reject congressional action as unconstitutional in cases of “clear mistake”). Cf. Henry Monaghan, Marbury and the Administrative State, 83 COLUM. L. REV. 1, 7 (1983) (describing Thayer’s work as “the most influential essay every written on American constitutional law”).

14 See supra note 4 (collecting discussions of popular constitutionalism).
branches rather than to judicial monologue.\textsuperscript{15} Considered against this impressive (but very incomplete) backdrop, \textit{Brand X} constitutionalism is merely an obvious, cautious means to implement a slightly more popular approach to constitutional construction.

\textit{Brand X} constitutionalism hoists the Supreme Court on its own administrative-law petard. \textit{Chevron} famously taught that the resolution of genuine legal ambiguity depends on the decision-maker’s policy choices and related assessments of legislative fact.\textsuperscript{16} Thanks to its expertise and greater political accountability, an agency should be better at making these determinations than a court as they bear on interpretation of a statute the agency administers; therefore, courts should defer to an agency’s construction of its own statute so long as it is reasonable.\textsuperscript{17} Mapping this argument into the constitutional context suggests that the legislature is a more appropriate body than the judiciary – both as a matter of institutional competence and political legitimacy – to make the policy and fact determinations commonly made in the course of resolving \textit{constitutional} ambiguity.\textsuperscript{18} Given this much, the \textit{Brand X} model, in the spirit of both Thayer and \textit{Chevron}, submits that courts owe considerable respect to congressional constitutional interpretations – so long as they are clear and embedded in focused legislation.

This caveat of requiring legislative clarity and focus as conditions for deference links to a second benefit of \textit{Brand X} constitutionalism: It might promote more meaningful constitutional deliberations in Congress.\textsuperscript{19} As

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\textsuperscript{17} Id.


\textsuperscript{19} For an essay suggesting that congressional constitutional deliberations could use improvement, see Suzanna Sherry, \textit{Irresponsibility Breeds Contempt}, 6 GREEN BAG 47, 47 (2002) (framing the Rehnquist Court’s aggressive use of judicial review as a natural reaction to a Congress that “has completely abdicated its responsibility to ensure that the legislation it enacts is constitutional, reasonable, and in the public interest”).
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Thayer saw the matter, the judicial practice of using independent judgment to determine the constitutionality of federal statutes infantilizes congressional deliberations – Congress does not have to take the Constitution seriously so long as there are grown-ups over at the Supreme Court to take care of any problems.\textsuperscript{20} The good professor seemed to trust that, if the Court were to limit its review of the constitutionality of federal legislation to a search for “clear error,” then Congress would rise to the occasion and exercise its increased power over constitutional construction responsibly.\textsuperscript{21} \textit{Brand X} constitutionalism is less trusting and seeks affirmative evidence that legislative constitutional interpretations deserve deference. As explained below, the Court might implement this requirement simply and cleanly by extending deference only to express findings of constitutionality contained within narrow, single-subject bills and denying it to provisions buried within complex statutes suited for logrolling.\textsuperscript{22} On this approach, Congress would earn its deference by adopting constitutional constructions through transparent means that maximize opportunity for focused deliberation and create clear signals of majority will.\textsuperscript{23}

Most importantly, the \textit{Brand X} model lends itself to interesting and significant applications. Looking to the fairly recent past, in \textit{Dickerson v. United States}, the Court rejected a federal statute that attempted to undo the Court’s \textit{Miranda} opinion by mandating that federal courts use a totality-of-the-circumstances test to determine the “voluntariness” of confessions.\textsuperscript{24} According to the Court, this statute improperly intruded into the Court’s particular turf – figuring out the “meaning” of the Fifth Amendment was none of Congress’s business.\textsuperscript{25} This same dynamic can be seen in the fate of the Religious Freedom Restoration Act of 1993 (RFRA)\textsuperscript{26}, which attempted to use Congress’s statutory authority to reinstate Free Exercise protections that the Court itself had abandoned as a matter of constitutional law in 1990’s

\textsuperscript{20}Thayer, supra note 13, at 155-56.
\textsuperscript{21}Thayer, supra note 13, at 155-56; \textit{see also} Tushnet, supra note 4, at 55 (observing that “[w]e really cannot know how Congress would perform if the courts exited, if Congress does badly because the courts are on the scene”).
\textsuperscript{22}\textit{See infra} Part V.B.
\textsuperscript{23}For further exploration of reforms Congress might adopt to justify Thayer-style deference to its constitutional interpretations, see generally Elizabeth Garrett & Adrian Vermeule, \textit{Institutional Design of a Thayerian Congress}, 2001 DUKE L. J. 1277, 1307-30 (suggesting reforms designed to encourage more focused committee and floor deliberation on constitutional issues).
\textsuperscript{25}\textit{Id.} at 432, 437.
Employment Division v. Smith. In City of Boerne v. Flores, the Court condemned RFRA as a legislative usurpation of the Court’s final authority to determine constitutional meaning. Adoption of Brand X constitutionalism would make crystal clear that such congressional efforts to “rewrite” the Constitution – that is, to replace what may be one reasonable constitutional gloss with another – are perfectly legitimate.

Looking to the future, the Brand X model could foster a more direct kind of constitutional conversation that may prove especially valuable with the coming of the “war on terror.” This conflict has already sparked huge controversies involving the constitutional balance of liberty and security. As with all large constitutional issues, the new balance the nation will strike should and ultimately will be determined by a grand conversation among many interested parties – including all three branches of the federal government, the states, and the public itself. The Court’s claim to interpretive supremacy tends, however, to stifle or misdirect such conversation. If the legislature can add value to constitutional decision-making, then it is all the more important that it do so in times when serious constitutional change is afoot – which seems to be the case now.

A roadmap: Part II will establish something akin to an historical pedigree for Brand X constitutionalism by surveying a miniscule portion of the vast legal commentary from the early days of Republic contending that extra-judicial actors should play an important role in determining the Constitution’s

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29 See DEVINS & FISHER, supra note 4, at 238 (“[T]he [constitutional] dialogue that takes place among the Court, elected government, and the American people is as constructive as it is inevitable. Because each part of government has unique strengths and weaknesses, constitutional interpretation is improved by broad and vigorous participation.”); Robert Bennett, Counter-Conversationalism and the Sense of Difficulty 95 Nw. U. L. Rev. 845, 900-04 (2001) (observing that a grand political conversation among many political actors ultimately helps determine constitutional meaning, and that judicial review impedes but does not entirely block this conversation); cf. Tushnet, Weak-Form Judicial Review, supra note 11 (suggesting that judicial review should operate as part of an iterative process for determining constitutional meaning in which both the legislature and judiciary speak).
operative meaning. Part III examines the modern Supreme Court’s dramatically different view that it – and it alone – is in charge of determining constitutional meaning. Part IV contrasts the Court’s claim to constitutional interpretive supremacy with its much more deferential approach to statutory interpretation in administrative law. Part V discusses how administrative law’s Brand X model might translate into a constitutional setting. Along the way, it touches on how the model might shed light on controversies regarding, for example: habeas corpus for non-citizen detainees in the war-on-terror, the legality of warrantless electronic surveillance by the NSA, the power of Congress to protect the “free exercise” of religion, and control of punitive damages awards through the Due Process clause.

II. THE VERY IDEA THAT EXTRA-JUDICIAL ACTORS CAN HELP FIGURE OUT THE CONSTITUTION

At the dawn of the Republic, there was no clearly established, fine-grained framework for determining proper relations among the branches with regard to constitutional construction – after all, the new federal Constitution was a grand experiment, and no one knew precisely how it would or should work out over time. Still, as this section demonstrates, it is safe to hazard that many influential observers expected extra-judicial voices to play a larger role in constitutional construction than the modern-day judicial supremacy model admits.

A. Judicial Review and Two Kinds of Deference

Marbury, in keeping with a common understanding of the time, claimed a judicial power to interpret the Constitution and use it as the basis to invalidate

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32 Boiled down to its rhetorical essence, Part II obliquely suggests that Jefferson, Madison, and Lincoln might have liked this Article’s proposed Brand X model for constitutional construction.


34 See infra text accompanying notes 256-259 (using NSA surveillance program to illustrate how Brand X model might promote “constitutional conversations” between the legislative and judicial branches).


36 See infra text accompanying notes 261-263 (using the Court’s substantive due-process limitations on punitive damages to highlight how the existence of a limited legislative power to trump judicial constitutional precedents could ameliorate legitimacy concerns inherent in judicial policymaking via constitutional interpretation).
It did not, however, specify what weight, if any, the Supreme Court should give to extra-judicial interpretations of the Constitution. On this point, two humble and closely related claims: First, many informed observers expected that courts would apply a kind of “clear error” standard when reviewing legislation for constitutionality. If legislation fell within the space where reasonable minds might disagree over its constitutionality, a court should not invalidate it. Second, many also expected that the courts would, in the course of determining their own best understanding of constitutional meaning, give substantial weight to the constitutional assessments of other political actors.

1. Deference as Space to Agreeably Disagree

In one common sense of the term, “deference” speaks to whether, in determining whether to affirm X's initial decision, Y should leave space for reasonable disagreement and only reverse after determining that X clearly erred. Thayer’s main project in his 1896 essay, *The Origin and Scope of the American Doctrine of Constitutional Law*, was to demonstrate the prevalence of this “clear error” stance toward judicial review among the courts themselves during the early days of the Republic. He identified nearly a score of judicial opinions, several from early Supreme Court justices, subscribing to this “well-established” rule. Thus, in the 1796 case *Ware v. Hylton*, we find Justice Chase declaring that he would never invoke the power of judicial review to strike a law “but in a very clear case.” He repeated this point in 1798’s *Calder v. Bull*, in which Justice Iredell, writing in a separate opinion, agreed that the Court should only void a law “in a clear and urgent case.” Likewise, in 1800’s *Cooper v. Telfair*, Justice Paterson observed that invalidation of legislation was only proper where there was “a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication.” Also in *Cooper*, Justice Washington explained, “[t]he presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly established.” And, to top things off, in 1819’s *Trustees of Dartmouth College*

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38 Thayer, supra note 13, at 139-40.

39 Id. at 140-46 (collecting authority).

40 Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236 (1796) (Chase, J.).

41 Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798) (Chase, J.) (“I will not decide any law to be void, but in a very clear case”).

42 Id. at 399 (Iredell, J.).

43 Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (Paterson, J.).

44 Id. at 18 (Washington, J.).
v. Woodward, the author of Marbury himself, Chief Justice Marshall explained “that in no doubtful case, would [the Court] pronounce a legislative Act to be contrary to the Constitution.” It would be easy to extend this recitation, but these quotes should suffice to demonstrate the narrow point that the “clear error” approach to judicial review of legislative action enjoyed notable early support. Much later, Thayer’s own advocacy helped revivify this support—he and disciples on the topic of judicial review included Justices Holmes, Brandeis, and Frankfurter. And to this day, the shadow of the clear-error doctrine appears in the Supreme Court’s mantra that legislative acts enjoy a presumption of constitutionality.

2. Deference to the “Liquidating” Force of Extra-Judicial Precedents

In another sense of the term, “deference” speaks to the weight that decision-maker X, when reaching its own judgment concerning a matter, should give to decision-maker Y’s judgment. We might apply this form of deference at the doctor’s office. We take a prescribed drug not because the prescription survives clear-error review but because we figure the doctor knows best. Prominent legal thinkers from the early Republic thought there was room for something like this form of deference in constitutional construction, too. The basic idea was that extra-judicial constructions of the Constitution could play a role in “liquidating” the meaning of its ambiguous provisions.

Turning to that most usual suspect Publius, one can find hints of this idea in Madison’s portions of The Federalist and emphatic support for it in his later writings. Defending the proposed Constitution against the charge that it was too vague, Madison/Publius wrote:


46 See Monaghan, supra note 13, at 7-8 (“Quite arguably, Thayer’s conception reflected the common understanding of how judicial review would actually operate under the new Constitution; in pronouncing an act invalid, a court would simply be ratifying a legal conclusion readily apparent to everyone from the face of the Constitution, as, for example, judicial invalidation of an act establishing a national church.”); SYLVIA NOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION, 59-65 (1990) (contending that during the period from the Ratification through Marbury, a consensus existed that the power of judicial review “was confined to the concededly unconstitutional act” and that “[t]his understanding was expressed on the U.S. Supreme Court by repeated use of the doubtful case rule”).


48 See, e.g., Morrison v. Olson, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting) (explaining that, in cases in which the Court examines the constitutionality of federal legislation, “it is rare … not to find anywhere in the Court’s opinion the usual, almost formulary caution that we owe great deference to Congress’ view that what it has done is constitutional”; but also explaining why this deference principle did not apply in Morrison itself).
All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.\textsuperscript{49}

Notably, Madison expected the “liquidating” precedents to flow both from “discussions” and “adjudications.” No doubt the judiciary was the expected source of the “adjudications.” If Madison meant both terms to carry independent meaning then he must have contemplated that authoritative “discussions” could come from non-judicial sources.

By itself, Madison’s use of the term “discussions” in \textit{The Federalist} is too thin a reed upon which to build an understanding of his theory of precedent. Madison himself saved us from speculation on this point by elaborating on the potential force of non-judicial precedents in letters he wrote after his presidency commenting on the constitutionality of various government actions. Consider first in this regard Madison’s description of the sort of legislative precedent that does not warrant respect:

In resorting to legal precedents as sanctions to power, the distinctions should ever be strictly attended to between such as take place under transitory impressions, or without full examination and deliberation, and such as pass with solemnities and repetitions sufficient to imply a concurrence of the judgment and the will of those who, having granted the power, have the ultimate right to explain the grant. Although I cannot join in the protest of some against the validity of all precedents, however uniform and multiplied, in expounding the Constitution, yet I am persuaded that legislative precedents are frequently of a character entitled to little respect, and that those of Congress are sometimes liable to peculiar distrust. … [O]wing to the termination of their session every other year at a fixed day and hour, a mass of business is struck off, as it were, at short-hand, and in a moment. These midnight precedents of every sort ought to have little weight in any case.\textsuperscript{50}

There are two important points to note in this passage. First, it implies that legislative precedents should carry a degree of stare-decisis power provided they have been the focus of serious deliberations. Second, the ultimate source of the authority of legislative precedent flows from the tacit approval of those

\textsuperscript{49} \textit{The Federalist} NO. 37, at 226 (Madison) (Scigliano ed., 2000).

\textsuperscript{50} \textit{Letter from James Madison to Judge Roan} (May 6, 1821), in 3 \textit{Letters and Other Writings of James Madison}, 217, 219 (Philadelphia, J.B. Lippincott & Co. 1867) [hereinafter, \textit{Letters and Other Writings}] (emphasis added).
who “granted the power” – that is to say, the people. Madison confirmed this understanding of the force of extra-judicial precedent in an 1817 letter to President Monroe:

As a precedent, the case [of proposed public works legislation] is evidently without the weight allowed to that of the National Bank, which had been often a subject of solemn discussion in Congress, had long engaged the critical attention of the public, and had received reiterated and elaborate sanctions of every branch of the Government; to all which had been superadded many positive concurrences of the States, and implied ones by the people at large.51

Thus, in the case of that contentious beast, the Bank of the United States, we have an example of legislative precedents that were not mere midnight precedents but rather the outcome of “solemn discussion.” In a nation dominated by public opinion, the liquidation of constitutional ambiguities is a natural by-product of deliberations over time by Congress as well as other governmental institutions that are themselves answerable to that ultimate source of sovereignty, the “people at large.” Thus, at bottom, it is the “people,” acting through their various representatives, who determine operative constitutional meaning.

