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# The *Brand X* Constitution

Richard Murphy\*

## 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 voices of the public, Congress, and the President (through 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

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within the space of legal reason should be committed to public judgment rather than nine life-tenured judges.

## The *Brand X* Constitution

“. . . Congress may not legislatively supersede our [Supreme Court] decisions interpreting and applying the Constitution.”<sup>1</sup>

“According to today’s opinion, the *agency* is . . . free to take . . . action that the Supreme Court found unlawful.”<sup>2</sup>

### I. INTRODUCTION

The first quote above comes from 2000’s *Dickerson v. United States*, in which the Supreme Court recently reminded everyone that the Constitution means whatever a majority of the Court last said it means.<sup>3</sup> 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 hail 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.<sup>4</sup> As *Dickerson* indicates, however, a growing pile

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1. *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (emphasis added).

2. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1017 (2005) (Scalia, J., dissenting) (emphasis added).

3. *Dickerson*, 530 U.S. at 437.

4. See 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.); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 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.”); 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”); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1359–78 (2001) (contending that Congress and the courts bring different strengths to constitutional interpretation and that the degree of deference the Court extends to Congress should depend on a variety of context-specific factors); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 221–22 (1994) (contending that the President has independent authority to interpret the Constitution and can implement this power by declining to enforce judicial decrees he deems unconstitutional); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation*

of books and law review articles condemning the Court's supremacist ways has not stopped the Court from reiterating that it is in charge of constitutional meaning.

One of the most enjoyable 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.<sup>5</sup>

We might call this model *Brand X* constitutionalism in honor of the source of the second opening quote above, 2005's *National Cable & Telecommunications Association v. Brand X Internet*

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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); 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); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 846 (2002) (suggesting that where there is room for reasonable disagreement over constitutional meaning, "the judiciary's most useful role may be in framing constitutional disputes for extrajudicial resolution and in enforcing the principled decisions reached elsewhere rather than in autonomously and authoritatively defining constitutional meaning").

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. MARSHALL 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. U. 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. 215, 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.

*Services*.<sup>6</sup> In *Brand X*, the Court held—de facto if not quite de jure—that agencies can trump judicial precedents thanks to the force of *Chevron* deference, which requires courts to defer to an agency’s reasonable construction of a statute it administers under certain conditions.<sup>7</sup> Read in light of its major precursors,<sup>8</sup> *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.

Translating this *Brand X* principle into constitutional law, this Article contends that 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 that the Court extends to its own *judicial* precedents under current doctrine.<sup>9</sup> The most spectacular application of this principle would come where Congress enacts (with the consent of the President or the overriding of a veto<sup>10</sup>) a reasonable constitutional construction

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6. *Brand X*, 545 U.S. 967.

7. 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.

8. The two most important *Brand X* precursors are *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) and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984) (holding that courts should defer to an agency’s reasonable resolution of ambiguity in a statute the agency administers). 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.

9. 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, 827 (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).

10. A quick 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 Congress overriding a veto.

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.<sup>11</sup>

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 of years of informed commentary insisting 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

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For exploration of a more aggressive approach to executive power to construe the Constitution, see generally Paulsen, *supra* note 4, at 262 (claiming that, just as the courts can engage in "judicial review" of the constitutionality of the other branches' actions, so does the President enjoy an analogous power of "executive review").

11. This Article's proposed legislative trump of judicial constitutional doctrine falls in the middle of a spectrum of proposals regarding political-branch power to affect constitutional doctrine. In essence, this Article proposes that the courts should, under limited circumstances, defer to legislative constitutional interpretations that the courts deem reasonable—even in the teeth of contrary precedent. More aggressive, "strong override" proposals leave the legislature, not the courts, with the final word on what is "reasonable." See, e.g., Robert Justin Lipkin, *Which Constitution? Who Decides?: The Problem of Judicial Supremacy and the Interbranch Solution*, 28 CARDOZO L. REV. 1055, 1059–60 (2006) (contending that Congress, not the Court, should have the final word in constitutional interpretation); 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) [hereinafter *Weak-Form Judicial Review*]. 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).

Professor Steven G. Calabresi, by contrast, has recently proposed a weaker form of override. He submits that the Court should defer to reasonable judgments by the political branches that "the costs of following precedent outweigh the benefits of overruling it." Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 344 (2005). The effect of such deference would be to wipe the stare-decisis slate clean and require the Court to determine the constitutional question at issue "on its merits according to the text of the Constitution." *Id.* Professor Calabresi rejects, however, the Thayerian view, embraced by this Article, that the Court, in addition to *not* deferring to its own precedents, should actively defer to those of Congress. *Id.*

Justice Marshall all made statements to this effect.<sup>12</sup> Writing in this same spirit nearly one hundred years later, James Bradley Thayer famously contended that courts should apply a deferential “clear error” standard when reviewing congressional legislation for constitutionality.<sup>13</sup> Hopping to our own centuries, as mentioned above, a backlash against claims of judicial supremacy has spawned a burgeoning field of popular constitutionalism in recent years.<sup>14</sup> Moreover, on a comparative constitutional note, a number of modern democracies have adopted legal regimes that assign the determination of fundamental rights to a “conversation” between the legislative and judicial branches rather than to a judicial monologue.<sup>15</sup> Considered against this impressive but very incomplete backdrop, *Brand X* constitutionalism is merely an obvious, cautious means to implement a slightly more popular approach to constitutional construction.

*Brand X* constitutionalism hoists the Supreme Court on its own administrative-law petard. Agency statutes are often riddled with ambiguities. *Chevron* famously taught that resolution of such ambiguities depends on the decision-makers’ policy choices and related assessments of legislative fact.<sup>16</sup> An agency operating in its own regulatory domain should enjoy greater policy expertise and political legitimacy than the generalist, unelected courts.<sup>17</sup> Where an agency develops an interpretation of a statute it administers using open, transparent procedures designed to promote deliberation, it tends to maximize these comparative advantages. Under such circumstances, a reviewing court should not impose its own

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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 (1893) (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 ever written on American constitutional law”).

14. See *supra* note 4 (collecting discussions of popular constitutionalism).

15. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 709, 719–39 (2001) (describing Canadian, British, and New Zealand constitutional regimes that create a “middle ground” between legislative and judicial supremacy for the purposes of defining and implementing fundamental rights).

16. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (framing agency statutory construction within the zone of legal reasonability as an exercise in policymaking implicating agency technical expertise).

17. *Id.* at 865–66.



“favorite” interpretation on an agency; rather, it should defer to the agency’s statutory construction so long as it falls within the space where reasonable minds can disagree.<sup>18</sup>

Mapping the preceding administrative law into a constitutional context suggests that the courts should defer to at least some congressional interpretations of the Constitution so long as they are reasonable. The principle that resolving legal ambiguity requires policymaking and fact-finding would seem to have just as much force when applied to a written constitution as to less basic statutory law.<sup>19</sup> Thanks to its electoral mandate, Congress can lay claim to greater political authority for policymaking than the courts. Moreover, administrative law has long acknowledged that legislatures should be better able than courts to determine broadly applicable, values-infused “legislative facts” of the sort that must inform policy judgments.<sup>20</sup> Where Congress actually deploys these strengths in adopting a given constitutional interpretation, the courts should, in the spirit of Thayer and *Chevron*, defer to that interpretation so long as it is reasonable.

To apply the preceding principle, however, courts need a standard for determining whether Congress has “earned” deference by deploying its interpretive advantages. This standard should be simple and should avoid intrusive, unseemly investigation into the quality of congressional procedures or deliberations. In light of these

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18. See *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001) (indicating that agency interpretations vetted through notice-and-comment rulemaking or formal adjudication should generally net *Chevron* deference as these procedures promote openness and deliberation).

19. For discussion of the roles that legislative fact-finding and intertwined policy judgments play in judicial constitutional construction, see generally David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 550 (1991) (“Traditionally, constitutional fact-finding served as a vehicle for the Court to reach normative judgments in interpreting the Constitution.”); see also Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 143–45 (2003) (discussing judicial practice of using “empirical data to assist . . . in choosing from among possible constitutional rules of decision”).

20. See 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”); David Shapiro, *Courts, Legislatures, and Paternalism*, 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” (citing Kenneth Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942))).

requirements, this Article suggests that courts reviewing the constitutionality of congressional legislation should apply *Chevron*/*Thayer*-style deference only to express findings of constitutionality contained within narrow, single-subject bills and deny such favored treatment to provisions buried within complex statutes suited for logrolling.<sup>21</sup> With this approach, Congress would earn deference by adopting constitutional constructions through transparent means that maximize opportunity for focused deliberation and create clear signals of majority will.<sup>22</sup>

By requiring legislative clarity and focus as conditions for deference, *Brand X* constitutionalism might promote more meaningful constitutional deliberations in Congress.<sup>23</sup> As Thayer saw the matter, the judicial practice of using independent judgment to determine the constitutionality of federal statutes infantilizes congressional deliberations.<sup>24</sup> He seemed to trust that, were the Court 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.<sup>25</sup> *Brand X* constitutionalism is less trusting and, by seeking affirmative evidence that legislative constitutional interpretations *deserve* deference, creates an incentive for Congress to subject its constitutional interpretations to focused deliberation.<sup>26</sup>

21. See *infra* Part V.A.3.

22. For further exploration of reforms Congress might adopt to justify Thayer-style deference to its constitutional interpretations, see generally Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1307–30 (2001) (suggesting reforms designed to encourage more focused committee and floor deliberation on constitutional issues).

23. For an essay suggesting that congressional constitutional deliberations could use improvement, see Suzanna Sherry, *Irrresponsibility Breeds Contempt*, 6 GREEN BAG 2D 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”).

24. Thayer, *supra* note 13, at 155–56.

25. *Id.*; 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”).

26. Cf. Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. (forthcoming 2008) (manuscript at 17, 41), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1019558#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019558#PaperDownload) (“[C]ourts should seriously consider the views of the other branches when there is evidence that they have thoughtfully and honestly considered the constitutional issue at hand.”).

Adopting the *Brand X* model would both mark and encourage a sea-change in attitudes toward the role of extra-judicial actors in constitutional interpretation. Looking to the recent past, in *Dickerson v. United States*, the Court rejected a federal statute that attempted to undo the Court's *Miranda* opinion by mandating that federal courts use a totality-of-the-circumstances test to determine the "voluntariness" of confessions.<sup>27</sup> 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.<sup>28</sup> This same dynamic can be seen in the fate of the Religious Freedom Restoration Act of 1993 (RFRA),<sup>29</sup> 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 *Employment Division v. Smith*.<sup>30</sup> In *City of Boerne v. Flores*, the Court condemned RFRA as a legislative usurpation of the Court's final authority to determine constitutional meaning.<sup>31</sup> *Brand X* constitutionalism would make crystal clear that such congressional efforts to influence operative constitutional meaning can be 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 will be determined by a grand conversation among all three branches of the federal government, the states, and the public itself.<sup>32</sup> The Court's claim to

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27. *Dickerson v. United States*, 530 U.S. 428, 431-33 (2000) (ruling 18 U.S.C. § 3501 (1994) an unconstitutional attempt to undo the warning requirements the Court imposed in *Miranda v. Arizona*, 384 U.S. 436 (1966)).

28. *See id.* at 433, 437.

29. 42 U.S.C. §§ 2000bb-1(b)(2) (2000) (requiring compelling interest as justification for government actions that substantially burden religious exercise).

30. 494 U.S. 872 (1990) (overruling *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963)).

31. 521 U.S. 507, 536 (1997).

32. *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 W. 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

interpretive supremacy tends, however, to stifle or misdirect such conversation.<sup>33</sup> 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.<sup>34</sup>

The way ahead: Part II will establish an historical pedigree for *Brand X* constitutionalism by examining a small portion of the vast legal commentary from the early days of the Republic contending that extra-judicial actors should play an important role in determining the Constitution's operative meaning.<sup>35</sup> Part III examines the modern Supreme Court's dramatically different view that it alone has the final word in determining constitutional meaning. Part IV contrasts the Court's claim to constitutional interpretive supremacy with its much more deferential *Brand X* 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,"<sup>36</sup> the power of Congress to protect the "Free Exercise" of religion,<sup>37</sup> and

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ultimately helps determine constitutional meaning, and that judicial review impedes but does not entirely block this conversation); cf. *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).

33. Cf. Mark Tushnet, "Shut Up He Explained," 95 NW. U. L. REV. 907, 917–20 (2001) (describing the Supreme Court as a "conversational bully" that uses judicial supremacist rhetoric to block constitutional conversation).

34. Cf. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 520–35 (2006) (describing development of a new constitutional regime, the "National Surveillance State," in response to changing technology and security concerns).

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

36. See *infra* text accompanying notes 234–38 (explaining how *Brand X* model might have encouraged more transparent, focused legislative deliberations on the habeas-stripping provisions of section seven of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in various sections of 10 U.S.C. §§ 948–50 and in 28 U.S.C. § 2241(e)(1))).

37. See *infra* text accompanying notes 239–42 (identifying Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(b)(2) (2000) as an example of the sort of focused congressional effort to trump judicial constitutional precedent that would warrant deferential treatment under the proposed *Brand X* model).

control of punitive damages awards through the Due Process Clause.<sup>38</sup>

## 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, 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 to use it as the basis to invalidate legislation.<sup>39</sup> 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.

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38. See *infra* text accompanying notes 247–49 (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).

39. See generally Saikrishna Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 926–81 (2003) (canvassing scores of remarks from framers and ratifiers of the Constitution to demonstrate an early consensus that courts were authorized to review legislation for constitutionality).

*1. Deference as space to disagree agreeably*

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.<sup>40</sup> He identified nearly a score of judicial opinions, several from early Supreme Court Justices, subscribing to this “well-established” rule.<sup>41</sup> 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.”<sup>42</sup> He repeated this point in 1798’s *Calder v. Bull*,<sup>43</sup> in which Justice Iredell, writing in a separate opinion, agreed that the Court should void a law only “in a clear and urgent case.”<sup>44</sup> 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 [C]onstitution, not a doubtful and argumentative implication.”<sup>45</sup> Also in *Cooper*, Justice Washington explained, “The presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly demonstrated.”<sup>46</sup> And, to top things off, in 1819’s *Trustees of Dartmouth College 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 [C]onstitution.”<sup>47</sup> 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.<sup>48</sup>

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40. Thayer, *supra* note 13, at 139–40.

41. *Id.* at 140–46 (collecting authority).

42. 3 U.S. (3 Dall.) 199, 237 (1796).

43. 3 U.S. (3 Dall.) 386, 395 (1798) (“I will not decide any law to be void, but in a very clear case.”).

44. *Id.* at 399 (Iredell, J., dissenting).

45. 4 U.S. (4 Dall.) 14, 19 (1800).

46. *Id.* at 18 (Washington, J., concurring).

47. 17 U.S. (4 Wheat.) 518, 624 (1819).

48. See SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 59–65 (1990) (contending that during the period from the Ratification through *Marbury*, a

Much later, Thayer's own advocacy helped revivify this support—his allies and disciples on the topic of judicial review included Justices Holmes, Brandeis, and Frankfurter.<sup>49</sup> 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.<sup>50</sup>

## 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,

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

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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"; 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.").

49. Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 8 (1993) (quoting ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 25 (Max Freedman ed., 1967)).

50. 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, "[i]t is rare . . . not to find anywhere in the Court's opinion the usual, almost formulaic caution that we owe great deference to Congress's view that what it has done is constitutional;" but also explaining why this deference principle did not apply in *Morrison* itself).

liquidated and ascertained by a series of particular discussions and adjudications.<sup>51</sup>

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 *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.<sup>52</sup>

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

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51. THE FEDERALIST NO. 37, at 226 (James Madison) (Scigliano ed., 2000).

52. Letter from James Madison to Judge Roan (May 6, 1821), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 217, 221 (Philadelphia, J.B. Lippincott & Co. 1867) [hereinafter, LETTERS AND OTHER WRITINGS] (emphasis added).



legislative precedent flows from the tacit approval of those 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.<sup>53</sup>

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.<sup>54</sup> 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

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53. Letter from James Madison to James Monroe, President of the United States (Dec. 27, 1817), in 3 LETTERS AND OTHER WRITINGS, *supra* note 52, at 54, 55–56; *see also* Letter from James Madison to N.P. Trist (Dec. 1831), in 4 LETTERS AND OTHER WRITINGS, *supra* note 52, 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 [B]ank could plead, was an evidence of the [P]ublic [J]udgment necessarily superseding individual opinions”).

54. 5 U.S. (1 Cranch) 299, 309 (1803).

1801 through a lame duck Congress.<sup>55</sup> 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 brought back circuit-riding in the Judiciary Act of 1802.<sup>56</sup> The question of the constitutionality of this Republican effort to undo the Federalists’ court-packing arrived at a Supreme Court led by Chief Justice Marshall, whom President Adams had packed into place in the closing hours of Federalist rule.<sup>57</sup> Chief Justice Marshall and arch-Federalist Justice Chase favored defying the 1802 Act’s command to resume circuit riding as constitutionally invalid.<sup>58</sup> But the Justices did not all agree on this course of action, and, in the absence of a united front, submission was the only option.<sup>59</sup> 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.<sup>60</sup>

A Congress full of the Constitution’s drafters had passed the Judiciary Act of 1789,<sup>61</sup> 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,

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55. Act to Provide for the More Convenient Organization of the Courts of the United States, ch. 4, 2 Stat. 89 (1801) (repealed 1802).

56. Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States, ch. 8, 2 Stat. 132 (1802).

57. For the story behind Chief Justice Marshall’s appointment, see BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 122–28 (2005).

58. *Id.* at 163–69.

59. *Id.* at 169–70.

60. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (emphasis added).