One need look no further than the early Supreme Court to find views similar to Madison’s on the importance of extra-judicial constitutional interpretations. Stuart v. Laird, an extraordinarily important case decided the same year as Marbury, provides an especially compelling example.52 This case arose in the aftermath of the “Revolution of 1800,” in which Jefferson’s Republicans took control of the Executive and Legislative branches from the Federalists. After their electoral defeat, the Federalists tried to entrench their power in the judiciary by rushing the Judiciary Act of 1801 through a lame duck Congress.53 This Act created new judgeships. It also eliminated the practice of having Supreme Court justices “ride circuit” as trial judges in lower courts. The infuriated Republicans eliminated the new judicial offices and

51 Letter from James Madison to James Monroe, President of the United States (Dec. 27, 1817), in 3 LETTERS AND OTHER WRITINGS, supra note 50 at 54, 55-56. See also Letter from James Madison to N.P. Trist (Dec. 1831), in 4 LETTERS AND OTHER WRITINGS, supra note 50, at 204, 211 (explaining that Madison had reevaluated the constitutionality of the Bank of the United States because “in the case of a Constitution as of a law, a course of authoritative, deliberate, and continued decisions, such as the Bank could plead was an evidence of the Public Judgment necessarily superseding individual opinions.”).

52 5 U.S. (1 Cranch) 299 (1803).

brought back circuit-riding in the Judiciary Act of 1802.\(^{54}\) The question of the constitutionality of this Republican political effort to undo the Federalist political effort to pack the judiciary arrived at a Supreme Court led by a Federalist, Chief Justice Marshall, whom President Adams had named in the closing hours of Federalist rule.\(^{55}\) Marshall and arch-Federalist Justice Chase favored defying the 1802 Act’s command to resume circuit riding as constitutionally invalid.\(^{56}\) The justices did not all agree on this course of action, however, and, in the absence of a united front, submission was the only option.\(^{57}\) The task of authoring the surrender document fell to Justice Paterson. His analysis of the constitutionality of forcing the resumption of circuit-riding by the justices was, to put it mildly, brief and to the point:

To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system [in 1789], affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.\(^{58}\)

A Congress full of the Constitution’s drafters had passed the Judiciary Act of 1789,\(^{59}\) which had required circuit riding, and the justices had ridden circuit without objection until the reforms of the Judiciary Act of 1801. As far as the Supreme Court was concerned, twelve years of “practice and acquiescence” settled that circuit riding was constitutional.\(^{60}\)

Marshall himself spoke to the importance of extra-judicial constitutional precedents in \emph{M’Culloch v. Maryland}, which was his turn to speak to the constitutionality of the Bank of the United States.\(^{61}\) Commenting on the Bank’s long progress through the other branches of government, the Chief Justice explained:

\(^{54}\) Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States, ch. 8, 2 Stat 132 (1802).


\(^{56}\) \textit{Id.} at 163-69.

\(^{57}\) \textit{Id.} at 169-70.


\(^{59}\) Judiciary Act, ch. 20, 1 Stat. 73 (1789).

\(^{60}\) Marshall himself, however, vehemently disagreed with the outcome of \textit{Stuart} until “the end of his days.” \textsc{Ackerman, supra} note 55, at 164.

\(^{61}\) 17 U.S. (4 Wheat.) 316 (1819).
The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first, in the fair and open field of debate, and afterwards, in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. … It would require no ordinary share of intrepidity, to assert that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance.  

Here we can see both the “clear error” and “liquidation” themes of precedent in play. In keeping with the “clear error” theme, we have the hint that it takes a “bold and plain usurpation” to trigger judicial invalidation of the bank. In keeping with the “liquidation” theme, we have Marshall’s suggestion that legislative and executive determinations, rendered after extensive and expert debate, were themselves evidence of the Bank’s constitutionality.  

At the risk of closing this subsection on a slightly speculative note, President Madison’s and Chief Justice Marshall’s assertions regarding the force of extra-judicial precedents must have struck many of their contemporaries.

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62 Id. at 402.

63 Many other judicial opinions through the years have conceded – at least as boilerplate – that the longstanding interpretations and practices of the political branches can settle constitutional meaning. See, e.g., United States v. Internat’l Bus. Machines Corp., 517 U.S. 843, 876-77 (1996) (Kennedy, J., dissenting) (opining that Court should give “great weight” to the Fifth Congress’s interpretation of the Export Clause); Walz v. Tax Comm’n, 397 U.S. 664, 678 (1970) (“[A]n unbroken practice … is not something to be lightly cast aside.”); Ex Parte Quirin, 317 U.S. 1, 42-43 (1942) (congressional constitutional construction followed since the Founding entitled to the “greatest respect”); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 327-28 (1936) (“A legislative practice … evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice.”); Myers v. United States, 272 U.S. 52, 175 (1926) (“This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution …, acquiesced in for a long term of years, fixes the construction to be given its provisions”); Fairbank v. United States, 181 U.S. 283, 321 (1901) (Harlan, J., dissenting) (claiming that “[c]ases almost without number” stand for the proposition that longstanding practical constructions can settle constitutional meaning); Field v. Clark, 143 U.S. 649, 691 (1892) (longstanding practical construction by Congress should not be disturbed unless “clearly incompatible with the supreme law of the land”); Burrow-Giles Lithographic Co. v. Saxony, 111 U.S. 53, 57 (1884) (constitutional construction of Congress dating back to 1790 “almost conclusive”); Cohen v. Virginia, 19 U.S. (6 Wheat.) 264, 421 (1821) (observing that a “concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction.”).
The Brand X Constitution (Draft, March 8, 2007)

contemporaries as repeating the merest common sense. In a new republic, (a) devoted to popular participation in government; (b) subject to a new and ambiguous constitution, and (c) in which the courts could only speak to constitutional matters in the limited context of resolving proper cases and controversies, the considered views of representative bodies had to matter to constitutional construction.

B. The Departmentalist Alternative to Judicial Supremacy

The preceding subsection spoke to the issue of how much weight courts should give to extra-judicial precedents. The flip-side of this question might be: How much weight should the other branches give to judicial precedents and decrees? In Worcester v. Georgia,64 the Supreme Court threw out a state criminal conviction on the ground that federal treaties had eliminated Georgia’s legislative jurisdiction over whites living in the Cherokee territory. According to a famous bit of apocrypha, President Jackson responded, “John Marshall has made his decision, now let him enforce it.”65 Regardless of whether President Jackson ever made this remark, he might as well have, and it neatly illustrates a perennial problem of judicial relations to the other branches. If President Jackson were legally obligated to enforce whatever decision the Supreme Court issued, then the Court would be the true, sovereign head of government. This result cannot be right in a republic in which the sovereign people split governmental power among three “coordinate” branches. On the other hand, if President Jackson were legally free to ignore the Supreme Court’s decision, then the Court would be a mere advisory body – another result that seems out of bounds.

In the context of discussions of judicial review, this clash is sometimes characterized as one between judicial supremacy and “departmentalism.”66 The modern Supreme Court subscribes to the judicial supremacy model – pursuant to which the Constitution means what the Court says it means and the political branches better obey the Court’s marching orders.67 Departmentalism, by contrast, takes the view that the three coordinate branches of the federal government are each charged with a duty to uphold the Constitution, and, in the course of their respective duties, each must try to interpret and implement it properly.68 In the absence of a judicial order based on a given constitutional

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64 31 U.S. (6 Pet.) 515 (1832).
68 See, e.g., Paulsen, supra note 4, at 221 (defending the departmentalist view that “[t]he power
interpretation, departmentalism is uncontroversial – of course Congress and the President should attempt to interpret and implement the Constitution where it bears on the conduct of their official duties. Departmentalism can become a direct challenge to judicial supremacy, however, if one cedes that judicial orders are not self-executing. If another official actor must enforce or otherwise take action to implement a judicial order, then there is space for that actor to review the judicial order for constitutionality. And, according to the more aggressive versions of departmentalism, if, for instance, a President deems a judicial order unconstitutional, then the President, in obedience to his oath to uphold the Constitution, should refuse to enforce the order.69

It may come as little surprise that various presidents – being after all, presidents – have subscribed to some form of departmentalism as opposed to judicial supremacy. As a quick demonstration of the noble lineage and importance of departmentalist thought, consider the views of Jefferson (author of the Declaration of Independence), Madison (“Father of the Constitution”), and Lincoln, (greatest president). Writing in 1819, Jefferson explained his view that the alternative to departmentalism was a constitutional absurdity:

For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one to, which is unelected by, and independent of the nation. … The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.70

Like his ally Jefferson, Madison was a departmentalist – the Constitution created each of the three “coordinate” branches, and it did not exalt one over the others. Unlike Jefferson, however, Madison combined his theoretical commitment to departmentalism with a practical understanding that the courts carry natural advantages into the political process of settling constitutional

to interpret law is not the sole province of the judiciary; rather, it is a divided, shared power not delegated to any one branch but ancillary to the functions of all of them within the spheres of their enumerated powers.”).

69 See id. at 222 (claiming that the President should refuse to enforce judicial decrees he determines are unconstitutional after “executive review”).

70 Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 15 WRITINGS OF THOMAS JEFFERSON, 212-13 (Albert E. Bergh ed., 1905); see also Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), in 11 WRITINGS OF THOMAS JEFFERSON, id., at 50-51 (“[T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.”).
meaning. At times, Madison thought this advantage unhealthy for the body politic, but, by late in his life in 1834, he had apparently come to peace with it. In that year, he penned a 500-word, unaddressed letter that first explained that each of the three “co-ordinate” departments must hew to its own interpretation of the Constitution but at the same time must also “pay much respect to the opinions of each other.” Thus, each branch enjoys independent interpretive power but also has a duty to accommodate the reasonable views of others so that government might function. But after planting this departmentalist flag, he then identified institutional and political advantages the judiciary enjoys in the interpretive game:

[N]otwithstanding this abstract view ..., [i]t is the Judicial department in which questions of constitutionality, as well as of legality, generally find their ultimate discussion and operative decision; and the public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities implied in its members; by the gravity and deliberation of their proceedings; and by the advantage their plurality gives them over the unity of the Executive departments, and their fewness over the multitudinous composition of the Legislative department.

Without losing sight, therefore, of the co-ordinate relations of the three departments to each other, it may always be expected that the judicial bench, when happily filled, will, for the reasons suggested, most engage the respect and reliance of the public as the surest expositor of the Constitution....

Notably, Madison’s analysis appears to assume that, at bottom, the legitimacy of constitutional interpretations rests on public acceptance. The people have delegated interpretive power to each of the three coordinate branches of the government, but they are more inclined, by and large, to accept the interpretations of the judiciary – at least when it is competently staffed. Madison thus combines a theoretic commitment to departmentalism with a practical political understanding of judiciary’s political advantages that would one day harden into a judicial doctrine of interpretive supremacy.

71 JAMES MADISON, Observations on the “Draught of a Constitution for Virginia,” in 5 THE WRITINGS OF JAMES MADISON, 284, 294 (Gaillard Hunt ed., 1904) (“[A]s the courts are generally the last in making their decisions, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper.”).
72 James Madison, Unaddressed Letter of 1834, in 4 LETTERS AND OTHER WRITINGS, supra note 50, at 349.
73 Id.
Lincoln’s discussion of departmentalism was prompted by the Supreme Court’s second major invocation of judicial review to invalidate federal legislation – *Dred Scott v. Sandford*.\(^{74}\) In this case, the Court held that blacks could not be citizens of the United States and that Congress lacked the power to ban slavery in federal territories.\(^{75}\) The Court thus interjected itself into the middle of the most divisive struggle in American history, and its greatest statesman had to respond. Lincoln’s argument for the legitimacy of resisting *Dred Scott* rested in part on the premises: (a) not all precedents are created equal – some are more persuasive than others; and (b) precedents gather force as they accumulate.\(^{76}\) Any particular precedent may constitute an aberration rather than proper evidence of the “true” state of the law. By this standard, *Dred Scott* was dubious as it had been produced by a partisan, divided court and had overruled prior government practice.\(^{77}\) Given this much, Lincoln remarked in 1857 that “it is not resistance, it is not factious, it not even disrespectful, to treat [*Dred Scott*] as not having yet quite established a settled doctrine for the country.”\(^{78}\)

Lincoln’s view that Supreme Court constitutional glosses do not amount to generally applicable, binding law left room for the nuanced departmentalism that Lincoln later propounded during his First Inaugural Address. Here, he conceded that a judicial decision must be binding on the parties to a given suit, and that judicial decisions generally were “entitled to very high respect and consideration, in all parallel cases, by all other departments of government.” Nevertheless:

> [T]he candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between two parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.\(^{79}\)

Thus, for Lincoln, like Madison, the “people” are to be “their own rulers,” and this proposition is inconsistent with the notion that a bare majority of the Supreme Court can issue constitutional interpretations that function as binding law throughout society.

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\(^{74}\) 60 U.S. (19 How.) 393 (1856).
\(^{75}\) Id. at 426-27, 452.
\(^{77}\) Id.
\(^{79}\) Id. at 178-79 (quoting First Inaugural Address (March 4, 1861), in Abraham Lincoln, 4 *The Collected Works*, supra note 78, at 268).
C. The Point of this Quick Tour

This section’s modest goal has been to identify several themes that have enjoyed substantial prominence in the history of American constitutional thought and that are in tension with modern claims of judicial supremacy. These themes include: *First*, courts owe deference to the constitutional interpretations of other political actors – as courts themselves have frequently conceded. *Second*, truly definitive constitutional interpretations are not generated every time a majority of the Supreme Court agrees to some given gloss. Rather, definitive constitutional interpretations grow organically from the accumulation of precedents – both judicial and extra-judicial – over time. This proposition combines both: (a) the democratic idea that the development of a constitutional consensus across various governmental institutions reflects a public judgment, and (b) the common-law view that precedents gather evidentiary force as they accumulate. *Third*, and on a closely related point, departmentalism teaches that the Supreme Court does not have the final, ultimate word in constitutional interpretation. One broad lesson we can take from the presence of these themes in American legal history is that the modern doctrine of judicial supremacy is not written in stone in some secret part of the Constitution. Rather, it is a manifestation of a particular, historically contingent balance of power among the branches.80

III. THE SUPREME COURT TELLS US WHAT TO DO WITH THE CONSTITUTION

Judicial deference and judicial supremacy are closely related concepts. Judicial deference principles purport to govern the weight that courts should accord other entities’ decisions. Judicial supremacy is a deference doctrine that runs in the other direction – it purports that the Supreme Court’s decisions bind other actors.