61. Judiciary Act, ch. 20, 1 Stat. 73 (1789).

twelve years of "practice and acquiescence" settled that circuit riding was constitutional.<sup>62</sup>

Chief Justice Marshall himself spoke to the importance of extra-judicial constitutional precedents in *M'Culloch v. Maryland*, which was his turn to speak to the constitutionality of the Bank of the United States.<sup>63</sup> Commenting on the Bank's long progress through the other branches of government, the Chief Justice explained,

The bill for incorporating the [B]ank 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.<sup>64</sup>

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 Chief Justice Marshall's suggestion that legislative and executive determinations, rendered after extensive and expert debate, were themselves evidence of the Bank's constitutionality.<sup>65</sup>

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62. Chief Justice Marshall himself, however, vehemently disagreed with the outcome of *Smart* until "the end of his days." ACKERMAN, *supra* note 57, at 164.

63. 17 U.S. (4 Wheat.) 316 (1819).

64. *Id.* at 402.

65. 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. Int'l Bus. Machs. 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) (following congressional constitutional construction since the Founding entitled to the "greatest respect"); *United States v. Curtiss-Wright Exp. 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

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 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 speak to constitutional matters only 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 is: How much weight should the other branches give to judicial precedents and decrees? In *Worcester v. Georgia*, 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.<sup>66</sup> According to a famous bit of apocrypha, President Jackson responded, "John Marshall has made his decision; now let him enforce it."<sup>67</sup> Regardless of whether President Jackson ever really made this remark, 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

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its provisions.") (citations omitted); *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) (asserting 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) (stating constitutional construction of Congress dating back to 1790 "almost conclusive"); *Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264, 421 (1821) ("[A] concurrence of statesmen, of legislators, and of judges, in the same construction of the [C]onstitution, may justly inspire some confidence in that construction.").

66. 31 U.S. (6 Pet.) 515, 520 (1832).

67. H.W. BRAND, *ANDREW JACKSON: HIS LIFE AND TIMES* 493 (2005) (noting that Horace Greeley "put words in Jackson's mouth" in ascribing this quote to Jackson but that it neatly captured his attitude).

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.”<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> In the absence of a judicial order based on a given constitutional 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. 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.<sup>71</sup>

It may come as little surprise that various *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

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68. See Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 110 (2004) (contrasting judicial supremacy and departmentalism).

69. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (asserting that Congress cannot override Supreme Court constitutional interpretations).

70. See, e.g., Paulsen, *supra* note 4, at 221 (“The power 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.”).

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

Jefferson, Madison, and Lincoln. 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.<sup>72</sup>

Like his ally Jefferson, Madison took the departmentalist view that the Constitution itself did not exalt one of the three “co-ordinate” branches 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 meaning. At times, Madison thought this advantage unhealthy for the body politic,<sup>73</sup> but, by late in his life in 1834, he had apparently come to peace with it. In that year, he penned a five-hundred-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.”<sup>74</sup> 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

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72. 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, *supra*, 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.”).

73. 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 decision, 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.”).

74. Unaddressed Letter of 1834, in 4 LETTERS AND OTHER WRITINGS, *supra* note 52, at 349.

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 department, 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 . . . .<sup>75</sup>

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 to accept the interpretations of the judiciary—at least when it is competently staffed.

The Supreme Court's second major invocation of judicial review to invalidate federal legislation, *Dred Scott v. Sandford*,<sup>76</sup> prompted Lincoln, too, to espouse a form of departmentalism. 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.<sup>77</sup> The Court thus injected 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 that (a) not all precedents are created equal as some are more persuasive than others; and (b) precedents gather force as they accumulate.<sup>78</sup> Any particular precedent may constitute an aberration rather than proper evidence of the "true" state of the law. By this standard, *Dred Scott* was

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75. *Id.* at 349–50.

76. 60 U.S. (19 How.) 393 (1856).

77. *Id.* at 426–27, 452.

78. DANIEL FARBER, LINCOLN'S CONSTITUTION 178 (2003).

dubious as it had been produced by a partisan, divided court and had overruled prior government practice.<sup>79</sup> 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.”<sup>80</sup>

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. There, 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.”<sup>81</sup> Nevertheless,

the 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 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.<sup>82</sup>

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.

### *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. 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

79. *Id.*

80. *Id.* (quoting Speech at Springfield, Illinois (June 26, 1857), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 401 (Roy P. Basler ed., 1953–55)).

81. *Id.* at 178–79 (quoting First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 80, at 268).

82. *Id.*



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.<sup>83</sup>

### 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.<sup>84</sup> 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.<sup>85</sup> Thus, the Court enjoys the attribute of sovereignty that it can bind everyone but itself.

Characterization of the Court's judicial deference doctrine and practice is daunting because the concept of deference is fuzzy,

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83. *Cf.* KRAMER, *supra* note 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”).

84. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

85. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“[W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent.”) (citation and quotation marks omitted).

because its application requires subjective judgments that are easy to second-guess, and because the relevant case law is complex and evolving.<sup>86</sup> These warnings duly noted, the Court does not, as a general rule, defer to others on “legal” issues of constitutional interpretation.<sup>87</sup> It has instead used its independent judgment to create a marvelously complex and intimidating spider web of esoteric constitutional doctrine. Constructing this doctrine often requires the Court to make determinations of “legislative fact” and intertwined policy judgments.<sup>88</sup> A moment’s scrutiny of the Court’s opinions reveals that it often independently “finds” such “facts” with striking casualness.<sup>89</sup>

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86. 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 “we must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding”) (citation and quotation marks omitted). In keeping with the dichotomy suggested by *Carolene Products*, 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. Carolene Prods. Co.*, 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., *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 “congruen[t] and proportion[ate]” with the injuries it seeks to prevent or remedy); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (striking a statute for exceeding congressional Commerce Clause power for the first time in fifty years). This tightening of judicial control has sparked considerable criticism. See, e.g., Buzbee & Schapiro, *supra*, 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).

87. See generally *infra* Part III.B.1.

88. “[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, 403–04 (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 19; Zick, *supra* note 19.

89. See *infra* Part III.B.2.

*A. Judicial Supremacy and Constitutional Construction*

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*,<sup>90</sup> which arose out of efforts to implement *Brown v. Board of Education*.<sup>91</sup> 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.'<sup>92</sup>

Notwithstanding the noble purpose behind this passage, its reading of *Marbury* grossly overreaches.<sup>93</sup> *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.<sup>94</sup> It did not claim that the Supreme Court's interpretations reign supreme over all extra-judicial actors. Indeed, such a claim would have been politically suicidal for Chief Justice Marshall to make at a time when Jefferson's Republicans were ripping apart the Federalists' efforts to

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90. 358 U.S. 1, 17-18 (1958).

91. 347 U.S. 483 (1954).

92. *Cooper*, 358 U.S. at 18 (citations omitted; italics added).

93. 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.").

94. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

entrench their power in the life-tenured but institutionally weak federal judiciary.<sup>95</sup>

Another greatest hit in the canon of judicial supremacy came in 1974's *United States v. Nixon*.<sup>96</sup> Nixon claimed that the judiciary lacked constitutional 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.<sup>97</sup> 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."<sup>98</sup>

*Cooper* and *Nixon* could not help but enhance the moral authority of the Court and the cultural force of its claim to judicial supremacy.<sup>99</sup> 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 to strike a hugely popular, bipartisan effort to protect the rights of religious people to practice their faith free from state interference.<sup>100</sup> 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.<sup>101</sup> 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.

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95. See generally ACKERMAN, *supra* note 57, at 147–62 (describing the political pressures facing the (Federalist-packed) federal judiciary after the Republican triumph of 1800).

96. 418 U.S. 683 (1974).

97. See Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1347 (1999) (criticizing *Nixon's* embrace of judicial supremacy but noting the difficult circumstances in which the Court found itself).

98. *Nixon*, 418 U.S. at 705 (citations omitted).

99. 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).

100. 521 U.S. 507, 529, 536 (1997).

101. 529 U.S. 598, 616–19 (2000).

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.<sup>102</sup>

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*

The Court's claim to the final word in constitutional interpretation leaves open the difficult problem of characterizing *how* it chooses among plausible constitutional interpretations. This subsection contends (a) that the Court generally prefers to rely on its own, independent judgment when fashioning constitutional doctrine and (b) that it often freely relies on its own factual assessments, intuitions, and policy judgments when doing so.

#### *1. Judicial independent judgment on "what the law is"*

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."<sup>103</sup> Just before the passage from *United States v. Nixon* quoted in the preceding subsection, the Court observed that any

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102. *Id.* at 616 n.7 (citations omitted).

103. *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.

Justice Antonin Scalia, Remarks at Telecommunication Law and Policy Symposium (Apr. 18, 2000) (quoted in Colker & Brudney, *supra* note 86, at 80 (2001)).

branch's interpretation of its own powers is owed "great respect from the others."<sup>104</sup> 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."<sup>105</sup> Professor Thayer could not have put the matter better himself.<sup>106</sup>

This deferential language, however, seems more in the nature of form than substance. For instance, in both the *Morrison* and *Nixon* cases just noted, the Court referred to the importance of deferring to other branches' judgments just before lowering the boom and rejecting them.<sup>107</sup> *Morrison* is especially interesting in this regard given that it was decided by a five-Justice majority with four dissenting Justices contending the statutory provision in question was constitutional.<sup>108</sup> That the four dissenting Justices reached this conclusion 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.<sup>109</sup>

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

104. 418 U.S. 683, 703 (1974).

105. *Morrison*, 529 U.S. at 607 (citing *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring); *United States v. Harris*, 106 U.S. 629, 635 (1883)).

106. See Thayer, *supra* note 13, at 143–45 (contending that the courts should only reject congressional action as unconstitutional in cases of "clear mistake").

107. See *Morrison*, 529 U.S. at 617 (holding that Congress may not use Commerce Clause authority to "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"); *Nixon*, 418 U.S. at 703–05 (rejecting executive branch claim to absolute immunity from judicial subpoenas).

108. *Morrison*, 529 U.S. at 628 (Souter, J., dissenting).

109. Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 665 (2000).

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, it seems generally to bring an attitude of independence rather than of deference to the task of constitutional review. 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.<sup>110</sup>

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.<sup>111</sup> Still, when it comes to determining how to interpret the Constitution, the Court prefers its own counsel.

*City of Boerne v. Flores* provides an especially potent illustration of this judicial view that, where the Court and Congress disagree on

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110. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 9 (1983) (footnotes omitted); see also SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 190 (Yale Univ. Press 1990) (observing that Thayer-style deference “has not provided an enduring working standard for modern judicial review” and “has, for now, been largely abandoned”); Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 75 (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.”); Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 681 (2006) (“The 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.”).

111. 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. See generally Barkow, *supra* note 5 (tracing the “fall” of the political-question doctrine and a parallel rise of judicial supremacy).

constitutional interpretation, it is the Court's views that matter.<sup>112</sup> Recall that this case addressed a challenge to the Religious Freedom Restoration Act (RFRA).<sup>113</sup> This statute was Congress's response to the Court's decision in *Employment Division v. Smith*, which, overruling precedent, 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.<sup>114</sup> RFRA attempted to restore this "compelling interest" test, but, in a bow to judicial supremacy, it 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.<sup>115</sup> 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.<sup>116</sup> The Court rejected this argument on the ground that the means that Congress uses to enforce Section 1 must be "congruen[t] and proportiona[te]" with the violations of rights that Congress seeks to fix.<sup>117</sup> 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.<sup>118</sup> Therefore, RFRA fell outside Congress's Section 5 power.

The preceding analysis misses the true heart of the matter, however. RFRA *rebuked* the Supreme Court—it was a scarcely veiled congressional declaration that *Smith*'s constitutional gloss was just plain wrong.<sup>119</sup> 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

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112. 521 U.S. 507 (1997).

113. 42 U.S.C. §§ 2000bb to bb-4 (2000).

114. 494 U.S. 872 (1990) (overruling *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963)).

115. 42 U.S.C. §§ 2000bb(a), 2000bb-1(a) to -1(b).

116. See *City of Boerne*, 521 U.S. at 516 (noting congressional reliance on the Fourteenth Amendment enforcement power).

117. *Id.* at 520.

118. *Id.* at 524.

119. Cf. S. REP. NO. 111, at 1898 (1993), as reprinted in 1993 U.S.C.C.A.N. 1892, 1898 ("For the Court to deem this [compelling-interest test] a 'luxury,' is to denigrate '[t]he very purpose of a Bill of Rights.'" (quoting *Employment Div. v. Smith*, 494 U.S. 872, 903 (1990) (O'Connor, J., concurring)) (citations omitted in original)).



in constitutional protections.”<sup>120</sup> He explained that allowing Congress to make such changes would be disastrous, for

[i]f 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.<sup>121</sup>

To forestall such disaster,

[w]hen 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*.<sup>122</sup>

Thus, the Court does not defer to the legislative branch’s constitutional interpretations; to the contrary, the Court instead defers to *its own* constitutional interpretations under the doctrine of *stare decisis*.

*Dickerson v. United States*<sup>123</sup> provides another excellent example of the Court’s independent approach to constitutional interpretation. Before *Miranda*, the admissibility of confessions under the Fifth Amendment and Due Process clauses depended upon “voluntariness” determined on the totality of the circumstances.<sup>124</sup> 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.<sup>125</sup> Two years later, Congress blasted back with 18 U.S.C. § 3501, which purported to reinstate the totality-of-the-

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120. *City of Boerne*, 521 U.S. at 532.

121. *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) (other citations omitted).

122. *Id.* at 536 (emphasis added).

123. 530 U.S. 428 (2000).

124. *Id.* at 432–33.

125. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

circumstances test of the pre-*Miranda* law in federal prosecutions.<sup>126</sup> The statute slumbered as administration after administration declined to invoke it.<sup>127</sup> But then the Fourth Circuit used it as a ground to reverse a district court's decision to grant Dickerson's motion to suppress a statement taken in violation of *Miranda*.<sup>128</sup>

The Rehnquist Court had long chipped away at the scope of *Miranda*;<sup>129</sup> the Chief Justice had a well-known dislike for it,<sup>130</sup> and *Miranda*'s constitutional basis had long been mysterious and at least debatable.<sup>131</sup> 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, ironically enough—insisted that *Miranda* was in fact a gloss on the Constitution.<sup>132</sup> As a result, it was obviously beyond Congress's power to alter.<sup>133</sup> Thus, Chief Justice Rehnquist, rather than accept a legislative constitutional construction he probably thought was substantively correct, instead deferred to a precedent, *Miranda*, that he thought was flat-out wrong.<sup>134</sup>

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126. See *Dickerson*, 530 U.S. at 435–36 (quoting 18 U.S.C. § 3501 (1994)) (characterizing the statute as an effort to overrule *Miranda*).

127. 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).

128. *Dickerson*, 166 F.3d at 672.

129. Cornell W. Clayton & J. Mitchell Pickerell, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1416–18 (2006) (briefly recounting judicial opinions that limit *Miranda*; describing their combined effect as “the death of a thousand cuts”).

130. Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 3 (2001) (describing Chief Justice Rehnquist as an “implacable critic” of *Miranda*; noting his opposition to it both on and off the Court).

131. 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 “[t]he 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”).

132. *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

133. *Id.* at 437 (“But Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”).

134. *Cf. id.* at 443 (“Whether 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.”).

*2. Judicial independent judgment on matters of fact and value*

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.<sup>135</sup> Many core constitutional provisions, such as the Due Process and Equal Protection Clauses, are, to put it mildly, extraordinarily vague. To create relatively specific 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. For example, no one claims that the President can constitutionally be less than thirty-five 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 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 their assessments of legislative fact. Constitutional doctrine is thus in part a function of how the justices think the world *should* work and in part a function of how they think the world *does* work.<sup>136</sup>

The 2006 case *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

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135. For recent discussions of the political nature of constitutional judicial review, see generally Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005).

136. Cf. Faigman, *supra* note 19, at 550 ("Traditionally, constitutional fact-finding served as a vehicle for the Court to reach normative judgments in interpreting the Constitution.").

doctrine.<sup>137</sup> Georgia police responded to a domestic dispute at the Randolph home.<sup>138</sup> 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 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.<sup>139</sup> Good thing for Scott he was awake. Under Court precedent, had he failed to object because, for instance, he was asleep on the couch, Janet's consent would have been good and the search "reasonable."<sup>140</sup>

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.<sup>141</sup> 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 entirely atypical situation."<sup>142</sup> But 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 it harder for police to intervene in domestic disputes.<sup>143</sup> The

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137. 547 U.S. 103 (2006).

138. For the Court's recounting of the facts of the case described in this paragraph, see *id.* at 106–08.

139. *Id.* But see *id.* at 108 n.1 (observing that a majority of the state supreme courts and all four federal circuit courts that had examined the same question concluded that "consent remains effective in the face of an express objection").

140. *Id.* at 127 (Roberts, C.J., dissenting) (contending that the *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").

141. *Id.* at 109–15 (majority opinion).

142. *Id.* at 127 (Roberts, C.J., dissenting).

143. See *id.* at 138 ("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?").

majority rejected this suggestion as baseless without any more evidence than the dissent had.<sup>144</sup>

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.”<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup> 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

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144. *Id.* at 117–20 (majority opinion) (dismissing as a “red herring” the charge that the *Randolph* rule might prevent police from stopping spousal abuse).

145. *Id.* at 113–20.

146. *See id.* at 115 (noting, as one might expect, “that a man’s home is his castle”) (citations and quotation marks omitted).

147. 60 U.S. (19 How.) 393, 406–07 (1856).

the negro might justly and lawfully be reduced to slavery for his benefit.<sup>148</sup>

Given the universality and depth of this opinion at the time of the Constitution's adoption, Chief Justice Taney reasoned that it should be read to exclude blacks from being members of the "[p]eople of the United States."<sup>149</sup>

*Plessy v. Ferguson* also implicated an odious value judgment concerning race.<sup>150</sup> It 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.<sup>151</sup> An obvious problem with this conclusion is 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.<sup>152</sup> 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.<sup>153</sup>

The controlling opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* also had obvious roots in contestable value and fact judgments.<sup>154</sup> This opinion affirmed the "essential holding" of *Roe v. Wade*<sup>155</sup> 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.<sup>156</sup> The plurality based this outcome in

148. *Id.* at 407.

149. The dissenting Justices had an easy time showing that Justice 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).

150. 163 U.S. 537 (1896).

151. See *id.* at 548, 550-51.

152. *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.").