Modern Supreme Court doctrine on judicial supremacy is simple: The Court is in charge of declaring “what the law is,” and no one else has any authority to override its constitutional interpretations outside the amendment process.81 An important caveat to this principle is that the Court claims authority to overrule its own constitutional precedents where a “special justification” exists for doing so – *i.e.*, a really good reason.82 Thus, the Court enjoys the attribute of sovereignty that it can bind everyone but itself.

80 Cf. Kramer, supra 4, at 8 (contending that judicial supremacy in constitutional law “is of surprisingly recent vintage” and “reflects neither the original conception of constitutionalism nor its course over most of American history”).
81 See e.g., United States v. Morrison, 529 U.S. 598, 616 n.7 (2000).
Characterization of the Court’s judicial deference doctrine and practice is somewhat daunting because the concept of deference is fuzzy, its application requires subjective judgments that are easy to second-guess, and the relevant case-law is complex and evolving. These warnings duly noted, the most important point to stress for the present purpose is that the Court does not, as a general rule, defer to others on “legal” issues of constitutional interpretation. It has instead used its independent judgment to create a marvelously complex and intimidating spider-web of esoteric constitutional doctrine. A related point to bear in mind is that Court’s constitutional constructions are in part a function of its determinations of “legislative fact” and intertwined policy judgments. A moment’s scrutiny of the Court’s opinions reveals that it often independently “finds” such “facts” with striking casualness.

A. Judicial Supremacy and Constitutional Construction

decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent”) (citation and quotation marks omitted).

83 The complex nature of the Court’s deference doctrine most readily appears in its approach to judicial review of the factual predicates needed for legislation to be constitutional – e.g., whether an activity affects commerce and thus may be regulated by Congress pursuant to the Commerce Clause. For fifty years or so following the New Deal, the Court’s default standard for reviewing such factual predicates was a lax form of rationality review. See, e.g., Preseault v. I.C.C., 494 U.S. 1, 17 (1990) (observing that “[w]e must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding”). In keeping with the dichotomy suggested by Carolene Products note 4, however, stricter scrutiny has applied to government actions that threaten the interests of “discrete and insular” minorities or otherwise trench on fundamental rights. See United States v. Caroleone Products, Inc., 304 U.S. 144, 152 n.4 (1938); William W. Buzbee & Robert A. Schapiro, Legislative Record Review, 54 STAN. L. REV. 87, 103-08 (2001) (discussing post-New-Deal judicial scrutiny of factual predicates). Over the last decade, the Court has seemed to tighten its control of congressional action in contexts that formerly had been subject to lax rational-basis review. See, e.g., United States v. Lopez, 514 U.S. 549, 561 (1995) (striking a statute for exceeding congressional Commerce Clause power for the first time in 50 years); City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (holding that the means that Congress adopts to enforce the Fourteenth Amendment must be “congruent[ ] and proportion[ate]” with the injuries it seeks to prevent or remedy). This tightening of judicial control has sparked considerable criticism. See, e.g., Buzbee & Schapiro, id., at 109-19 (criticizing the Court for subjecting congressional legislation to a new and incoherent form of “legislative record” review); Ruth Colker & James J. Brudney, Dissing Congress, 100 MICH. L. REV. 80, 83-84 (2001) (taking a similarly dim view of the Court’s tightening of fact review).

84 See generally infra Part III.B.1.

85 “[L]egislative facts” are those that “inform[ ] … legislative judgment on questions of law and policy.” K. Davis, An Approach to Problems of Evidence in the Administrative Process, 55 HARV. L. REV. 364, 404 (1942). For extensive discussion of the importance of the Court’s legislative fact-finding and policy judgments to its constitutional construction, see generally Faigman, supra note 18; Zick, supra note 18.

86 See infra Part III.B.2.
It is no coincidence that the Supreme Court’s two most famous assertions of judicial supremacy came in cases in which it enjoyed immense moral power. The first of these cases was 1958’s *Cooper v. Aaron*, which arose out of efforts to implement *Brown v. Board of Education*. Governor Faubus of Arkansas had fomented violent resistance to integration of the Little Rock schools. He justified his actions by claiming that the state of Arkansas, which was not a party to *Brown*, was not bound by the Court’s reasoning in it. A unanimous Court struck back with as much rhetorical punch as it could muster:

In 1803, Chief Justice Marshall … declared in the notable case of *Marbury v. Madison*, … ‘It is emphatically the province and duty of the judicial department to say what the law is.’ This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Notwithstanding the noble purpose behind this passage, its reading of *Marbury* grossly overreaches. *Marbury* claimed that the courts have a duty to interpret and apply the Constitution as they exercise their judicial power to resolve proper cases and controversies. It did not claim that the Supreme Court’s interpretations reign supreme over all extra-judicial actors. Indeed, not only is this claim not to be found in *Marbury*, it would have been politically suicidal for Marshall to make it at a time when Jefferson’s Republicans were ripping apart the Federalists’ efforts to entrench their power in the life-tenured but institutionally weak federal judiciary.

Another greatest hit in the canon of judicial supremacy came in 1974’s *United States v. Nixon*. Nixon claimed that the judiciary lacked constitutional

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87 358 U.S. 1, 17-18 (1958).
89 *Cooper*, 358 U.S. at 17-18 (citations omitted).
90 KRAMER, supra note 4, at 127 (“To contemporary readers [of *Marbury*], Marshall was simply insisting – like practically every other judge and writer of the era – that courts had the same duty and the same obligation to enforce the Constitution as everyone else, both in and out of government.”).
92 See generally ACKERMAN, supra note 55, at 147-62 (describing the political pressures facing the (Federalist-packed) federal judiciary after the Republican triumph of 1800).
authority to review the propriety of his invocation of executive privilege to block a judicial subpoena seeking production of the Watergate tapes. The situation presented a real danger of a constitutional meltdown – if the Court ordered production and Nixon successfully resisted then a great deal of the Court’s practical authority might vanish in a puff of smoke. The Court, undeterred, blasted back that “it is the province and duty of this Court ‘to say what the law is’ with respect to the claim of privilege presented in this case. *Marbury v. Madison.*”

*Cooper* and *Nixon* could not help but enhance the moral authority of the Court and the cultural force of its claim to judicial supremacy. The Court’s later invocations of this doctrine, however, have arrived in less earthshaking circumstances in which the Court’s analysis takes on a legalistic rather than moral flavor. For instance, in *City of Boerne v. Flores*, we find the Court invoking its interpretive supremacy in the course of invalidating an overwhelming bipartisan effort to protect the rights of religious people to practice their faith free from state interference. In *United States v. Morrison*, we find the Court invoking judicial supremacy in the course of determining that a federal civil remedy for gender-motivated crime exceeded Congress’s Commerce Clause power. The *Morrison* Court explained:

It is … a permanent and indispensable feature of our constitutional system that the federal judiciary is supreme in the exposition of the law of the Constitution. No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.

Regardless of whether one agrees or disagrees with the fine points of the Court’s analysis in these two cases, invoking judicial supremacy to *cut back* on civil-rights legislation to protect state sovereignty lacks the inspiring quality of using it to undo official apartheid or to make sure that presidents remain subject to the rule of law.

**B. Judicial (Non)Deference in Constitutional Construction**


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95 418 U.S. at 704-05 (citations omitted).
96 *Cf. KRAMER*, supra note 4, at 222-23 (observing that the progressive direction of the Warren Court’s decisions increased the appeal of judicial supremacy among liberals).
99 Id. at 616 n.7.
It is logically possible for strong doctrines of judicial supremacy and judicial deference to co-exist. The Court could, for instance, extend substantial deference to other actors’ constitutional interpretations in the course of its own decision-making, but still insist that once it has arrived at its own interpretation, it is binding on all other actors. Rhetoric from the Court’s own opinions sometimes suggests such a combination of deference and supremacy. The Court often states that legislative action – as the work product of a co-equal branch of government – carries with it a “presumption of validity.” Just before the passage from United States v. Nixon quoted in the preceding subsection, the Court observed that any branch’s interpretation of its own powers is owed “great respect from the others.” Similarly, in United States v. Morrison, Chief Justice Rehnquist’s majority opinion remarked that, “[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.” Professor Thayer could not have put the matter better himself.

This deferential language, however, seems more in the nature of form than substance. For instance, in both the Nixon and Morrison cases just noted, the Court referred to the importance of deferring to other branches’ judgments just before lowering the boom and rejecting them. Morrison is especially interesting in this regard given that it was decided by a five-justice majority with four dissenting judges contending the statutory provision in question was constitutional. That the four dissenting justices reached this conclusion

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100 City of Boerne v. Flores, 521 U.S. 507, 535 (1997) (observing that Congress’s duty to consider the constitutionality of its legislation justifies “the presumption of validity its enactments now enjoy”). Regarding this presumption, Justice Scalia has remarked revealingly:

My Court is fond of saying that acts of Congress come to the Court with the presumption of constitutionality. … but if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution … then perhaps that presumption is unwarranted.


103 See Thayer, supra note 13, at 143-45 (contending that the courts should only reject congressional action as unconstitutional in cases of “clear mistake”).
105 529 U.S. at 628 (Souter, dissenting).
certainly suggests that a “reasonable” constitutional interpretation could support the statute.

More generally, although judicial supremacy and judicial deference do not logically contradict each other, they are in strong tension with one another. As Professor Robert Schapiro explains:

A strong view of judicial supremacy implies an absence of judicial deference. If constitutional interpretation is the special preserve of the Judiciary, and the constitutional role of the Court is privileged and unique, then the Court has no reason to afford special significance to the constitutional judgments of Congress or the President.106

Spinning this thought out a bit more, acceptance of judicial supremacy suggests that the courts must be the best and most legitimate of constitutional interpreters — otherwise, constitutional interpretation should not be their “special preserve.” If courts are the best and most legitimate constitutional interpreters, then they should use independent judgment when establishing constitutional doctrine rather than defer to other less competent and less legitimate interpreters.

In any event, although the Court often states the importance of deferring to the political branches’ constitutional interpretations, the dominant mindset that the justices seem to apply when conducting judicial review is independence rather than deference. Professor Monaghan has aptly observed in this regard:

[H]ere, as elsewhere, Holmes’s page of history is worth a volume of logic. The Court and the profession have treated the judicial duty as requiring independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text, and that specific conception of the judicial duty is now deeply engrained in our constitutional order.107

107 Henry Monaghan, Marbury and the Administrative State, 83 COLUM. L. REV. 1, 9 (1983) (footnotes omitted). See also Jacob E. Gersen & Adrian Vermeule, 116 YALE L. J. 676, 681 (2006) (observing that “[t]he strength of the doctrinal presumption [of constitutionality], has waxed and waned over the course of American constitutional history. Today, many believe that the presumption has withered away, particularly in certain contexts.”); Evan H. Caminker, Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past, 78 IND. L. J. 73, 74 (2003) (“If actions speak louder than words, it appears that the Court’s continuing recitation of a presumption of constitutionality afforded congressional enactments has become mere sport.”); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION, 190 (1990) (observing that Thayer-style deference “has not provided an enduring working standard for modern judicial review. … [It has, for now, been largely abandoned.”).
There are, to be sure, important exceptions to this dominant mindset of independence. Most notably, the Court at times invokes the “political question” doctrine to leave resolution of some important constitutional issues entirely to the political branches.\footnote{See, e.g., Baker v. Carr, 369 U.S. 186, 210-17 (1962) (discussing scope and operation of the political question doctrine). In keeping with the judicial supremacist tenor of the times, the scope of the political question doctrine has narrowed in recent decades – the Court sees itself as “in charge” of more and more of the Constitution. \textit{See generally} Barkow, supra note 5 (tracing the “fall” of the political-question doctrine and a parallel rise of judicial supremacy).} Still, it seems fair to hazard that, when it comes to determining how to interpret the Constitution, the Court prefers its own counsel.

2. A Political Court – The Effect of Value and Fact Judgments on “What the Law Is”

Part of the excuse for judicial supremacy in a democracy is that courts implement expert legal judgments rather than impose their political views. One need not adhere to the crass view that the justices vote their party lines to recognize that this law-politics dichotomy crumbles under the slightest pressure.\footnote{For recent discussions of the political nature of constitutional judicial review, see generally Richard A. Posner, \textit{Foreword: A Political Court}, 119 HARV. L. REV. 31 (2005); Barry Friedman, \textit{The Politics of Judicial Review}, 84 TEX. L. REV. 257 (2005).} To put a wildly obvious matter mildly, many core constitutional provisions are extraordinarily vague – \textit{e.g.}, the Due Process and Equal Protection Clauses. To create relatively concrete guiding norms from such raw materials, judges turn as a matter of course to the traditional sources of text, history (often including analysis of original meaning), and judicial precedent. Judges vary with regard to how they approach and weigh these sources. These sources are nonetheless objective in the sense that anyone with a modicum of training can access them at least partially. They are sufficient to foreclose debate on a broad class of potential constitutional disputes that have such obvious answers that no one ever thinks to contest them – \textit{e.g.}, no one claims that the President can constitutionally be less than 35 years of age. In close constitutional disputes concerning ambiguous provisions, however, these legal tools plainly leave open a zone of reasonable interpretation. To choose an interpretation (or construction) from within this residual zone of reasonability, a court must make a value choice. In other words, once the law runs out, politics must begin. The political choices the Court makes must be influenced by the personal ideologies of its members as well as by their sense of the range of results the broader polity and norms of legal craft will tolerate. These choices are also intertwined with the justices’ assessments of legislative fact.
Constitutional doctrine is thus in part a function of how the justices think the world should work, and how they think the world does work.\textsuperscript{110}

The 2006 case, \textit{Georgia v. Randolph}, provides a narrow but illuminating example of the role the justices’ intertwined value and fact determinations can play in creating new constitutional doctrine.\textsuperscript{111} Georgia police responded to a domestic dispute at the Randolph home.\textsuperscript{112} Janet told the police that Scott used cocaine; Scott claimed Janet was the drug abuser. Janet retorted that the police could find evidence of Scott’s drug use in the house. Sergeant Murray asked Scott for consent to search; Scott, a lawyer, said no. So Sergeant Murray – no dummy he – asked Janet. She consented and led the officer to Scott’s bedroom, where he found a drinking straw with cocaine on it. The inevitable motion to suppress made its way to the Supreme Court. There, the majority ruled that Scott’s express objection undid Janet’s consent, rendering the search “unreasonable” and illegal under the Fourth Amendment.\textsuperscript{113} Good thing for Scott he was awake – under Court precedent, had he failed to object because he was asleep on the couch, Janet’s consent would have been good and the search “reasonable.”\textsuperscript{114}

And just how did the majority justify its conclusion that what we might call “mixed consent” searches are constitutionally “unreasonable”? Rhetorically, it depended in part on its determination that a “widely shared social expectation” exists that one ought not to enter a home where one inhabitant says come in and the other says keep out.\textsuperscript{115} There was of course no record evidence that any such social expectation exists, which led Chief Justice Roberts to chide the majority for “creat[ing] constitutional law by surmising what is typical when a social guest encounters an atypical situation.”\textsuperscript{116} The dissenting justices engaged in some creative fact-finding, too. Chief Justice Roberts suggested that the majority’s holding would cause an increase in spousal abuse by making

\textsuperscript{110} Cf. Faigman, \textit{supra} note 18, at 549 (“Traditionally, constitutional fact-finding served as a vehicle for the Court to reach normative judgments in interpreting the Constitution.”).