153. 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).

154. 505 U.S. 833 (1992) (plurality).

155. 410 U.S. 113, 163 (1973).

156. *Casey*, 505 U.S. at 833, 843, 853, 876.

part on a policy choice to favor stare decisis to enhance legal stability and legitimacy.<sup>157</sup> This choice was in turn based in part on a factual assessment that people would perceive overruling *Roe* as an unprincipled, political act, which would severely damage the legitimacy of the Court.<sup>158</sup> Worse, the effect of undermining the legitimacy of the Court would be to sap the country's "very ability to see itself through its constitutional ideals."<sup>159</sup> This politico-factual assertion was, one might say, controversial.<sup>160</sup>

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.<sup>161</sup> 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."<sup>162</sup> The plurality added that the government could, consistent with this framework, rely on hearsay or establish presumptions favoring detention.<sup>163</sup> Given this flexibility, the plurality thought "it unlikely that this basic process will have the dire impact on the central functions of war-making that the Government forecasts."<sup>164</sup> 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.

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157. *Id.* at 864–69.

158. *Id.* at 867.

159. *Id.* at 868.

160. *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*.").

161. 542 U.S. 507 (2004).

162. *Id.* at 533.

163. *Id.* at 533–34.

164. *Id.* at 534.

In short, to reiterate a brutally obvious but important proposition: The Court's development of constitutional doctrine is infused with the Justices' intertwined judgments of value and legislative-fact.<sup>165</sup> We thus find the Supreme Court in *Randolph* creating constitutional doctrine based on its surmises of what people expect to occur where one inhabitant of a home invites a person to come inside and another tells him to go away.<sup>166</sup>

#### IV. ADMINISTRATIVE LAW TROIKA: *CHEVRON*, *MEAD*, AND *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 nastily complex, but the most current form of the basic framework runs something like this: An agency can earn deference for its statutory construction by developing it by 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. One can flesh out this somewhat simplified characterization by examining 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.*,<sup>167</sup> (b) the opaque *United States v. Mead Corp.*,<sup>168</sup> and (c) the most recent of the lot, the eponymous *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.<sup>169</sup>

##### A. Inevitable Chevron

The Clean Air Act Amendments of 1977 required certain “stationary source[s]” of air pollution to undergo a stringent permitting process.<sup>170</sup> Industry wished to avoid this process;

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165. See generally Faigman, *supra* note 19 (discussing the role of “normative” fact-finding in the construction of constitutional law).

166. *Georgia v. Randolph*, 547 U.S. 103, 110–14 (2006).

167. 467 U.S. 837 (1984).

168. 533 U.S. 218 (2001).

169. 545 U.S. 967 (2005).

170. *Chevron*, 467 U.S. at 839–40.



environmental groups wished to see it aggressively implemented. The EPA's interpretation of this critical phrase shifted as it was buffeted by changing administration views and judicial glosses from the D.C. Circuit.<sup>171</sup> In 1981, after the Reagan Administration swept into office on a deregulatory agenda, the 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.<sup>172</sup> In the subsequent litigation, the D.C. Circuit conceded that the meaning of "stationary source" was ambiguous, but it 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.<sup>173</sup>

The Supreme Court reversed the D.C. Circuit, and, along the way, announced the famous *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.<sup>174</sup>

At step-one of this analysis, the Supreme Court agreed with the D.C. Circuit that congressional intent vis-à-vis "stationary source" was unclear.<sup>175</sup> At step-two, the Supreme Court declared the EPA's

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171. See *id.* at 853-59 (tracing the history of the EPA's regulatory interpretations of "stationary source" as used in the Clean Air Act Amendments of 1977).

172. *Id.* at 840, 857-58.

173. *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 723, 725-28 (D.C. Cir. 1982), *rev'd sub nom.*, *Chevron*, 467 U.S. 837.

174. *Chevron*, 467 U.S. at 842-43 (footnotes omitted).

175. *Id.* at 842.

bubble-concept construction reasonable.<sup>176</sup> Therefore, the D.C. Circuit should have affirmed the agency's gloss rather than imposing 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.<sup>177</sup> 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.<sup>178</sup> 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."<sup>179</sup> In other cases, the delegation of this authority to agencies to specify the meaning of ambiguous statutory terms is "implicit."<sup>180</sup>

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 construe authoritatively an agency's statute. The Court filled its own explanatory gap by turning to the comparative-advantage themes of expertise and legitimacy.<sup>181</sup> 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.<sup>182</sup> 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 (for example, 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

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176. *Id.* at 864–65.

177. *See id.* at 843–44.

178. *Id.* at 843–44.

179. *Id.* at 844.

180. *Id.*

181. *Id.* at 864–66.

182. *Id.*

and Congress and thus are more politically accountable than life-tenured federal judges.<sup>183</sup>

*B. Limiting Chevron with Muddy Mead*

Courts and scholars have devoted mountains of commentary to determining how to deploy the Court's *Chevron* decision.<sup>184</sup> One primary difficulty arose from the fact that agencies can create statutory interpretations in many different ways. On one end of the spectrum, an agency might, as was the case in *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, is to determine which should enjoy *Chevron*'s strong deference.

In *United States v. Mead Corp.*, the Court tried, with mixed success, to answer this difficult question.<sup>185</sup> At the outset of its analysis, *Mead* stressed *Chevron*'s delegation theme.

We hold that administrative implementation of a particular statutory provision qualifies for *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.<sup>186</sup>

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183. *Id.*

184. For a handful of the leading articles on *Chevron*, see David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; John H. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); John H. Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Review in Troubled Times*, 73 FORDHAM L. REV. 1103 (2004); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

185. 533 U.S. 218 (2001).

186. *Id.* at 226-27.

When these prerequisites for strong *Chevron* deference fail, a court should review an agency's statutory interpretation through the lens of the much weaker "*Skidmore* deference."<sup>187</sup> This doctrine merely instructs courts to give careful attention to an agency's statutory construction before adopting the construction that the court itself deems best.<sup>188</sup> 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 . . . .<sup>189</sup>

On one level, the preceding passage is horribly squishy, suggesting that *Chevron* eligibility depends on an agency's authorized use of certain types of "relatively formal administrative procedure"—except

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187. See *id.* at 234.

188. 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 it power to persuade, if lacking power to control").

189. *Mead*, 533 U.S. at 229–30 (italics added) (citations omitted).

where it does not.<sup>190</sup> But notwithstanding this squishiness, a dominant theme of *Mead* remains the Court's effort to cabin the scope of *Chevron* deference with procedure. The rationale for caring about procedure links back to the expertise and political accountability themes that appeared in *Chevron* itself. "[R]elatively formal administrative procedures," the Court explained, encourage "deliberation" (and thus the deployment of expertise) and "fairness" (transparency and political accountability).<sup>191</sup> As a result, generally speaking, interpretations produced by such means are more deserving of deference than others.

This conclusion that interpretations produced via relatively formal procedures are generally *better* than others then 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,<sup>192</sup> this opinion's bottom line is: absent express instructions from Congress, the Court extends *Chevron* deference to those agency interpretations that the Court deems most deserving.<sup>193</sup>

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190. *Id.* 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 230–31 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57, 263 (1995)).

191. *Id.* at 230.

192. 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).

193. 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

### C. Brand X Resolves the Stare Decisis/Chevron Clash

The *Chevron* doctrine and judicial stare decisis norms pull in fundamentally different directions. Applying *Chevron*, a court's chief task is to determine whether an agency statutory construction falls within the space of reasonability. A finding that a given agency statutory construction is reasonable (or not) does not preclude the possibility that a range of reasonable constructions exist. In *Chevron* itself, the Court celebrated this flexibility, proclaiming that "[a]n initial agency interpretation is not instantly 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."<sup>194</sup> 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 *Skidmore* deference to the statutory interpretation, which instructs the court to adopt the statutory construction it deems best.<sup>195</sup> From a traditional *Marbury* view, this most favored construction becomes "what the law is."<sup>196</sup> 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.<sup>197</sup> If this is indeed the way the law works, then

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rulemaking or formal adjudication, whereas *Chevron* deference *may* apply to other agency interpretations in special circumstances.

194. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984); *see also* *Smiley v. Citibank, N.A.*, 517 U.S. 735, 740–42 (1996) (explaining that agency interpretive changes need only survive arbitrariness review).

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

196. *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").

197. For examples of courts using their precedents to trump later, inconsistent agency interpretations, *see, for example*, *Neal v. United States*, 516 U.S. 284, 294–95 (1996); *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1131 (9th Cir. 2003), *overruled sub. nom. by Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Bankers Trust*

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.<sup>198</sup> 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.

This duel between *Chevron* deference and stare decisis arrived at the Supreme Court in 2005 in *National Cable & Telecommunication Association v. Brand X Internet Services*, and the Court chose deference.<sup>199</sup> 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."<sup>200</sup> 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.<sup>201</sup> In 2000, the Ninth Circuit had held that cable-modem service was a "telecommunications service."<sup>202</sup> Later, the FCC, after notice-and-comment, declared that it was not.<sup>203</sup> Various parties sought review

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N.Y. Corp. v. United States, 225 F.3d 1368, 1375–76 (Fed. Cir. 2000); BPS Guard Servs., Inc. v. NLRB, 942 F.2d 519, 523–24 (8th Cir. 1991).

198. See *Mead*, 533 U.S. at 247 (Scalia, J., dissenting) (claiming that *Mead* would often make the applicability of *Chevron* deference often an accident of timing—a side effect he characterized as "positively bizarre").

199. *Brand X*, 545 U.S. 967.

200. *Id.* at 982.

201. *Id.* at 975–76.

202. AT&T Corp. v. Portland, 216 F.3d 871, 880 (9th Cir. 2000).

203. *Brand X*, 545 U.S. at 978–79 (citing *In re Inquiry Concerning High-Speed Access*

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 precedent controlled the issue, and it vacated the FCC order in relevant part.<sup>204</sup> As support for this outcome, the majority relied heavily on a Supreme Court case, *Neal v. United States*, which stated, "[o]nce 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."<sup>205</sup>

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 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.<sup>206</sup>

As for the Supreme Court precedent upon which the Ninth Circuit had innocently relied, the Court explained that, 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.'"<sup>207</sup> This gloss on *Neal* was

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to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 4824, ¶ 41 (2002)).

204. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1131 (9th Cir. 2003), *overruled sub. nom. by Brand X*, 545 U.S. 967.

205. *Brand X*, 345 F.3d at 1131–32 (quoting *Neal v. United States*, 516 U.S. 284, 294–95 (1996)).

206. *Brand X*, 545 U.S. at 983 (2005) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting)).

207. *Id.* at 984 (quoting *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)).



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.<sup>208</sup>

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,

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).<sup>209</sup>

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208. *Id.* at 1017 (Scalia, J., dissenting) (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)) (citations omitted).

209. *Id.* at 983 (majority opinion) (italics 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 the

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 conclusory nature of the argument supporting the majority's resolution of the deference/*stare-decisis* duel should not, however detract from the importance of *Brand X*'s outcome for administrative law.<sup>210</sup> The remarkable bottom line of *Brand X* is that independent judicial statutory constructions are not always the final, definitive word in statutory interpretation.<sup>211</sup> 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*

In *Chevron*, the Supreme Court recognized that choosing among reasonable statutory interpretations requires policymaking for which agencies have comparative advantages because of their greater expertise (ability) and political accountability (legitimacy).<sup>212</sup> 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.<sup>213</sup> This broad

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Court's 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." When 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.

210. For a thoughtful analysis of the *Brand X* opinion and its potential importance for administrative law, see generally Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 NW. U. L. REV. 997 (2007).

211. *Brand X*, 545 U.S. at 982–84.

212. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 864–66 (1984).

213. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J.,

reading, however, is subject to a natural objection, which is that not all agency statutory interpretations are created equal—some implicate agency expertise more than others; some are created via more transparent, politically-open means than others. Understood in light of this objection, the *Mead* framework represents the Court's effort to fashion a rule for determining which agency interpretations have been subject to sufficient focused, transparent consideration to merit *Chevron*'s strong deference.<sup>214</sup> But by clarifying that courts should, where *Chevron* does not apply, adopt the statutory interpretations they deem best, *Mead* increased 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 reasonable agency interpretations entitled to *Chevron* deference under the *Mead* framework can trump contrary judicial precedents.<sup>215</sup>

#### 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.<sup>216</sup> The courts have rejected both *Chevron* and Thayerism in their unalloyed forms.<sup>217</sup> 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 for which agencies have "earned" such treatment. The balance of this Article explores how one might, by applying a similar *Brand X* approach to Thayerism, develop an attractive framework for allocating control of constitutional construction among judicial and legislative actors.

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dissenting) (describing *Chevron* doctrine as maintaining that "all authoritative agency interpretations of statutes they are charged with administering deserve deference").

214. See *supra* Part IV.B (supporting this characterization of the framework for determining *Chevron* eligibility adopted by the Court in *Mead*).

215. *Brand X*, 545 U.S. at 982–84.

216. See *supra* note 5 (identifying works that have drawn the *Chevron*-Thayer parallel).

217. See *supra* Part IV (discussing ongoing evolution of the *Chevron* doctrine); Part III.B (discussing the Court's exercise of independent judgment over issues of constitutional law).

A. Mapping the Chevron-Mead-Brand X Troika onto Thayerism

1. The obvious Chevron case for Thayerism

*Chevron* and Thayerism both acknowledge that reasonable minds can 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.”).<sup>218</sup> 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.<sup>219</sup>

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 people can express their judgments 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.<sup>220</sup> 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

218. See *supra* notes 177–83 and accompanying text.

219. See *supra* text paragraph preceding note 193.

220. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 864–66 (1984).

determining constitutional meaning.<sup>221</sup> Moreover, even a brief inspection of any number of Supreme Court opinions—from the soon-to-be obscure,<sup>222</sup> to the most notorious,<sup>223</sup> to the most celebrated<sup>224</sup>—confirms that the Court's 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 also 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.<sup>225</sup> Through its committee system, Congress can, for instance, conduct far-reaching investigations 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.<sup>226</sup> The Court was not in any position to conduct a broad investigation of this empirical claim but imposed the requirement anyway.<sup>227</sup> Congress, by contrast, could, if it wished,

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221. See *supra* text accompanying notes 73–82 (discussing Madison's and Lincoln's views on the role of public opinion in determining constitutional meaning).

222. See, e.g., *Georgia v. Randolph*, 547 U.S. 103 (2006) (discussed *supra* at text accompanying notes 137–46).

223. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (discussed *supra* at text accompanying notes 147–49).

224. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (discussed *supra* at text accompanying note 153).

225. See *supra* note 20 (discussing greater congressional competence to determine "legislative facts"); see also Calabresi, *supra* note 11, at 340–41 (contending that "[a]ssessing the costs to society associated with retaining a precedent and weighing those costs against the reliance interests of society that a precedent may have generated is fundamentally an empirical and political task" for which the political branches have greater competency than the courts).

226. *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.").

227. Cf. *id.* at 533 (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

conduct extensive investigation of the means for solving the problem of “involuntary” confessions.<sup>228</sup> Note also 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.” Fact and policy judgments blur into each other.<sup>229</sup> Thus, respect both for Congress’s greater ability to find legislative facts and their political nature support applying some form of *Chevron*/Thayer-style judicial deference in constitutional interpretation.

## 2. *Making the Mead move*

An aggressive Thayerist might contend that every statute that Congress enacts embodies at least an “implicit” legislative judgment that the statute is 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

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for empirical investigation utilized in the social sciences the factual basis for the Court’s premise is patently inadequate.”).

228. See also Calabresi, *supra* note 11, at 341 (“The House and Senate can investigate . . . empirical questions by holding hearings, by talking to constituents in an *ex parte* manner, and by commissioning national studies by such agencies as the General Accounting Office.”); cf. Karyal, *supra* note 4, at 1359–78 (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 CORNELL L. REV. 883, 906 (2000) (surveying legislative history of the 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”).

229. Ariza, *supra* note 20, at 556 (observing that so-called “fact-finding” in the context of equal protection analysis veers into value choice); Kamisar, *supra* note 228, at 918–24 (observing that determining whether a confession is “voluntary” requires value judgment, but contending that this point supports *judicial* rather than *legislative* control over the issue).

for this process that it enjoys over the courts.<sup>230</sup> *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.<sup>231</sup> 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. This process is, after all, the default mode for agencies to create what are called “legislative rules.”<sup>232</sup> 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. 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.<sup>233</sup>

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

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230. See *supra* Part IV.B (supporting this characterization of the *Mead* framework).

231. *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001).

232. See 5 U.S.C. § 553 (2000) (establishing notice-and-comment as the regular mode for legislative rulemaking).

233. See *supra* text accompanying note 52 (quoting Madison’s criticism of “midnight” legislative precedents); Healy, *supra* note 26 (commenting that “if Congress passes a law without seriously considering the constitutional issues it raises, I see no reason to defer to that judgment”).

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 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 attempts to alter the Supreme Court’s stated constitutional doctrine, legislation fitting this description would likely be controversial and command considerable public and legislative attention. This attention would in turn ensure political accountability and encourage 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 (MCA).<sup>234</sup> 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 for a cause of action in court.<sup>235</sup> In addition, the Act stripped jurisdiction

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234. Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (2006) (codified largely at 10 U.S.C. §§ 948–950).

235. 10 U.S.C.A. § 948a(1) (West Supp. 2007) (defining “unlawful enemy combatant”); 10 U.S.C.A. § 949a(b)(2)(E) (West Supp. 2007) (regulating admission of hearsay in military commissions); 28 U.S.C.A. § 2241 (West Supp. 2007) (clarifying that Geneva Conventions do not create a cause of action that prisoners can invoke in U.S. courts).



from the courts to hear habeas petitions from prisoners contesting their enemy combatant status.<sup>236</sup> Senator Specter declared the bill “patently unconstitutional on its face” in light of its effect on habeas corpus.<sup>237</sup> 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.”<sup>238</sup> 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 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),<sup>239</sup> by contrast, provides an excellent example of a clear statement of a public judgment from Congress on a constitutional matter. Recall that in *Employment Division v. Smith*, the Court had overruled precedents holding that the Free Exercise Clause requires the government to have a compelling interest to justify facially neutral laws that substantially burden religious practices.<sup>240</sup> RFRA is fewer than one thousand words long, and it directly and clearly tries to do just one thing: restore the Free Exercise protections *Smith* had struck.<sup>241</sup> It passed with overwhelming, bipartisan support and was

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236. 28 U.S.C. § 2241(c)(1) (stripping courts of habeas jurisdiction over those determined to be “enemy combatants”).

237. Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush—Constitutional Challenges Predicted*, WASH. POST, Sept. 29, 2006, at A01.

238. *Id.* Senator Specter’s prediction may be coming true as the Supreme Court recently granted certiorari to review the constitutionality of the MCA’s habeas-stripping provision during the upcoming 2007 Term. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (mem.).

239. 42 U.S.C. § 2000bb (2000).

240. *Employment Div. v. Smith*, 494 U.S. 872 (1990) (overruling *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963)).

241. *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”).

signed by President Clinton.<sup>242</sup> It is difficult to imagine a more potent signal of a legislative judgment regarding constitutional interpretation.

Extending Thayer-style, strong deference to narrowly-drawn legislation that makes clear 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 potential to create a dynamic that would improve legislative constitutional deliberations. Making congressional focus the price of strong deference would give members an incentive to embed constitutionally questionable proposals in narrowly-drawn legislation to maximize their chances of survival. For example, were the proposed 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 beneficial 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 infantilization of congressional constitutional debate that many have suggested is a debilitating effect of aggressive judicial review.<sup>243</sup>

### *3. The Brand X clarification: deference trumps stare decisis*

In administrative law, the *Mead* move contracts the scope of *Chevron* deference by limiting its application to those agency statutory interpretations that “deserve” it. The *Brand X* move, by contrast, expands *Chevron*’s scope by recognizing that whether a

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242. The Senate passed RFRA on a 97-3 vote. 139 CONG. REC. S14,470 (daily ed. Oct. 27, 1993); cf. William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOCS. 2377 (Nov. 16, 1993) (crediting broad support for RFRA to the “power of God”).

243. See *supra* notes 24–25 and accompanying text (identifying the infantilization argument against judicial review); cf. Waldron, *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*).

statutory interpretation deserves deference should not depend on whether it contradicts judicial precedent.<sup>244</sup> Applying the *Brand X* move to Thayerism leads to the conclusion that a reasonable congressional constitutional construction that “deserves” deference should be able to trump contrary judicial precedents.

Recognizing a limited, *Brand X* legislative power to trump judicial constitutional precedents would carry two advantages. First, it would lessen the tendency of Supreme Court opinions under the current regime of judicial supremacy to squelch or distort further discussion of constitutional issues.<sup>245</sup> Allowing Congress a *Brand X* trump would increase its incentive to engage in serious, ongoing “constitutional conversations” with the judicial branch.<sup>246</sup> If such “constitutional conversations” are good—a proposition that this Article has, in truth, treated as an axiom—then they provide a reason to allow *Brand X* legislative trumps.

But, perhaps just as importantly, accepting the existence of the *Brand X* trump would help legitimate the Supreme Court’s constitutional doctrines even were Congress never to invoke this power. For an example of this dynamic, consider the Supreme Court’s recent efforts to limit punitive damages. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court indicated that, to avoid running afoul of the Due Process Clause, punitive damages generally should not exceed a 9:1 ratio to compensatory damages.<sup>247</sup> In a nod to its own judicial nature, the Court insisted that it was not laying down a “bright-line” rule.<sup>248</sup> Still, one need not be a strict constructionist to be uncomfortable with the Court’s legislative ability to make policy by pulling numbers out of the Due Process Clause. Under the current regime, Congress lacks any power to undo the Court’s new framework, and Congress’s silence on this point is therefore meaningless. By contrast, the proposed *Brand X* regime would acknowledge that: (a) Congress has authority to

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244. See *supra* Part IV.C (analyzing Nat’l Cable & Telecomm. Ass’n v. *Brand X* Internet Servs., 545 U.S. 967 (2005)).

245. Cf. Tushnet, *supra* note 33, at 917–20 (deploring the tendency of the Court to act as a “bully” in constitutional conversation).

246. Cf. Gardbaum, *supra* note 15, at 709, 719–39 and accompanying text (noting that various Commonwealth countries have committed to systems that build constitutional law out of “conversations” between legislative and judicial branches).

247. 538 U.S. 408, 425 (2003).

248. See *id.*

fashion its own limits on punitive damages that contradict the Court's framework; and (b) the Court should uphold Congress's handiwork as constitutional so long as it survives deferential review. If Congress had this *Brand X* trumping power but did not use it, then its passive acquiescence would provide evidence that the Court's framework had not violated a 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.<sup>249</sup>

Summarizing, the positive case for a nuanced Thayerism inspired by the Supreme Court's own administrative law doctrines largely boils down to: (a) the *Chevron* idea that Congress has comparative advantages over the courts in the game of constitutional interpretation based on its political authority and its fact-finding powers; (b) the *Mead* idea that, so long as Congress actually deploys these advantages in creating a reasonable constitutional interpretation, the courts should defer to it; and (c) the *Brand X*-inspired insight that a limited legislative power to trump judicial constitutional interpretations could both encourage a beneficial "constitutional conversation" among the branches and help legitimate the Supreme Court's own spider-web of constitutional doctrine.

#### *B. Some Objections and Responses to Brand X Style Thayerism*

Of course, even if one grants that the positive case for the *Brand X* model of Thayerism made above has some merit, there remain obvious objections to overcome. They include the following:

*Congress is incompetent.* The Supreme Court is the great protector of individual rights from the tyranny of the majority. Precisely because Congress is the majoritarian body, it would interpret the Constitution *badly*.

*The Brand X model of constitutional review would create too much legal instability.* The courts should not extend deference to those

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249. 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-majoritarian objections to judicial review of legislation).

congressional constitutional constructions that contradict Supreme Court precedents because we want fundamental law to remain stable. Allowing Congress to disturb judicial constitutional doctrine, even just within the zone of reason, would destabilize constitutional law to an unacceptable degree.

*"The people" do not want Thayerism.* This last objection may strike the deepest. The truth is that nobody, including the political branches, really wants to interfere with judicial supremacy. Judicial supremacy gained ascendancy precisely because it accommodates the needs of political actors and reflects a public judgment that the courts *should* be in charge of constitutional interpretation. Ironically, a Thayer-style effort to popularize constitutional interpretation would thus defy the popular will.

The balance of this subsection will try to defuse these three objections.

*1. Defusing the competence objection: isn't the Supreme Court better?*

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 *better* at this task thanks to the countervailing comparative advantages 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."<sup>250</sup> Because the Court is a better interpreter, it follows that the Court should prefer its own constitutional constructions to legislative alternatives—even if the latter are "reasonable."

Perhaps the most basic response to this objection is to concede honestly that it raises a question that no one can rigorously answer. The world is far too complex to allow certain judgments about whether America would be a better or worse place if the federal judiciary enjoyed somewhat less dominance over constitutional questions.

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250. 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'").

An alternative response would be to list dreadful Supreme Court decisions such as *Dred Scott*,<sup>251</sup> *Plessy*,<sup>252</sup> etc. Readers can, of course, add other decisions they regard as abominations—some will want to add *Korematsu*,<sup>253</sup> and foes of abortion will place *Roe*<sup>254</sup> and *Casey*<sup>255</sup> at the front of 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.<sup>256</sup> 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.<sup>257</sup> If these Justices do away with abortion rights or affirmative action, the volume of these voices will no doubt increase.<sup>258</sup>

In addition to the preceding negative case against the Court, one can also make a positive case for the potential constitutional

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251. *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).

252. *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), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

253. *Korematsu v. United States*, 323 U.S. 214 (1944) (permitting internment of Japanese-American citizens during World War II), *superseded by statute*, Pub. L. 100-383, 102 Stat. 903, *as recognized in* *Adarand Constructors v. Peña*, 515 U.S. 200, 215 (1995).

254. *Roe v. Wade*, 410 U.S. 113 (1973) (declaring a constitutional right to abortion).

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

256. *Brown*, 347 U.S. 483 (overruling *Plessy* and 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”).

257. See, e.g., TUSHNET, *supra* note 4, at 187 (condemning judicial review from the progressive end of the political spectrum).

258. Consider, in this regard, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (rejecting facial challenge to the constitutionality of the Partial-Birth Abortion Ban Act of 2003), and *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007) (striking school district plans that used racial classifications to allocate children to public schools).

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.<sup>259</sup> He notes in particular that Civil War-era members of Congress offered a far richer analysis of the legality of secession than did the Supreme Court.<sup>260</sup> 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*.<sup>261</sup>

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.<sup>262</sup> 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.<sup>263</sup> Thus, in the incredibly unlikely event that Congress attempted to overrule *Brown v. Board of Education*, the Court would review constitutional issues de novo. The concession that deferential review should not apply to statutes that threaten to narrow fundamental rights does not, however, lead to the conclusion that deference should not apply in other contexts.<sup>264</sup> For instance, it would be consistent with the spirit of *Carolene Products* note 4 to extend Thayer-style deference to statutes that seek to *expand*

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259. David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789-1861*, in CONGRESS AND THE CONSTITUTION 18-34 (Neal Devins & Keith Whittington eds., 2005).