\textsuperscript{111} 126 S. Ct. 1515 (2006).

\textsuperscript{112} For the Court’s recounting of the facts of the case described in this paragraph, see \textit{id.} at 1519.

\textsuperscript{113} \textit{Id.} But see \textit{id.} at 1520 n. 1 (observing that a majority of the state supreme courts and all four federal circuit courts that had examined the same question had concluded that “consent remains effective in the face of an express objection”).

\textsuperscript{114} Georgia v. Randolph, 126 S. Ct. 1515, 1531 (2006) (Roberts, C.J., dissenting) (contending that \textit{Randolph} rule protects, “for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room”).

\textsuperscript{115} \textit{id.} at 1521-23.

\textsuperscript{116} \textit{id.} at 1531 (Roberts, C.J., dissenting).
it harder for police to intervene in domestic disputes. The majority rejected this suggestion as baseless without any more evidence than the dissent had. Be all this as it may, the majority purported to balance competing individual and governmental interests and came to the conclusion that the mixed-consent search was “unreasonable.” It is hard to escape the conclusion that the key driver of this conclusion was the majority’s value judgment that the right to privacy protected by the Fourth Amendment should be strong enough to block a mixed-consent search. The dissent reached a contrary value judgment. Both sides then proceeded to make factual claims they deemed plausible enough to support their value judgments. The majority’s claim that permitting mixed-consent searches would violate a meaningful social consensus increased the “weight” of the individual privacy interests at stake. The dissenting justices’ claim that the new rule would endanger battered spouses increased the weight of the governmental (and individual interests) served by permitting the search.

Randolph is absolutely typical in the sense that the Supreme Court frequently turns to a mix of value judgments, facts, and speculation about facts to justify its constitutional doctrines. One can plainly see this dynamic in many of the Court’s most famous and controversial opinions. One of many atrocities in Dred Scott v. Sandford was its holding that blacks cannot be citizens of the United States. Chief Justice Taney backed up the value judgment obviously inherent in this holding with an extensive discussion of the state of race relations during the period leading up to the Constitution’s adoption. He asserted that “the fixed and universal [opinion] in the civilized portion of the white race” had been that blacks were “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.” Given the universality and depth of this opinion at the time of the Constitution’s adoption, Taney reasoned that it must have been

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117 See id. at 1537-38 (Roberts, C.J., dissenting) (“What does the majority imagine will happen, in a case in which the consenting co-occupant is concerned about the other’s criminal activity, once the door clicks shut?”).
118 Id. at 1525-26 (Souter, J., writing for the Court) (dismissing as a “red herring” the charge that the Randolph rule might prevent police from stopping spousal abuse).
120 See id. at 1524 (noting, as one might expect, “that a man’s home is his castle”) (citations and quotation marks omitted).
122 Id. at 407.
the intent of those who adopted it to exclude blacks from being members of the
“people of the United States.”

*Plessy v. Ferguson* held that a Louisiana law requiring railroads to
segregate white and black passengers into “separate but equal” compartments
did not offend the Fourteenth Amendment’s Equal Protection Clause. Like
*Dred Scott*, this opinion implicated an odious value judgment concerning
race. An obvious problem with its analysis was that a law requiring
segregation implies a legally cognizable need for it because the superior race
finds it unpleasant to mix with its inferiors. The Court dismissed this concern
with the factual claim that any stigma flowing from segregation flowed from
the construction that blacks chose to put on it. Sixty years later, in *Brown v. Board of Education*, the Court made a value choice in favor of integration and
supported it by citing social science claiming that segregation itself creates
stigma and a sense of inferiority.

In *Casey v. Planned Parenthood of Pa.*, Justices Kennedy, O’Connor, and
Souter jointly authored the controlling plurality opinion that affirmed the
“essential holding” of *Roe v. Wade* that the state may not place an “undue
burden” on a woman’s right to abort even while hinting that *Roe* may have
been wrongly decided at the time. This decision was in part a function of a
policy choice to favor stare decisis to enhance legal stability and legitimacy.
This value judgment had roots in the plurality’s factual assessment that people
would perceive overruling *Roe* as an unprincipled, political act, which would
severely damage the legitimacy of the Court. Worse, because Americans’
“belief in themselves as such as a people is not readily separable from their
understanding of the Court invested with the authority … to speak before all
others for their constitutional ideals,” the effect of undermining the legitimacy
of the Court would be to sap the country’s “very ability to see itself through its

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123 The dissenting justices had an easy time showing that Taney’s history was a tissue of
overreaching and over-generalization. See, e.g., *id.* at 572-73 (Curtis, J., dissenting) (identifying
five states in which free African-Americans enjoyed citizenship and franchise at the time of the
Articles of Confederation).
124 *163 U.S. 537 (1896).*
125 *Id.* at 551 (“We consider the underlying fallacy of the plaintiff’s argument to consist in the
assumption that the enforced separation of the two races stamps the colored race with a badge of
inferiority. If this be so, it is not by reason of anything found in the act, but solely because the
colored race chooses to put that construction upon it.”).
126 *347 U.S. 483, 494 n.11 (1954)* (citing a series of studies documenting that segregation
creates a sense of inferiority that harms the education of black students).
127 *410 U.S. 113, 163 (1973).*
129 *505 U.S. at 863-67 (1992).*
130 *Id.* at 867.
This politico-factual assertion was, one might say, controversial. More recently, *Hamdi v. Rumsfeld* confronted the Court with the difficult task of balancing individual liberty interests against the need for national security and effective prosecution of the War on Terror. *Hamdi* was an American citizen captured in Afghanistan then held in a brig in the United States as an “unlawful enemy combatant.” His habeas petition found its way to the Supreme Court. There, the controlling plurality concluded “that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” The plurality added that the government could, consistent with this framework, rely on hearsay or establish presumptions favoring detention. Given this flexibility, the plurality predicted that “[w]e think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts.” This conclusion of legislative fact may well have been correct, and it is certainly possible that the Court struck the optimal balance between security and liberty in the course of checking executive authority. Nonetheless, regardless of whether *Hamdi* reached a good outcome or not, the Court got to it by second-guessing the executive branch’s fact and policy judgments in a matter of national security.

The preceding few pages slap an explanation point on a brutally obvious proposition: The Court’s development of constitutional doctrine is infused with the justices’ intertwined value and legislative-fact judgments. Moreover, by claiming to have supreme and final authority over constitutional construction, the Court has (at least implicitly) claimed dominion over such fact-finding and policy analysis as is part and parcel of the process of creating new constitutional law. We thus find the Supreme Court in *Randolph* casually considering what a person should do if one inhabitant of a home invites him to come inside and the other tells him to go away.

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132 See *id.* at 998 (Scalia, J., dissenting) (“The Court's judgment that [overruling *Roe*] … would 'subvert the Court's legitimacy' must be another consequence of reading the error-filled history book that described the deeply divided country brought together by *Roe*.”).
134 *Id.* at 533.
135 *Id.* at 533-34.
136 *Id.* at 534.
137 See generally Faigman, *supra* note 18 (discussing the role of “normative” fact-finding in the construction of constitutional law).
IV. ADMINISTRATIVE LAW TROIKA: CHEVRON, MEAD, BRAND X

The supremely self-confident Supreme Court instructs us that it is in charge of determining the operative meaning of the Constitution, but the Court takes a very different approach to statutory construction in administrative law. The fine points of this doctrine are, regrettably, nastily complex, but the most current form of the basic framework might plausibly be characterized this way: An agency can earn deference for its statutory construction by developing it via means that foster deliberation and political accountability; courts should affirm agency statutory constructions that earn such deference so long as they are reasonable – even if they contradict prior judicial precedent. To flesh out this (somewhat contentious) characterization, we now examine three critical Supreme Court cases that together form what this Article calls the “Brand X model”: (a) the inevitable Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.;139 (b) the opaque United States v. Mead Corp.;140 and (c) the most recent of the lot, the eponymous National Cable & Telecomm. Ass’n v. Brand X Internet Serv.141

A. Inevitable Chevron

The Clean Air Act Amendments of 1977 required certain “stationary source[s]” of air pollution to undergo a stringent permitting process.142 Industry wished to avoid this process; environmental groups wished to see it aggressively implemented. EPA’s interpretation of this critical phrase shifted as it was buffeted by changing administration views and judicial glosses from the D.C. Circuit.143 In 1981, after the Reagan administration swept into office on a deregulatory agenda, EPA adopted a “bubble concept” approach to “stationary source,” which allowed a firm to avoid obtaining a permit to increase emissions from a component of its plant so long as the overall emissions of the plant did not increase.144 In the subsequent litigation, the D.C. Circuit conceded that the meaning of “stationary source” was ambiguous, but nonetheless struck EPA’s bubble-concept construction on the ground that it conflicted with the court’s own precedents construing the Clean Air Act Amendments’ policy of seeking air quality improvement.145

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142 Chevron, 467 U.S. at 839-40.
143 See id. at 853-59 (tracing history of EPA’s regulatory interpretations of “source” as used in the Clean Air Act Amendments of 1977).
144 Id. at 840, 857-58.
The Supreme Court reversed the D.C. Circuit, and, along the way, announced the famous \textit{Chevron} two-step:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.\footnote{Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (footnotes omitted).}

The D.C. Circuit had (correctly) conceded that congressional intent vis-à-vis “stationary source” was unclear,\footnote{Id. at 842.} and the Supreme Court deemed EPA’s bubble-concept construction reasonable.\footnote{Id. at 842.} Therefore, the D.C. Circuit should have accepted EPA’s gloss rather than impose its own favored reading.

The Court turned to several themes to justify its deferential two-step. The first was congressional delegation – courts should defer to reasonable agency statutory constructions because that is what Congress wants.\footnote{Id. at 865.} The Court explained that a congressional delegation of power to an agency to carry out a statutory program carries with it authority to make policy and rules to fill “gaps” left unfilled by the statute itself.\footnote{Id. at 843-44.} Sometimes Congress delegates this gap-filling power expressly by specifying that an agency has “authority … to elucidate a specific provision of the statute by regulation.”\footnote{Id. at 843-44.} In other cases, the delegation of this authority to agencies to specify the meaning of ambiguous statutory terms is “implicit.”\footnote{Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).}

Of course, the obvious problem with suggesting that vague statutory language signals an “implicit” grant of interpretive power is that it begs the question of whether Congress wished the agency or the courts to enjoy the power to authoritatively construe an agency’s statute. The Court filled its own
explanatory gap by turning to the comparative-advantage themes of expertise and legitimacy.\textsuperscript{153} By definition, within the space where a statute is amenable to more than one legally reasonable construction, the law does not compel the choice of any given one of them. To choose among legally reasonable constructions, a decision-maker must make a policy choice.\textsuperscript{154} Agencies, not courts, should make the policy choices needed to resolve ambiguities in statutes agencies administer because: (a) agencies have more “expertise” than judges when it comes to determining how to implement their statutory missions (\textit{i.e.}, the EPA knows more about how the Clean Air Act should work than the D.C. Circuit); and (b) agencies are answerable to the President and Congress and thus are more politically accountable than life-tenured federal judges.\textsuperscript{155}

B. \textit{Limiting} \textit{Chevron} \textit{with Muddy Mead}

Determining how to deploy the Court’s \textit{Chevron} decision sparked mountains of controversy in the courts (and the law reviews). One difficulty arose from the fact that agency statutory interpretations arise in endless procedural contexts. On one end of the spectrum, an agency might, as was the case in \textit{Chevron} itself, embed a statutory interpretation in a legislative rule, a process that can consume a tremendous amount of agency energy. On the other extreme, an agency might be said to engage in statutory interpretation whenever any one of its employees tells someone what he or she thinks some bit of the agency’s organic statute means. Plainly, not all agency pronouncements of statutory meaning are created equal. The problem, then, was to determine which should enjoy \textit{Chevron}’s strong deference.

\textit{United States v. Mead Corp.} tried, with mixed success, to answer this difficult question.\textsuperscript{156} In announcing its “holding” drawing the boundary on strong deference, the Court stressed \textit{Chevron}’s delegation theme:

\begin{quote}
We hold that administrative implementation of a particular statutory provision qualifies for \textit{Chevron} deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.\textsuperscript{157}
\end{quote}

Where these prerequisites for strong \textit{Chevron} deference fail, a court should review an agency’s statutory interpretation through the lens of much weaker

\begin{footnotes}
\textsuperscript{153} Id. at 864-66.  \\
\textsuperscript{155} Id. at 864-66.  \\
\textsuperscript{156} 533 U.S. 218 (2001).  \\
\textsuperscript{157} Id. at 226-27.
\end{footnotes}
“Skidmore deference.” Skidmore deference is arguably not a meaningful form of deference at all insofar as it merely instructs courts to give careful attention to an agency’s statutory construction before adopting the one that the court itself deems best. Thus, application of the Mead framework determines whether, in a given case, a court’s job is either: (a) to determine whether an agency statutory construction is reasonable; or (b) to adopt the best available statutory construction – as determined by the court itself.

Mead’s first step makes Chevron-eligibility turn on whether Congress has delegated power to an agency to imbue its statutory interpretations with the “force of law.” To guide this inquiry, the Court explained:

We have recognized a very good indicator of delegation meriting Chevron treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying Chevron deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. That said, and as significant as notice-and-comment is in pointing to Chevron authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded … .

On one level, the preceding passage is horribly squishy, suggesting Chevron eligibility depends on an agency’s authorized use of certain types of “relatively formal administrative procedure” – except where it does not. But notwithstanding this squishiness, the dominant theme of Mead remains the Court’s effort to cabin the scope of Chevron deference with procedure. The

158 Id. at 234.
159 See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (advising courts that the weight of an agency’s interpretation of a statute it administers should depend on “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give power to persuade, if lacking power to control”).
161 The Court conceded that there can be non-procedural signals of delegation in part to avoid contradicting a six-year-old precedent in which it had applied Chevron deference to an agency interpretation issued in the absence of any procedural formality. See id. at 230 (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-257, 263 (1995)).
rationale for caring about procedure links back to the expertise and political accountability themes that appeared in *Chevron* itself. “Relatively formal administrative procedures,” the Court explains, encourage “deliberation” (and thus the deployment of expertise) and “fairness” (e.g., transparency and political accountability). As a result, generally speaking, interpretations produced via such means are more deserving of deference than others.

The conclusion that interpretations produced via relatively formal procedures are generally better than others circles back to the delegation theme of both *Chevron* and *Mead*. The Court assumes that of course Congress wants courts to defer to those agency interpretations that are most worthy of deference. Interpretations produced via relatively formal procedures tend, as a group, to be more worthy of deference than others. It follows that Congress wants the courts to extend strong deference to such interpretations. Thus, once one peers past the cloud of *Mead*’s delegation-talk,

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162 *Mead*, 533 U.S. at 230.

163 For criticisms of the *Chevron-Mead* doctrine’s insistence on maintaining the confusing delegation fiction, see, e.g., William R. Andersen, *Against Chevron – A Modest Proposal*, 56 ADMIN. L. REV. 957, 963 (2004) (observing that “the bewildering confusion in the decisions and the commentary suggests that the delegation fiction [of *Chevron* and *Mead*] is not a useful tool”); Ronald J. Krotoszynski, Jr., *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 737 (2002) (contending that frameworks for determining deference should focus directly on agency expertise and dispense with the delegation fiction).

164 This subsection’s claim that *Mead* contemplated using procedural formality as a key device to determine which agency interpretations deserve *Chevron* deference should not obscure that *Mead* was a complex and confusing opinion from which judges can pluck a number of disparate themes. Justice Breyer, in particular, has resisted crude application of any bright-line procedural test to determine *Chevron*-worthiness. *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 221–22 (2002) (stressing that *Mead* allows *Chevron* deference to apply in the absence of procedural formality). Still, the bottom line of *Mead* is that, generally speaking, *Chevron* deference applies to agency interpretations adopted via notice-and-comment rulemaking or formal adjudication, whereas *Chevron* deference may apply to other agency interpretations in special circumstances.

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proclaiming that “[a]n initial agency interpretation is not carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”

A primary function of judicial stare decisis norms, by contrast, is to preserve legal stability.

*Mead* magnified the potential for *Chevron* flexibility to clash with stare-decisis stasis. The problem flowed from *Mead*’s rough bottom line that *Chevron*-eligibility depends on whether an agency has used favored procedures to develop an interpretation. Applying this framework, an agency can find itself litigating a statutory construction before it has earned *Chevron* deference for it. In such a case, a court should apply so called *Skidmore* deference to the statutory interpretation, which instructs the court to adopt the statutory construction it deems best. On a traditional *Marbury* view, this most favored construction becomes “what the law is.” An appellate court following stare decisis norms will follow its own precedent absent unusual circumstances – as will lower courts within the same jurisdiction. In keeping with judicial supremacy norms, the court will expect other entities, including agencies, to comply with the precedent as well. If this is indeed the way the law works, then the court’s *Skidmore* construction will have robbed the agency of the power it otherwise would have enjoyed under *Chevron* to shift among reasonable interpretations. This outcome, however, makes the scope of an agency’s power to make policy via flexible interpretation depend on an accident of timing – which seems absurd. The alternative, however, is to concede that, after a court has declared the “best” meaning of an agency’s statute, an agency can earn *Chevron* deference for a different construction and trump the judicial precedent.

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166 See *Mead*, 533 U.S. at 234 (applying *Skidmore* deference to agency statutory construction that did not merit *Chevron* deference).

167 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (claiming for the courts the “province and duty … to say what the law is”).

168 For examples of courts using their precedents to trump later, inconsistent agency interpretations, see, e.g., *Neal v. United States*, 516 U.S. 284, 294-95 (1996); *Brand X Internet Services v. FCC*, 345 F.3d 1120, 1131 (9th Cir. 2003), overruled sub. nom. *National Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967 (2005); *Bankers Trust New York Corp. v. United States*, 225 F.3d 1368, 1375-76 (Fed. Cir. 2000); *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519, 523-24 (8th Cir. 1991).

169 See *Mead*, 533 U.S. at 247 (Scalia, J., dissenting) (claiming that *Mead* would make the applicability of *Chevron* deference often an accident of timing – a side effect he characterized as “positively bizarre”).
This duel between *Chevron* deference and stare decisis arrived at the Supreme Court in 2005’s *National Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, and the Court chose deference.\(^{170}\) It held that “a court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”\(^{171}\) More directly, only a judicial opinion that claims to have identified the *only* reasonable interpretation of a statute can block the application of *Chevron* deference to an agency’s later, inconsistent construction of the same statute. Where a judicial precedent does not satisfy this condition, a reasonable, *Chevron*-eligible agency statutory construction should trump it.

*Brand X* arose out of a dispute concerning regulation of cable companies that sell broadband Internet service. Under the Telecommunications Act of 1996, providers of “telecommunications service” are common carriers subject to mandatory regulation; “information service” providers are not.\(^ {172}\) In 2000, the Ninth Circuit had held that cable-modem service was a “telecommunications service.”\(^ {173}\) Later, the FCC, after notice-and-comment, declared that it was not.\(^ {174}\) Various parties sought review in various courts, and the proceedings were consolidated, by happenstance, in the Ninth Circuit. There, rather than extend *Chevron* deference to the FCC’s new statutory construction, a split panel held that the court’s own earlier precedent controlled the issue, and it vacated the FCC order in relevant part.\(^ {175}\) As support for this outcome, the majority relied heavily on a Supreme Court case, *Neal v. United States*, which stated, “[w]hen we have determined a statute’s meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency’s later interpretation of the statute against that settled law.”\(^ {176}\)

The Supreme Court reversed, holding that the Ninth Circuit should have extended *Chevron*’s strong deference to the FCC. The Court quickly explained that the Ninth Circuit’s approach led to the

anomalous result[ ] … that whether an agency’s interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the

\(^{170}\) 545 U.S. 967 (2005).
\(^{171}\) Id. at 982.
\(^{172}\) Id. at 975.
\(^{173}\) AT & T Corp. v. Portland, 216 F.3d 871 (9th Cir. 2000).
\(^{174}\) *Brand X*, 545 U.S. at 979 (citing In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4824, ¶ 41 (2002)).
\(^{175}\) *Brand X Internet Services v. FCC*, 345 F.3d 1120, 1131 (9th Cir. 2003), *overruled sub. nom.* National Cable & Telecomm. Ass’n v. Brand X Internet Serv., 545 U.S. 967 (2005).
\(^{176}\) *Brand X*, 354 F.3d at 1131-32 (quoting *Neal v. United States*, 516 U.S. 284, 295 (1996)).
order in which the interpretations issue: If the court’s construction came first, its construction would prevail, whereas if the agency’s came first, the agency’s construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. 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.\(^{177}\)

As for the Supreme Court precedent upon which the Ninth Circuit had innocently relied, properly understood, *Neal v. United States* merely stood for the proposition “that a court’s interpretation of a statute trumps an agency’s under the doctrine of stare decisis only if the prior court holding determined a statute’s clear meaning.”\(^{178}\) This gloss on *Neal* was consistent with *Chevron* itself, which does not allow an agency to adopt an interpretation that violates a statute’s unambiguous meaning in any event.

As Justice Scalia saw the matter, the majority’s smooth, curt reasoning glided over a direct, self-inflicted attack on the core of the Article III courts’ power. Contemplating the prospect of an agency trumping a court’s independent statutory construction, he wrote:

> This is not only bizarre. It is probably unconstitutional. … Article III courts do not sit to render decisions that can be reversed or ignored by Executive officers. … “Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.” That is what today’s decision effectively allows. Even when the agency itself is party to the case in which the Court construes a statute, the agency will be able to disregard that construction and seek *Chevron* deference for its contrary construction the next time around.\(^{179}\)

The majority’s response to Justice Scalia’s broadside was a slightly covered exercise in *ipse dixit*. Denying that *Brand X* allowed agencies to “override” courts, the majority explained:


\(^{178}\) Id. at 984 (characterizing rule of *Neal v. United States*, 516 U.S. 284, 295 (1996)) (citations omitted).

\(^{179}\) Id. at 1017 (Scalia, J., dissenting) (citations omitted).
Since *Chevron* teaches that a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is *not authoritative*, the agency’s decision to construe that statute differently from a court does not say that the court’s holding was *legally wrong*. Instead, the agency may, consistent with the court’s holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. In all other respects, the court’s prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable).180

Of course, this response does not so much make an argument as beg the question presented by *Brand X* in the first place – which was whether an independent judicial construction should trump *Chevron* deference or vice versa. When the Court advises that a court’s opinion as to the best reading of an agency’s statute is not “authoritative” and therefore can be trumped by a later agency reading without being “legally wrong”, the Court is really just stating its conclusion.

The thinness of the argument supporting the majority’s resolution of the deference/stare-decisis duel should not, however detract from its importance. The bottom line of *Brand X* is that independent judicial statutory constructions are not the final, definitive word in statutory interpretation. A reasonable agency statutory construction can trump a judicial precedent. Implicit in the Court’s easy adoption of this principle is the proposition that the values underlying the *Chevron* doctrine, which include a preference for expert decision-making and political accountability, are sufficient in this statutory context to trump the values served by stare decisis and judicial interpretive supremacy.

D. *Combining the Troika into the Brand X Model*

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180 Id. at 983 (emphasis added). To support the idea that an agency can trump a court without declaring the latter “legally wrong,” the Court analogized a federal agency’s role to that of a state court. The Court explained that, where an agency trumps a precedent, “[t]he precedent has not been ‘reversed’ by the agency, any more than a federal court’s interpretation of a State’s law can be said to have been ‘reversed’ by a state court that adopts a conflicting (yet authoritative) interpretation of state law.” Id. at 983-84. Cf. Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272, 1273-76 (2002) (suggesting this state-court analogy as a means to defuse the clash between stare decisis and *Chevron* magnified by *Mead*). The problem with this analogy, however, is that it ignores that when a federal court construes state law, it is construing the law of some other sovereign. It therefore makes perfect sense to deny that the federal court’s construction of a state statute is “authoritative.” Where a federal court construes a federal statute, the question of whether an administrative or judicial construction should be “authoritative” must be determined on the basis of some principle other than sovereignty.
In *Chevron*, the Supreme Court recognized that choosing among reasonable statutory interpretations requires policymaking for which agencies have a comparative advantage because of their greater expertise (ability) and political accountability (legitimacy). In the hands of its most aggressive proponents, *Chevron* stood for the proposition that courts should defer to all authoritative, reasonable constructions by an agency of a statute it administers. This broad reading, however, is subject to a natural objection and a natural complication. The natural objection is: Just because someone has a capability does not mean that they always use it. This objection suggests a narrower approach that denies *Chevron* deference to those interpretations that do not visibly implicate values of agency expertise and political accountability. Understood in this light, the *Mead* framework, by favoring interpretations embedded in notice-and-comment rulemaking or formal adjudication, represents an effort to create a judicial rule for determining which agency interpretations have been subject to sufficient focused consideration (implicating agency expertise) in a transparent way (implicating political accountability) to merit *Chevron*’s strong deference.

The natural complication flows from the potential for the policymaking flexibility favored by *Chevron* to clash with judicial stare decisis (and supremacy) norms. *Brand X* resolved this clash, concluding unequivocally that those reasonable agency interpretations – that have earned their *Chevron* deference under the *Mead* framework – should not lose it just because of contrary judicial precedent.

V. A BRAND X CONSTITUTION

The *Chevron* doctrine’s requirement of deference to agency statutory constructions analogizes easily to Thayer’s “clear error” doctrine, which insists that the courts should strike federal legislation on constitutional grounds only where no reasonable constitutional construction can save it. The courts have rejected both *Chevron* and Thayerism in their unalloyed forms. In administrative law, this rejection led to the development of the *Brand X* model, which contracted and expanded the reach of strong deference to fit the contexts where agencies have “earned” such treatment. The balance of this Article explores how one might, by applying a similar *Brand X* approach to Thayerism,

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182 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J. dissenting) (describing *Chevron* doctrine as maintaining that “all authoritative agency interpretations of statutes they are charged with administering deserve deference”).
183 *See supra* Part IV.B (supporting this characterization of the framework for determining *Chevron* eligibility adopted by the Court in United States v. Mead Corp., 533 U.S. 218 (2001)).
185 *See supra* note 5 (identifying works that have drawn the *Chevron*-Thayer parallel).
develop an attractive framework for allocating control of constitutional construction among judicial and legislative actors.

A. The Easy Analogy Between Chevron and Thayerism

Chevron and Thayerism both acknowledge that reasonable minds may differ with regard to how to construe ambiguous positive law, and both instruct that courts are generally not the preferred decision-makers for choosing among reasonable constructions. Recall that Chevron offered two basic types of rationale for its form of deference: (a) the delegation rationale (“We defer because that is what Congress wants – even though it was too polite to say so out loud.”), and (b) the comparative advantage rationale (“We defer because agencies know their jobs better than we do, and they are answerable to politically accountable office-holders.”). On inspection, the delegation rationale collapses into the comparative advantage rationale – the reason the Court thinks Congress wants Chevron deference is because the Court thinks that Chevron deference is a good idea, and the Court indulges the assumption that Congress is reasonable enough to want what the Court wants.

The comparative-advantage rationales for Chevron deference in a statutory context – political accountability and expertise – apply with obvious force to the constitutional context as well. This point is most obvious as it relates to political accountability. In a representative democracy, the legitimacy of official action flows back to the will of the people. The mass of the people can express their judgment most directly (albeit imperfectly) through their representatives. It follows that the legislature must be the primary law-giver and that courts should generally respect its judgments concerning the content of law. Of course, the Constitution constrains legislative action, but, in Chevron, the Court in essence conceded that the resolution of ambiguity in positive law is more in the nature of a political than legal act. This rather self-evident point has deep roots in American constitutional thought – we can see echoes of it, for instance, in Madison’s characterization of constitutional interpretation as a hunt for a “public judgment” as well as in Lincoln’s insistence that the people, to remain their own “rulers,” must have a voice in determining constitutional meaning. Moreover, even a brief inspection of any number of Supreme Court opinions – from the soon-to-be obscure (e.g., Georgia v. Randolph) to the most notorious (e.g., Dred Scott) to the most

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186 See supra notes 149-155 and accompanying text.
187 See supra text paragraph preceding note 164.
189 See supra text accompanying notes 71-79 (discussing Madison’s and Lincoln’s views on the role of public opinion in determining constitutional meaning).
celebrated (e.g., Brown$^{192}$) confirms that Supreme Court constitutional “interpretations” are deeply infused with the justices’ values and certainly not in any strong sense compelled by “law.” If such political judgments should be made by politically accountable officials, it easily follows that the Court should defer to Congress’s reasonable constitutional interpretations.

The Chevron comparative advantage of expertise, too, supports such deference. It is a commonplace that Congress, as an institution, is better able to determine “legislative facts” – those bearing on policy-making as opposed to adjudication – than the courts.$^{193}$ Through its committee system, Congress can, for instance, conduct far-reaching investigations of whatever interests the committee chair in a way that a court, confined to the reach of a case-or-controversy, cannot. Miranda provides a good case in point for thinking about this difference. The Supreme Court’s decision to require police to read suspects their “Miranda rights” rested on a factual conclusion that this requirement was needed to prevent coercion in violation of the right against self-incrimination.$^{194}$ The Court was not in any position to conduct a broad investigation of this empirical claim but imposed the requirement anyway.$^{195}$ Congress, by contrast, could, if it wished, conduct extensive investigation of the means for solving the problem of “involuntary” confessions.$^{196}$ Note also

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$^{191}$ Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (discussed supra at text accompanying notes 121-123).


$^{193}$ See David Shapiro, 74 VA. L. REV. 519, 551-56. (1988) (contrasting the competencies of courts and legislatures; observing that legislatures have greater capacity to discern what are “appropriately named” “legislative facts”); William D. Araiza, The Section 5 Power and the Rational Basis Standard for Equal Protection, 79 TUL. L. REV. 519, 555 (2005) (noting that “the Court has long-conceded to Congress … the latter’s superior fact-finding ability”).