260. *Id.* at 27-33.

261. See *supra* text accompanying notes 112-122 (describing Congress's efforts to expand Free Exercise rights in RFRA and the Court's invalidation of its efforts).

262. *United States v. Carolene Prods. 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").

263. *Id.*

264. Cf. Waldron, *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").

fundamental rights. Thus, the asserted superiority of the Court's ability to protect certain kinds of rights does not squeeze out all room for deference to legislative constitutional constructions. Once this principle is conceded, the details are a matter for negotiation.

*2. Defusing the stability objection: constitutional conversation trumps stare decisis*

One might accept that the benefits of *Brand X* legislative trumps are real 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 that: (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.<sup>265</sup> In addition, stare decisis is supposed to ratchet down judicial discretion by requiring courts to honor rules they have developed in the past.<sup>266</sup> Judicial supremacy ensures that one authoritative voice can determine the Constitution's meaning; by reducing resistance to judicial decisions, this doctrine can enhance legal stability and uniformity as well as the effectiveness of the courts' dispute-resolution function.<sup>267</sup>

Obviously, there is far more to say (or question) about the virtues (and vices) 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* trumps 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

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265. For discussion of these and related advantages, see, for example, Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1177-84 (2006); Fredrick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987).

266. Cf. 1 WILLIAM BLACKSTONE, COMMENTARIES \*69 (explaining that obedience to precedent blocks judges from improperly deciding cases according to their own "private judgment[s]").

267. See 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).



are good reasons to think that the balance favors allowing reasonable *Brand X* 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.<sup>268</sup> 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 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. In *Massachusetts v. EPA*, for instance, the Court recently ruled that the Clean Air Act authorizes the EPA to regulate automobile emissions to curb global warming.<sup>269</sup> In the *Georgia v. Randolph* case discussed above, the Court recently determined that the Fourth Amendment allows an inhabitant of a home to block a police search even if another inhabitant gives consent.<sup>270</sup> *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* trumps. The Court often explains that stare decisis does not operate with full force in the constitutional context because no one else can revise the Court's constitutional interpretations; therefore, the Court should be quicker to find and correct its own mistakes than in non-constitutional contexts.<sup>271</sup> In this spirit, it is black-letter stare decisis doctrine that the Court will overrule constitutional precedents that

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268. See *supra* Part IV.C (discussing Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)).

269. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1460–62 (2007).

270. 547 U.S. 103, 127–29 (2006) (discussed *supra* at text accompanying notes 137–46).

271. *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).

have proven to be “unworkable” or “badly reasoned.”<sup>272</sup> And, true to its word, the Court does in fact overrule its constitutional precedents fairly frequently.<sup>273</sup> 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.<sup>274</sup>

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 power only rarely. It is 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, usually *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.<sup>275</sup> Again, Congress’s rebuke in RFRA to the Court’s *Smith* decision provides the archetypical case.<sup>276</sup>

Still, it must be conceded that acceptance in principle of *Brand X* trumps would tend to undermine the judicial-supremacy 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

272. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

273. 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).

274. 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 271 (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.

275. Cf. TUSHNET, *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).

276. See *supra* text accompanying notes 112–22, 239–42 (discussing the Supreme Court’s invalidation of RFRA, a congressional effort to reinstate Free Exercise protections abandoned by the Court in *Employment Division v. Smith*, 494 U.S. 572 (1990)).

instance, the seminal case in the judicial-supremacy canon, *Cooper v. Aaron*,<sup>277</sup> arose out of Governor Faubus' instigation of violent resistance to *Brown v. Board of Education*.<sup>278</sup> In such disputes, a widely-shared public sentiment that the Supreme Court's word is law must strengthen the Court's hand.

It is not, however, obvious that sapping the norm of judicial supremacy with *Brand X* trumps would, on balance, harm the country.<sup>279</sup> For one thing, although it is certainly true that the Court can and has acted as a powerful force for good at times, history demonstrates beyond doubt that it has at other times issued rulings that have caused great harm. Also, undermining the norm of judicial supremacy would not eliminate the fact that, as Madison observed almost two centuries ago, the people will tend, generally speaking, to regard the Court as the most trustworthy interpreter of the Constitution.<sup>280</sup> Even deprived of the cloak of judicial supremacy, the Court would continue to enjoy great power to *persuade* others to follow its constitutional lead.

### 3. *Confronting the deepest objection: judicial supremacy is popular*

The preceding subsection defended *Brand X* trumps from the charge that they would unduly destabilize constitutional law by arguing, among other things, that Congress would only rarely deploy them. One reason Congress would hesitate to tangle with the Court is that the public supports the proposition that the judiciary has a special, definitive role to play in constitutional interpretation.<sup>281</sup> If the Court made a regular habit of adopting constitutional rules that a clear majority of the country found detestable and irrational,

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277. 358 U.S. 1, 17-18 (1958); see *supra* Part III.A for a discussion of the judicial supremacy rhetoric of *Cooper*.

278. 347 U.S. 483 (1954).

279. But nor, in fairness, is it obvious that sapping the norm of judicial supremacy would *not* harm the country. For a thoughtful discussion of this point, see Healy, *supra* note 26, at 42-46 (expressing concern that judicial deference to the political branches' efforts to undo the Court's constitutional rulings would encourage defiance of precedent and politicize constitutional law).

280. See *supra* text accompanying note 75 (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).

281. 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").

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.<sup>282</sup> 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 administrative law doctrines. 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 needed to implement the Constitution, then *Brand X* constitutionalism would defy rather than obey the public’s judgment. In short, *Brand X* constitutionalism is vulnerable to the charge that it is *unpopular*.<sup>283</sup>

Two answers to this powerful objection present themselves. One is that, 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 passage of *Brand X*-style legislation would suggest an exception for a particular circumstance.

Another possible answer 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. Stranger things have happened, but not many.

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282. 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.”).

283. Cf. *id.* at 2598–99 (suggesting that the existing practice of judicial review amounts to “popular constitutionalism”—albeit of a “mediated” kind).

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.<sup>284</sup>) Passage of the BXCCA would thus signify that *Brand X* constitutionalism was, indeed, “popular” constitutionalism. 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 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 much longer article. For the present, before shrugging off the BXCCA as frivolously unconstitutional, consider that for hundreds of years Congress has exercised substantial control over how the federal courts exercise their judicial power to find fact and determine law.<sup>285</sup> Ubiquitous statutory standards of review (at least for matters of fact and policy)

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284. See *supra* note 4 (citing to works by these popular constitutionalists).

285. 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 to 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”).

are one manifestation of this historical practice.<sup>286</sup> Another provocative and recent example of such control can be found in the Anti-Terrorism and Effective Death Penalty Act, in which Congress in effect required federal courts to defer to state-court constitutional interpretations that are not clearly erroneous.<sup>287</sup> In a related but more controversial vein, substantial scholarly arguments have been made that Congress can force courts to abandon stare decisis—which is another way of saying that Congress could force courts to stop deferring to judicial precedents that the courts themselves deem incorrect.<sup>288</sup> Given this combination of well-established law and provocative legal commentary, it is far from obvious that the legislative control of judicial deference proposed by the BXCCA would be a constitutional non-starter.

## VI. CONCLUSION

In recent years, the Supreme Court's claim to be the final, definitive interpreter of the Constitution has come under sustained

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286. See, e.g., Administrative Procedure Act, 5 U.S.C. § 706 (2000) (establishing standards for judicial review of agency action).

287. 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) (2000). 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 adhere 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.

288. See John Harrison, *The Power of Congress over the Rules of Precedent*, 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)); Paulsen, *supra* note 285, at 1590 (claiming Congress has the power to eliminate stare decisis in the federal courts). *But see* Calabresi, *supra* note 11, at 336–40 (concluding, *contra* Paulsen, that Congress cannot invoke its Necessary and Proper Clause power to abrogate the Court's “autonomous, implied power to sometimes follow precedent”); 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); Healy, *supra* note 26, at 21–30 (contending, *contra* Paulsen, that Congress cannot abrogate stare decisis as to do so would infringe on the “judicial power,” which entails “the power to decide how to decide what the law is”).

attack from across the political spectrum from scholars pushing for a more “popular” constitutionalism.<sup>289</sup> This Article contributes to popular constitutionalism by deploying recent developments in the Supreme Court’s own administrative-law doctrines 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, express constitutional constructions that are embedded in focused federal legislation even in the teeth of contrary Supreme Court precedent. In effect, this “neo-Thayerian” 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 voices of the public, Congress, and the President (through the veto power) in constitutional construction—an outcome that luminaries such as Jefferson, Madison, Lincoln, and Thayer would favor. 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. Also, increasing the power of Congress’s voice in constitutional interpretation might lead to more and better congressional constitutional deliberations. In addition, recognizing a limited congressional power to trump the Court’s constitutional precedents would increase the legitimacy of those precedents Congress does *not* challenge.

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289. 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.”).