$^{194}$ Miranda v. Arizona, 384 U.S. 436, 467 (1966) (“In order to combat these pressures [of custodial interrogation] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.”).

$^{195}$ Cf. Miranda, 384 U.S. at 532 (White, J., dissenting) (“Insofar as appears from the Court's opinion, it has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.”).

$^{196}$ Cf. Katyal, supra note 4 (arguing for expanded legislative role in constitutional construction; observing, with regard to Miranda, “[w]hat the police are doing now [in custodial interrogations], and what rules are easy for them to apply, are general questions to which legislatures are better suited to provide answers [than courts].”). But see Yale Kamisar, Can (Did) Congress “Overrule” Miranda? 85 CORN. L. REV. 883, 906 (2000) (surveying legislative history of 1968 congressional effort to overturn Miranda, 18 U.S.C. § 3501, and concluding that, “[o]n this occasion at least, the much-vaunted superior fact-finding capacity of Congress was little in evidence.”).
that Congress’s judgments concerning this problem would necessarily be deeply intertwined with value judgments regarding what it means for a confession to be “voluntary” or “coerced.” This point highlights that fact and policy judgments blur into each other.\textsuperscript{197} Thus, respect both for Congress’s greater ability to find legislative facts and their political nature support the application \textit{Chevron}-Thayer-style judicial deference in constitutional interpretation.

In short, the positive case for a form of Thayerism is obvious. There remain, however, objections to overcome. The most obvious may be the easiest to defuse. It is the hyper-\textit{Marbury} idea that the Constitution puts the courts in charge of final determination of constitutional meaning, which is inconsistent with any kind of Thayerism.\textsuperscript{198} That is, just as \textit{Chevron} explains that Congress “delegates” interpretive authority to agencies (not courts),\textsuperscript{199} so the Constitution “delegates” supreme interpretive authority to the courts (not Congress or the President). The most basic problem with this objection is that the Constitution nowhere says anything of the sort. Lacking any textual mooring, any attempt to justify judicial supremacy that steps beyond the \textit{ipse dixit} must argue that judicial supremacy is a terrific idea – so terrific, in fact, that the “structure” of the Constitution implies that it has “delegated” ultimate interpretive authority to the courts. Thus, just as we saw with \textit{Chevron}, the “implicit delegation” story must rely, at bottom, on policy justifications,\textsuperscript{200} which, in the case of judicial supremacy, are eminently contestable.

There are, however, more potent objections to consider than the hyper-\textit{Marbury}, silent-deligation argument. One is that, notwithstanding democratic pieties, Congress does not engage in serious constitutional deliberations. This objection has particular force as applied to complex, omnibus legislation – which no one actually reads in full. Thus, even if Congress might, in some abstract sense, enjoy comparative advantages over courts in constitutional interpretation, it may rarely, if ever, deploy them. A second objection is that the Supreme Court is the great protector of individual rights from the tyranny of the majority – Congress, even if it does reflect public judgments, would

\textsuperscript{197} Araiza, \textit{supra} note 193, at 556 (observing that so-called “fact-finding” in the context of equal protection analysis veers into value choice); Kamisar, \textit{supra} note 196, at 918-24 (observing that determining whether a confession is “voluntary” requires value judgment, but contending that this point supports \textit{judicial} rather than \textit{legislative} control over the issue).

\textsuperscript{198} For one of the Supreme Court’s frequent invocations of hyper-\textit{Marbury}, see, e.g., United States \textit{v.} Morrison, 529 U.S. 598, 616 n.7 (2000) (“[E]ver since \textit{Marbury} this Court has remained the ultimate expositor of the constitutional text.”).


\textsuperscript{200} See \textit{supra} text accompanying notes 153-155 (explaining how \textit{Chevron}’s “delegation” fiction is rooted in judicial policy assessments).
interpret the Constitution badly. A third objection relates to the dispute resolution function of judicial review – we want stable constitutional rules that everyone, by and large, will agree to live by. Allowing Congress to determine constitutional doctrine (albeit within the zone of reason) would destabilize constitutional law to an unacceptable degree. The fourth objection may strike the deepest: The dark truth is that nobody, including the political branches, really wants to interfere with judicial supremacy. Indeed, judicial supremacy has gained ascendance because it accommodates the needs of political actors and reflects a broadly-based public judgment that the courts should be in charge of constitutional interpretation.

The *Chevron* doctrine, too, was subject to some of these objections. The judicial response was to develop the *Brand X* model, which refined *Chevron*’s scope.\footnote{See supra Part IV.} Perhaps a form of this model can serve a similar function for Thayerism.

**B. Defusing Legislative Thoughtlessness: A Constitutional Analogue to Mead**

An aggressive Thayerist might contend that every statute that Congress enacts embodies at least an “implicit” legislative judgment that the statute is, in its entirety, constitutional. Although there is a formal purity to this position, it has the obvious drawback of extending as much deference to an earmark sneaked into a bill in the dead of night as, say, major civil rights legislation passed after extreme effort and deliberation. As the *Chevron* doctrine unfolded, it raised a similar problem: Applied aggressively to all agency statutory constructions, *Chevron* ignores that some agency constructions seem more worthy of deference than others. The Supreme Court’s major response to this problem was the *Mead* framework, which, again, is best understood as an effort to ensure that *Chevron* deference applies where there are grounds for concluding that an agency has, in creating a statutory construction, applied the comparative advantages for this process that it enjoys over the courts.\footnote{See supra Part IV.B (supporting this characterization of the *Mead* framework).} *Mead* thus favors statutory interpretations vetted through notice-and-comment rulemaking or formal adjudication because these “relatively formal administrative procedures” encourage application of expertise and relative transparency.\footnote{\textbf{533 U.S.} at 229-30.} The question then becomes: Is there some attractive way to translate the Court’s *Mead* move into the constitutional milieu?

Crudely translated, *Mead* could lead straight back to the conclusion that all congressional legislation should qualify for strong deference. The most direct analogue to the congressional legislative process to be found in administrative
law is notice-and-comment rulemaking – which is, after all, the default mode for agencies to create what are called “legislative rules.” 204 But true congressional legislation, with its requirements of bicameralism, presentment, and committee processing, is far more “formal” than notice-and-comment rulemaking. Therefore, one might smoothly reason, all federal legislation should receive strong deference. But this conclusion does nothing to solve the problem that a great deal of legislation does not receive serious, broad-based scrutiny from members of Congress, and everyone knows it. Indeed, James Madison made this point nearly two-hundred years ago, explaining that “midnight precedents” – the result of the last-minute, pell-mell rush that attends the close of legislative sessions – deserve no one’s respect. 205

The search for a more refined translation should focus not on the details of Mead’s proceduralist framework, but rather on the impulse that led the Court to create that framework – the need to identify which extra-judicial interpretations merit strong deference and which do not. Obviously, any judicial effort to separate the deserving legislative wheat from the undeserving chaff would need to avoid detailed scrutiny of the legislative process or the actual substance of any given member’s deliberations. The last thing anyone should want is the Supreme Court checking whether a statute was scrutinized enough in committee or if enough members of Congress thought hard enough about it. Inevitably, such efforts would degenerate into ad hoc inquiries lacking judicially-manageable standards and, at all odds, show profound “disrespect” for Congress.

But the Court need not open the black box of legislation to recognize that some enactments signal public will, enhance transparency, and invite deliberation better than others. The case for deferring to legislative constitutional assessments is most potent where legislation plainly benefits from the comparative advantages that the legislature enjoys over the courts in constitutional interpretation. The dominant advantage is political accountability, but Congress may also lay claim to greater competence in legislative fact-finding. The very clearest way for the legislature to signal a genuinely public judgment concerning constitutional meaning is by stating that judgment explicitly and specifically in narrowly drawn legislation. Particularly where a statute is meant to alter the Supreme Court’s stated constitutional doctrine, legislation fitting this description would likely be controversial and command considerable public and legislative attention – thus ensuring political

204 See 5 U.S.C. ‘ 553 (estabishing notice-and-comment as the regular mode for legislative rulemaking).
205 See supra text accompanying note 50 (quoting Madison’s criticism of “midnight” legislative precedents).
accountability and prompting a kind of focus that may spur deployment of relevant expertise. Moreover, narrowly drawn legislation devoted solely to a constitutional point would tend to minimize the potential for logrolling to distort signals of majority will (at least as compared to complex omnibus legislation).

One can see the potential importance of this focus requirement by considering Senator Arlen Specter’s concerns regarding the recently enacted Military Commissions Act of 2006. This complex bill was enacted in the shadow of the November 2006 elections; Congress was in a hurry. Among many other things, this statute: established military commissions for trying “unlawful enemy combatants”; defined who “unlawful enemy combatants” are; authorized the use of hearsay in military commissions; and blocked individuals from using the Geneva Conventions as the basis of a cause of action in court. In addition, the Act stripped jurisdiction from the courts to hear habeas petitions from prisoners contesting their enemy combatant status. Senator Specter declared the bill “patently unconstitutional on its face” in light of its effect on habeas corpus. After his efforts to amend the bill failed, Specter voted for it anyway on the ground that it included some good provisions and that “the [C]ourt will clean it up.” Specter’s comments and subsequent conduct neatly illustrate that the courts cannot reasonably assume that an enacting majority deemed any given provision within complex legislation to be constitutional. Suppose, by contrast, that the habeas-stripping provision had been voted on as a separate matter. This procedural device would not, of course, prevent members from voting for or against the provision based on commands from party leadership or horse-trading regarding different bills. It would, however, especially in such an important matter, tend to reduce the force of such factors. For instance, it seems safe to hazard that Senator Specter

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207 See generally id. (establishing military commissions); id. at ’3 (to be codified at 10 U.S.C. ‘948a(1)) (defining “unlawful enemy combatant”); id. at ’3 (to be codified at ’949a(b)(2)(E)) (regulating admission of hearsay in military commissions); and id. at ’5 (to be codified at 28 U.S.C. ‘2241) (clarifying that Geneva Conventions do not create a cause of action that prisoners can invoke in U.S. courts).

208 Id. at ’7 (to be codified at 28 U.S.C. ‘2241(e)(1)) (stripping courts of habeas jurisdiction over those determined to be “enemy combatants”).


210 Id.
would have voted against the habeas-stripping bill had he been able to do so without threatening the whole of the MCA.

The Religious Freedom Restoration Act of 1993 (RFRA),\textsuperscript{211} by contrast, provides an excellent example of a clear statement of a public judgment from Congress on a constitutional matter. Recall that in \textit{Employment Division v. Smith}, the Court had, in a 5-4 decision, overruled precedents holding that, absent a compelling governmental interest, facially neutral laws that substantially burden religious practices violate the Free Exercise Clause.\textsuperscript{212} RFRA is less than one thousand words long, and it directly and clearly tries to do just one thing: To restore the Free Exercise protections Smith had struck.\textsuperscript{213} It passed with overwhelming bipartisan support and was signed by President Clinton.\textsuperscript{214} It is difficult to imagine a clearer, more potent signal of a public judgment regarding constitutional interpretation.

Extending Thayer-style, strong deference to narrowly-drawn legislation that makes express determinations of constitutionality would grant exceptional legislation such as RFRA the respect that democracy would seem to demand. At the same time, denying such deference to legislation that sends a less clear signal of a public judgment, such as the MCA, has the potential to create a dynamic that improves constitutional deliberation and signaling by the legislature. By making focus the price of strong deference, this approach would give members an incentive to enact constitutionally questionable proposals via narrowly-drawn legislation. For example, were the proposed \textit{Brand X} model in place for constitutional issues in September 2006, it would have given Senator Specter additional leverage for his effort to carve the habeas-stripping measure out of the main MCA bill. Without idealizing the legislative process, if one grants that congressional deliberation and accountability are good things, then it would have been good to increase congressional (and public) focus on this controversial measure by making it stand on its own. More broadly, encouraging congressional focus on constitutional issues might tend to counteract the infantalization of

\textsuperscript{213} See 42 U.S.C. §2000bb(b)(1) (declaring legislative purpose “to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened”).
congressional constitutional debate that many have suggested is a debilitating effect of aggressive judicial review.\textsuperscript{215}

C. \textit{But the Supreme Court Is Better at Constitutional Interpretation}

Even if one credits that Congress enjoys political and informational advantages over the Supreme Court in constitutional interpretation, one might still believe that the Supreme Court is substantively \textit{better} at constitutional interpretation thanks to countervailing comparative advantages that it enjoys. The most obvious claim to make in this regard is that, thanks to its insulation from the electorate, the Court is better suited to play the role of protecting the fundamental rights of minorities from the "tyranny of the majority."\textsuperscript{216} Because the Court is a better interpreter, it follows that the Court should prefer its own (reasonable) constitutional constructions to (reasonable) legislative alternatives.

Perhaps the most basic response to this objection is to concede honestly that it raises a question that no one can rigorously answer. Even if everyone agreed with regard to the precise nature of our fundamental rights, the world is far too complex to allow certain judgments with regard to whether it would be a better or worse place if the American federal judiciary enjoyed somewhat less dominance over constitutional questions. Even more to the point, there is, in any event, widespread, deeply-held disagreement concerning the precise scope of our fundamental rights, which pretty much dooms efforts to reach consensus concerning which branch of government is better at protecting them.

A more direct counterpunch is: \textit{Dred Scott},\textsuperscript{217} \textit{Plessy},\textsuperscript{218} etc. Readers can, of course, add other decisions they regard as abominations – some will want to add \textit{Korematsu},\textsuperscript{219} foes of abortion will place \textit{Roe}\textsuperscript{220} and \textit{Casey}\textsuperscript{221} at the front of

\textsuperscript{215} See supra note 21-22 and accompanying text (identifying the infantalization argument against judicial review). \textit{Cf.} also Waldron, \textit{The Core Case}, supra note 4, at 1384-85 (observing that "it is striking how rich the reasoning is in legislative debates on important issues of rights in countries without judicial review"; claiming that the British legislative debate over abortion was far richer than the Supreme Court’s efforts in Roe v. Wade).

\textsuperscript{216} See Waldron, supra note 4, at 1395 (observing that “[t]he concern most commonly expressed about the work of a democratic legislature is that, because they are organized on a majoritarian basis, legislative procedures may give expression to the ‘tyranny of the majority.’”).

\textsuperscript{217} \textit{Dred Scott v. Sandford}, 60 U.S. (19 How.) 393 (1856) (holding, inter alia, that African-Americans could not be citizens of the United States and that Congress could not ban slavery in federal territories).

\textsuperscript{218} \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896) (upholding Louisiana law that required segregation of railroad cars into “separate but equal” compartments for whites and African-Americans).


\textsuperscript{220} \textit{Roe v. Wade}, 410 U.S. 113 (1973) (declaring constitutional right to abortion).
the list. More generally, the idea that the Court serves a special role as a progressive and wise protector of individual rights is in large part an artifact of the tremendous good the Warren Court did in advancing the cause of civil rights in *Brown* and its wake. But *Brown*, which was decided over fifty years ago, helped undo the damage that the Court itself had helped inflict less than fifty years before in *Plessy*. Acting as a “progressive” and wise protector of fundamental rights is not a necessary aspect of the Court’s makeup. Recognition of this fact helps explain the increasing prevalence of attacks on judicial supremacy from those on the left – who have noticed that the Court is now largely composed of strongly conservative justices. If these justices do away with abortion rights or affirmative action, the volume of these voices will no doubt increase.

In addition to the preceding negative case against the Court, one can also make a positive case for the potential constitutional competency of Congress. Professor David Currie, for instance, contends that, during the early day of the Republic up through the time of the Civil War, Congress was often a better (and far more important) interpreter of the Constitution than the Supreme Court. He notes in particular that Civil War-era members of Congress offered a far richer analysis of the legality of secession than the Supreme Court’s perfunctory efforts. Of course, the modern Congress is a very different beast, and perhaps it is not capable of the deliberative heights reached by its forebears. Nonetheless, to use an example that keeps cropping up in this Article, many observers would agree that the 1993 Congress expressed a better understanding of the proper scope of Free Exercise rights in the Religious Freedom Restoration Act than the Court did in 1990’s *Employment Division v. Smith*.

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221 Planned Parenthood v. Casey, 505 U.S. 833 (1992) (holding that state may not place “undue” burdens on right to abortion).

222 *Brown* v. Board of Education, 347 U.S. 483 (1954) (overruling *Plessy*: holding that public school segregation is unconstitutional). *Cf.* KRAMER, supra note 4, at 229 (decrying the tendency to invoke Marbury and Brown to justify characterizing the Court as a “major force advancing American liberty” notwithstanding a litany of sins against liberty including *Dred Scott, Korematsu*, “the dismantling of Reconstruction,” and “complicity in the Red scares”).

223 *See, e.g.*, TUSIENET, TAKING THE CONSTITUTION, supra note 4 (condemning judicial review from the progressive end of the political spectrum).


225 Id. at 27-33.

226 *See supra* text accompanying notes 211-214 (describing Congress’s efforts to expand Free Exercise rights in RFRA and the Court’s invalidation of it).
A final response to the Supreme-Court-is-my-shepherd-I-shall-not-want argument might take the form of a partial retreat inspired by Carolene Products note 4.227 On this account, the Court might deny deference to legislative constitutional constructions that threaten to infringe fundamental rights or the interests of “discrete and insular” minorities.228 Thus, in the incredibly unlikely event that Congress attempted to overrule Brown v. Board of Education, the Court would review the legal issue de novo. (Not that this increase in scrutiny would matter as the Court would strike such a move as unreasonable and outrageous in any event). Note, however, that the proposition that there are contexts in which deference to legislative judgments is a bad idea does not undermine the proposition that there are also contexts in which deference to legislative judgments is a good idea.229 For instance, consistent with the spirit of Carolene Products note 4, the Court might tighten review of statutes that threaten to narrow civil rights but extend Thayer-style deference to those that seek to expand them. Regardless of how one spells out the particulars of this accommodation, so long as one agrees that not all constitutional cases involve legislation that threatens fundamental rights, it should follow that the asserted superiority of the Court’s ability to protect these rights should not squeeze out all room for deference to legislative constitutional constructions. Once this principle is conceded, the details are a matter for negotiation.

D. Brand Xing the Constitution with Legislative Overrides

Whereas the Mead move narrowed the scope of Chevron deference, the Brand X opinion expanded it by clarifying that judicial precedents should not rob agencies of their power to make policy via statutory interpretation. Implicit in its holding was the proposition that the values served by agency flexibility, expertise, and political accountability trump those served by judicial stare decisis and supremacy norms. The question naturally presents itself: Might this same logic apply in a constitutional context? Where Congress has “earned” deference for a constitutional construction by stating it expressly in narrowly-drawn legislation as described above, should that deference apply even in the teeth of contrary Supreme Court precedent? Or should respect for

227 United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (adverting to the possibility that the Court should tighten its review of the factual predicates necessary for legislation to be constitutional where it “restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation” or seems to be directed against “discrete and insular minorities”).
228 Id.
229 Cf. Waldron, The Core Case, supra note 4, at 1405-06 (making the more general observation that, even if Carolene Products note 4’s concern to protect the rights of “discrete and insular minorities” justifies judicial review in some contexts, it should not be read to “leverag[e] a more general practice of judicial review into existence”).
the rule-of-law values inherent in stare decisis in the constitutional context trump deference?

1. The Supreme Court’s (Unsurprising) View of the Matter

The Supreme Court has left no doubt where it stands on this subject, and, again, City of Boerne230 and Dickerson 231 offer the most apt examples. Recall once more that City of Boerne addressed a challenge to RFRA,232 Congress’s attempt to restore Free Exercise protections that the Court had abandoned in Employment Division v. Smith, which held that the Free Exercise Clause does not require the government to have a compelling interest to support laws that substantially burden religious practice but are facially neutral.233 In a bow to judicial supremacy, RFRA does not actually say that Smith construed the Constitution incorrectly. Rather, it extols the policy virtues of the Court’s pre-Smith compelling-interest test and then invokes Congress’s statutory authority to revivify it.234 In the litigation, defenders of RFRA claimed that Congress enjoyed this authority under Section 5 of the Fourteenth Amendment, which authorizes Congress to enforce the equal-protection guarantees of Section 1.235 The Court rejected this argument on the ground that the means that Congress uses to enforce Section 1 must be “congruent[t] and proportiona[te]” with the violations of rights that Congress seeks to fix.236 In the Court’s view, there were insufficient grounds to think that state governments engaged in the kind of religious discrimination that might merit RFRA as a response.237 Therefore, RFRA fell outside Congress’s Section 5 power.

The preceding analysis misses the true heart of the matter, however. Putting niceties to one side, RFRA rebuked the Supreme Court – it was Congress’s “implicit” statement that Smith’s constitutional gloss was just plain wrong.238 Recognizing this, Justice Kennedy observed in City of Boerne that RFRA, rather than being a true remedial measure under Section 5, actually “appear[ed] … to attempt a substantive change in constitutional protections.”239

235 See City of Boerne, 521 U.S. at 516 (noting congressional reliance on the Fourteenth Amendment enforcement power).
236 Id. at 520.
237 Id. at 524.
238 Cf. S. REP. NO. 111, 103d Cong., 1st Sess., 1892, 1898 (1993), reprinted in 1993 U.S.C.C.A.N. 1892 (“For the Court to deem this [compelling-interest test] a ‘luxury,’ is to denigrate ‘[t]he very purpose of a Bill of Rights.’”).
He explained that allowing Congress to make such changes would be disastrous, for:

If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it.” *Marbury v. Madison.* Under this approach, it is difficult to conceive of a principle that would limit congressional power.240

To forestall such disaster,

When the political branches of the Government act against a background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis,* and contrary expectations must be disappointed.241

Thus, judicial precedent, not legislative precedent, must control.

*Dickerson v. United States* makes this point even more dramatically.242

Before *Miranda,* the admissibility of confessions under the Fifth Amendment and Due Process clauses depended upon “voluntariness” determined on the totality of the circumstances.243 In *Miranda,* the Court famously imposed the requirement that police read suspects their “*Miranda* rights” as a prerequisite for statements taken during custodial interrogation to be admissible.244 Two years later, Congress blasted back with 18 U.S.C. ’3501, which purported to reinstate the totality-of-the-circumstances test of the pre-*Miranda* law in federal prosecutions.245 The statute slumbered as administration after administration declined to invoke it.246 But then the Fourth Circuit used it as a

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240 Id. at 529 (citations omitted).
241 Id. at 536.
243 Id. at 432-33.
245 See *Dickerson,* 530 U.S. at 435-36 (quoting 18 U.S.C. ’ 3501; characterizing it as an effort to overrule *Miranda*).
246 See United States v. Dickerson, 166 F.3d 667, 672 (4th Cir. 1999) (observing that no administration had ever attempted to enforce ’3501 and that the DOJ had gone so far as to forbid the local U.S. Attorney from relying on it in the instant case), rev’d, 530 U.S. 428 (2000); Michael Edmund O’Neill, *Undoing Miranda,* 2000 BYU L. Rev. 185, 210-32 (recounting history of executive non-enforcement of ’3501).
ground to reverse a district court’s decision to grant Dickerson’s motion to suppress a statement taken in violation of *Miranda*.247

The Rehnquist Court had long chipped away at the scope of *Miranda*;248 the Chief Justice had a well-known dislike for it;249 and *Miranda*’s constitutional basis had long been mysterious and at least debatable.250 One might therefore have thought that the Court would use *Dickerson* as a chance to overrule *Miranda* and apply the statute. Instead, the Court – in an opinion authored by Chief Justice Rehnquist no less – insisted that *Miranda* was in fact a gloss on the Constitution.251 As result, it was beyond Congress’s power to alter – a point the Court deemed so obvious that it disposed of it in a single sentence: “But Congress may not legislatively supercede our decisions interpreting and applying the Constitution.”252 In short, Chief Justice Rehnquist invoked judicial supremacy to knock out a legislative constitutional construction that he himself believed was *better* than the Court’s own *Miranda* gloss.253

2. A Positive Case for *Brand X* Legislative Overrides

The positive case for allowing *Brand X* overrides rests in part on the now familiar proposition that the legislature should enjoy authority to choose among reasonable constitutional constructions because, *a la Chevron*, it enjoys greater political accountability and information-gathering power than the courts.254 As the Court itself recognized in the administrative context in the actual *Brand X* opinion, if there is a fair case to be made for judicial deference on these grounds in the first place, it does not disappear into thin air just because a court

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247 *Dickerson*, 166 F.3d at 672.
250 See, e.g., Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. ' 3501 and the Overhauling of Miranda*, 85 Iowa L. Rev. 175, 228 (1999) (contending that “the view that *Miranda* rights are not constitutionally required is not some ‘gloss’ or ‘spin’ on the Supreme Court’s opinions; rather it is the way the Supreme Court itself has described *Miranda* rights.”).
252 Id. at 437.
253 Cf. id. at 443 (observing that “[w]hether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now.”)
254 See supra Part V.A (discussing the Thayer-Chevron analogy).
has issued a relevant precedent. The *Chevron*-style advantages should apply **regardless** of whether a congressional constitutional construction contradicts judicial precedent.

A limited legislative power to trump judicial constitutional precedents carries its own particular advantages, however. Note that where Congress actually plays the trump, it will, by definition, be contributing directly and expressly to a very public “constitutional conversation” about some issue potent enough to stir such an expensive effort. To see how this effect might be beneficial, consider the unfolding fate of the executive-initiated NSA program of warrantless electronic surveillance of persons in the United States, which arguably violated both the Foreign Intelligence Surveillance Act (FISA) and the Fourth Amendment – as one court in a rather breathless opinion has already held. The nature of this program is a moving target – in part to try to moot ongoing litigation, the administration now runs the program through some sort of limited FISA-court review. But the potential remains for other courts to rule against the constitutionality of this program or some descendant. Suppose the Supreme Court did so. The widespread belief, even among legislators, that the Court is charge of the Constitution would tend to mute any formal congressional response. Suppose, however, that Congress responded to this invalidation by enacting a statute authorizing the surveillance program. The stare decisis force of the Court’s constitutional precedent would likely trump the statute out of hand. But surely the “reasonability” (and thus constitutionality) of this surveillance program should depend on a solid understanding of the values and expectations of the American people, as well as of the terrorist threat. Given that we live in a representative democracy, these are matters on which it seems obvious that the legislature should be heard – regardless of the fortuitous timing of a Supreme Court opinion. By

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255 National Cable & Telecomm. Ass’n v. Brand X Internet Serv., 545 U.S. 967, 983 (2005); see also supra note 177 (quoting and discussing the Court’s *Brand X* opinion).


258 Cf. U.S. CONST., AM. IV (protecting persons against “unreasonable searches and seizures”).

259 Cf. Georgia v. Randolph, 126 S.Ct. 1515, 1521 (2006) (observing that “[t]he constant element in assessing Fourth Amendment reasonableness in the consent cases … is the great significance given to widely shared social expectations”).

260 Cf. id. at 1525 n.6 (collecting cases in which “exigent circumstances” justified warrantless search).
legitimating legislative responses to the Court’s opinions, Brand X constitutionalism could encourage this sort of engagement – and also reduce the tendency of Congress to pass the constitutional buck (and responsibility) to the Court. Returning to the NSA example, a Supreme Court decision on this matter, rather than stopping discussion, might instead spark very public legislative deliberations over how, in a democracy, we are to balance liberty and security. If such “constitutional conversations” are good, then they provide a reason to allow Brand X overrides.

Another advantage of the Brand X override would flow from the legitimating effect its mere existence would have on Supreme Court constitutional doctrine. The line between a proper judicial holding and improper judicial legislation is, of course, malleable and contestable. That said, a great deal of the jungle of constitutional doctrine carries the unmistakable odor of legislation. The Supreme Court’s efforts to limit punitive damages provide a nice, recent example. In State Farm Mut. Auto. Ins. Co. v. Campbell, the Court indicated that, in general, to avoid running afoul the Due Process Clause, punitive damages should not exceed a 9:1 ratio to compensatory damages or perhaps a 1:1 ratio where compensatory damages are substantial. In a nod to its own judicial nature, the Court did insist that it was not laying down a “bright-line” rule. Still, one need not be a strict constructionist to be somewhat uncomfortable with the Court’s ability to pull numbers out of the (substantive part) of the Due Process Clause.

Under a Brand X approach, Congress, could, if it wished, fashion its own limits on punitive damages (for federal causes of action) that are inconsistent with the Court’s State Farm doctrine, and the Court should uphold them so long as they pass rationality review. Where Congress enjoys such power but does not exercise it, its passive acquiescence is, at the least, evidence that the Court has not violated an overwhelming public judgment sufficiently strong to generate contrary legislation. Thus, the possibility of legislative overrides, even if not invoked, would solve at least part of the “counter-majoritarian” difficulty posed by the current regime in which the Supreme Court is the Supreme Policymaker by virtue of its dominance of constitutional construction.

261 538 U.S. 408, 425 (2003). For a still more recent effort by the Court to fashion a substantive-due-process law of punitive damages, see Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) (holding that punitive damages that punish defendants for harming nonparties violate due process).
262 Id.
263 See Jeffrey Goldsworthy, Judicial Review, Legislative Override, and Democracy, 38 Wake Forest L. Rev. 451, 456-59 (2003) (contending that, even if they are rarely invoked, legislative override provisions, such as Section 33 of the Canadian Charter of Rights, eliminate counter-
3. Defusing the Instability Objection to Brand X Legislative Overrides

One might accept that the benefits of Brand X overrides just described are real enough but still reject this practice on the ground that it would deprive constitutional law of the benefits that flow from stare decisis and judicial supremacy norms. Advantages commonly claimed for stare decisis include: (a) it promotes fairness by assuring that like cases are treated alike; (b) it enables people to plan their conduct in reliance on stable law; and (c) it saves judicial resources by avoiding repetitious reexamination of settled questions. In addition, stare decisis is supposed to ratchet down judicial discretion by requiring courts to honor rules they have developed in the past. Judicial supremacy ensures that one, authoritative voice can determine the Constitution’s meaning, and, by reducing resistance to judicial decisions, enhances legal stability and uniformity as well as the effectiveness of the courts’ dispute-resolution function.

Obviously, there is far more to say (or question) about the virtues of stare decisis and judicial supremacy, but, to be terrifically reductive about the matter, they boil down to the common-sense idea that legal stability is a good thing for many reasons. The proposed Brand X overrides are premised on the common-sense idea that political accountability (and related virtues) are good, too. There is no rigorous way to balance these competing virtues. The inquiry is qualitative, and its outcome necessarily contentious. But, these concessions to agnosticism duly noted, there are good reasons to think that the balance favors allowing reasonable Brand X-style legislative overrides to trump judicial constitutional constructions.

As a threshold matter, the Court’s own balancing of the virtues of judicial deference versus stare decisis in the actual Brand X opinion favored allowing agencies to trump judicial precedents. If we assume the Court struck this balance correctly in the statutory context, it is logical to suspect that it might be equally apt in the constitutional context. An obvious argument against this extension is that there is something so special and important about

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\[\text{Footnotes:}\]

\[\text{264 For discussion of these advantages, see, e.g., Fredrick Schauer, Precedent, 39 Stan. L. Rev. 571, 595-602 (1987).}\]

\[\text{265 Cf. 1 William Blackstone, Commentaries *69 (explaining that obedience to precedent blocks judges from improperly deciding cases according to their own “private judgment[es]”).}\]

\[\text{266 See especially Larry Alexander & Fredrick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1371-81 (1997) (contending that a core function of law is “to settle authoritatively what is to be done,” and that to further this settlement function, officials should defer to the Supreme Court’s resolution of constitutional ambiguities).}\]

\[\text{267 See supra Part IV.C (discussing National Cable & Telecomm. Ass’n v. Brand X Internet Serv., 545 U.S. 967 (2005)).}\]
constitutional interpretation that it must be reserved for the courts. But, notwithstanding the Constitution’s semi-sacred status, some questions of statutory construction have far broader import than many constitutional questions. This term, for instance, the Court has heard arguments concerning whether the Clean Air Act requires the EPA to regulate automobile emissions to curb global warming.268 Last term, in the Georgia v. Randolph case discussed above, the Court determined that an inhabitant of a home can block a police search even if another inhabitant gives consent.269 Randolph is not trivial, but it is not the more important of the two cases.

The Court’s own stare decisis doctrine and practice also undermine the “rule of law” case against Brand X overrides. The Court often explains that stare decisis does not operate with full force in the constitutional context as, because no one else can revise the Court’s constitutional interpretations, it must be readier to find and correct its own mistakes.270 In this spirit, it is black-letter stare-decisis doctrine that the Court will overrule constitutional precedents that have proven to be “unworkable” or “badly reasoned.”271 And, true to its word, the Court does in fact overrule its constitutional precedents fairly frequently.272 It is far from obvious that permitting the Congress, like the Court itself, to “overrule” a precedent on occasion would cripple a constitutional system that already tolerates a considerable amount of legal instability.273

Another, very closely related reason not to fear the corrosive impact of Brand X overrides on the rule-of-law is that Congress would likely invoke this

268 Massachusetts v. Environmental Protection Agency, Docket No. 05-1120 [update after opinion issued].
270 Agostini v. Felton, 521 U.S. 203, 235-36 (1997) (collecting authority for the proposition that stare decisis is “at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions”). For a provocative argument that the Supreme Court’s precedents should genuinely bind the Court itself, see Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. PA. J. CONST. L. 155 (2006).
272 See, e.g., Steven G. Calabresi, The Tradition of the Written Constitution: Text, Precedent, and Burke, 57 ALA. L. REV. 635 (2006) (discussing ten major constitutional cases since 1937 in which the Supreme Court overruled precedent and identifying many others).
273 Note also the ironic theoretical possibility that Brand X overrides could strengthen the operation of judicial stare decisis norms and thus tend to stabilize constitutional law as a whole. Taking the Court at its word, it applies a weaker form of stare decisis to its constitutional decisions because no one else can revise them. See supra note 270 (citing authority for this point). Allowing Congress a limited power to trump Supreme Court constitutional interpretations would reduce the force of this justification for weak stare decisis.
power only rarely. It is, of course, true that legislating is easier than amending the Constitution. But that is not saying much because amending the Constitution is close to impossible. Passing legislation is, by constitutional design, hard to do. The suggested Brand X model makes it still harder by extending its form of deference only to the clearest legislative signals concerning constitutional meaning – express determinations of constitutionality contained within narrowly drawn statutes. Any effort to trump a Supreme Court constitutional construction by such means would naturally be controversial and attract substantial attention. For all these reasons, Congress would likely only attempt such overrides when backed by overwhelming public sentiment.274 Again, Congress’s rebuke in RFRA to the Court’s Smith decision provides the archetypical case

Still, it must be conceded that acceptance in principle of Brand X overrides would tend to undermine the judicial-supremacist cultural norm that the law is whatever a majority of the Court says it is. Undermining this principle could have effects outside disputes with Congress. For instance, the seminal case in the judicial-supremacy canon, Cooper v. Aaron,275 arose out of Governor Faubus’ instigation of violent resistance to Brown v. Board of Education.276 A broadly-based public sentiment that the Supreme Court’s word is law must strengthen the Court’s hand in such disputes. But it is not obvious that the country is best off when the Court enjoys maximum power. Although it is certainly true that the Court acted as a powerful force for good in, for instance, Brown, history demonstrates beyond doubt that it does not always “do the right thing.” Also, undermining the norm of judicial supremacy would not eliminate the fact that, as Madison observed almost two centuries ago, the people will tend as a rule to regard the Court as the most trustworthy interpreter of the Constitution.277 Even deprived of the cloak of judicial supremacy, the Court would continue to enjoy great power to persuade others to follow its constitutional lead.

Summarizing, allowing reasonable legislative constitutional constructions to trump Supreme Court constitutional precedents would inject popular sentiment into the process of constitutional construction in a controlled and

274 Cf. Tushnet, Taking the Constitution, supra note 4, at 28 (observing that “[l]egislative inertia is a powerful force in general,” and that it is an open empirical question whether courts or legislatures oscillate more frequently on fundamental questions).
275 358 U.S. 1, 17-18 (1958); see supra Part III.A for a discussion of the judicial supremacy rhetoric of Cooper.
277 See supra text accompanying note 73 (quoting Madison’s assessment that, for a variety of institutional reasons, the public will tend to trust the constitutional constructions of the judiciary more than those of the other branches).
limited way. It would not, however, substantially destabilize constitutional law because Congress would only invoke this power rarely and when backed by substantial public support. Even though Congress would not use this power often, accepting it in principle would ameliorate the counter-majoritarian difficulty that the Court uses constitutional interpretation as a means to legislate on contentious policy issues. Acceptance of the Brand X model in the constitutional context would naturally tend to undermine the norm of unthinking judicial supremacy. It would not, however, deprive the Court of its leading role as the most important and persuasive expositor of the Constitution.

E. But Wait Just a Second: Judicial Supremacy Is Popular

The preceding subsection defended Brand X constitutionalism from the charge that it would unduly destabilize constitutional law by claiming that Congress would only rarely invoke it. One reason Congress would hesitate to tangle with the Court is that the idea that the judiciary has a special, definitive role to play in constitutional interpretation has substantial public support. If the Court made a regular habit of adopting constitutional rules that a clear majority of the country found detestable and irrational, this support would no doubt fade. Political scientists claim that the Court avoids this fate by not straying far or for long from dominant public opinion. Thus, the public supports the Court, and, notwithstanding life-tenure, the Court does not offend the public – at least not so often as to eliminate the public’s support.

The public’s broad support for the Court links to what might be the deepest objection to Brand X constitutionalism. At this Article’s outset, it described its proposed model as an attractive means to implement a mild, incremental form of popular constitutionalism based on the logic of the Court’s own doctrine. This claim related to the core rationale for Brand X constitutionalism, which is that: (a) choosing among reasonable constitutional constructions requires policy and value choices; and (b) due to its representative nature, Congress, not the Supreme Court, should make such choices. If, however, the public prefers that the Court rather than Congress make the policy choices inherent in constitutional construction, then Brand X constitutionalism would defy rather than implement the public’s judgment. In short, Brand X constitutionalism is vulnerable to the charge that it is unpopular.

278 Barry Friedman, Judging Judicial Review: Marbury in the Modern Era, 101 Mich. L. Rev. 2596, 2631 (2003) (discussing social science finding that a large majority of people believe that “the Supreme Court has final authority to say what the Constitution means”).

279 See id. at 2606 (“Although the modeling is not perfect, and the empirical tests have their failings, the wealth of existing evidence suggests that most of the time judicial decisions fall within the range of acceptability that one might expect of the agents of a popular government.”).

280 Cf. id. at 2598-99 (suggesting that the existing practice of judicial review amounts to
Two answers to this powerful objection present themselves. One is that, in any case where Congress manages to pass narrowly-drawn legislation that includes an express constitutional construction, this particular construction must have, by definition, sufficient public support to make it through bicameralism and presentment. Thus, even if the public, generally speaking, supports the idea that the Supreme Court should take the lead in constitutional construction, the existence of trumping legislation suggests an exception for a particular circumstance.

Another possibility lies in determining who has the onus to push for adoption of Brand X constitutionalism in the first place. It is within the realm of metaphysical possibility that the Court, overwhelmed by arguments for popular constitutionalism in general and this Article in particular, might adopt Brand X constitutionalism of its own accord. On the off chance anyone was considering doing so, no one should hold their breath awaiting such judicial self-abnegation.

Alternatively, Congress might make the first move and push the Court to adopt Brand X constitutionalism by passing narrowly-drawn legislation that expressly states that the Court should defer to reasonable legislative constitutional constructions that are expressly stated in narrowly-drawn legislation. Call this statute the Brand X Constitutional Construction Act (BXCCA). Congress will adopt the BXCCA only if a strong enough public judgment develops in favor of it. (One small part of the process of developing this support, incidentally, lies in criticizing judicial supremacy and explaining that it is not a necessary aspect of American constitutionalism – as scholars such as Larry Kramer, Mark Tushnet, Jeremy Waldron, Michael Stokes Paulsen, and others have done in recent years.281) Passage of the BXCCA would thus signify that Brand X constitutionalism was, indeed, “popular” constitutionalism. At least until the public and the legislature send this signal, however, one must expect the Supreme Court to persist in its supremacist ways.

Of course, judicial review of the BXCCA would itself present thorny constitutional issues regarding the degree to which Congress can control judicial deference and stare decisis norms in the constitutional context. The thorniest might be the intriguing regress problem of determining whether the Court should extend Brand X deference to a legislative constitutional construction expressly demanding Brand X deference for express legislative constitutional constructions. To explore these issues fully would require a

281 See supra note 4 (citing to works by these popular constitutionalists).
much longer Article. But for the present, let these few observations suffice to
demonstrate that the BXCCA is not a frivolously unconstitutional idea. First,
Congress has considerable constitutional control over federal court
jurisdiction. The existence of a “greater” power to strip jurisdiction does not
imply the existence of a “lesser” power to insist that the Court honor
congressional constitutional interpretations that the Court itself deems
reasonable. It does, however, put the relatively innocuous nature of this lesser
power into perspective. Second, for hundreds of years Congress has exercised
considerable control over the manner in which the federal courts exercise their
judicial power to find fact and determine law. Ubiquitous statutory
standards of review (at least for matters of fact and policy) are one
manifestation of this historical practice. Another provocative and recent
example of such control can be found in the Anti-Terrorism and Effective
Death Penalty Act (AEDPA), which in effect requires federal courts to defer to
state-court constitutional interpretations that are not clearly erroneous.
Fourth, although the matter is of course controversial, substantial scholarly
arguments have been made that Congress may regulate or eliminate the
operation of judicial stare decisis.

282 U.S. Const., art. III, §§ 1, 2.
283 See Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey? 109 Yale L.J. 1535, 1582-90 (2000) (documenting longstanding and well-settled congressional control over federal courts’ “rules of procedure; rules of evidence; statutes prescribing the res judicata effect to be accorded judgments of other courts; statutes prescribing the level of deference to be accorded findings of fact by other courts; statutes prescribing the level of deference to be accorded to conclusions of law by administrative agencies; statutes prescribing choice-of-law rules and rules of decision; statutes mandating or forbidding traditional equitable remedies; and statutes abrogating judicially developed rules of prudential standing.”).
285 In AEDPA, Congress blocked federal courts from issuing writs of habeas corpus to state prisoners based upon claims that a state court has heard on the merits “unless the adjudication of the claim … resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). This provision presupposes that the proper way to figure out how to apply the Constitution is to read the Supreme Court’s opinions, and it does not block the Supreme Court from creating generally applicable, prospective constitutional glosses. It does, however, create a system in which the federal courts, including the Supreme Court itself, cannot apply their “best” understanding of the Constitution in a given case but instead must hew to whatever constitutional gloss has been “clearly established” in earlier cases. By normalizing deferential judicial review of constitutional interpretations in as critical a context as habeas, AEDPA may subtly undermine the proposition that the Court should apply independent judgment to issues of constitutional interpretation in other contexts.
286 See Paulsen, supra note 283, at 1590 (claiming Congress has the power to eliminate stare decisis in the federal courts); John Harrison, The Power of Congress over the Rules of Precedent,
CONCLUSION

In recent years, the Supreme Court’s claim to be the final, definitive interpreter of the Constitution has come under sustained attack from across the political spectrum from scholars pushing for a more “popular” constitutionalism. This Article contributes to “popular constitutionalism” by deploying recent developments in the Supreme Court’s own administrative-law doctrine against it. Together, these Chevron-related developments form the Brand X model, which stands broadly for the proposition that, where an agency uses transparent, deliberative means to adopt a reasonable interpretation of a statute it administers, the courts should defer to this interpretation regardless of whether it contradicts judicial precedent. Translating this Brand X model into a constitutional setting, this Article claims that courts should uphold reasonable, explicit constitutional constructions that are embedded in focused federal legislation even in the teeth of contrary Supreme Court precedent. In effect, this proposal would require the Supreme Court to extend about as much deference to select legislative precedents as it now indulges to its own judicial precedents. Adopting this approach would expand in a limited and controlled way the voice of the public, Congress, and the President (though the veto power) in constitutional construction. The most fundamental reason to pursue this change is that choosing among reasonable constitutional constructions is a political task that depends on the decision-makers’ value judgments and assessments of legislative fact. In a representative democracy, the problem of making policy choices within the space of legal reason should be committed to public judgment rather than nine life-tenured judges.

50 Duke L. J. 503, 540 (2000) (concluding that Congress may regulate stare decisis to achieve systemic ends (e.g., to enhance legal stability or judicial economy)). But see Richard Fallon, Stare Decisis and the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. Rev. 570, 591-93 (2001) (claiming that judicial stare decisis norms enjoy constitutional status and are immune from congressional control).

287 See, e.g., Kramer, supra note 4, at 248 (“The Supreme Court is not the highest authority in the land on constitutional law. We are.”); Tushnet, supra note 4, at 194 (“As Lincoln said, the Constitution belongs to the people. Perhaps it is time for us to reclaim it from the courts.”).