AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Judicial Review

**Baldwin v. United States, 140 S.Ct. 690** (2020)

*Howard Baldwin believed he was owed a considerable tax refund. He mailed the relevant forms to the Internal Revenue Service (IRS) before the relevant deadline, but the IRS never received the forms. Under the common law mailbox rule, evidence that a document had been mailed created a presumption that the document had been received. The IRS before 1954, however, had actually required physical delivery of tax documents. In 1954, Congress declared that a tax document sent by registered mail would be considered to have been delivered to the IRS by the postmark date. Circuit courts in the following years divided over whether that statute should be interpreted as carving out an exception to the previous physical delivery rule or the federal judiciary should also be guided by the common law mailbox rule which treats evidence that a document was mailed as creating a presumption that the document was received. In 2011, the IRS promulgated a rule declaring the federal law as providing the only exception to the physical delivery rule. A lower federal court, applying the common law mailbox rule, ruled that Baldwin was entitled to a refund. That decision was reversed by the Court of Appeals for the Ninth Circuit. Baldwin appealed to the Supreme Court of the United States.*

 *The Supreme Court unanimously denied certiorari. Justice Clarence Thomas’s dissent insisted that the Supreme Court needed to rethink deference to agency interpretation of federal law. At a minimum, Thomas maintained that the Supreme Court’s decision in* National Cable & Telecommunications Assn. v. Brand X Internet Services *(2005), which he wrote, should be overruled.* Brand X *held that the federal courts should defer to federal agency interpretations of federal law that are insistent with past judicial decisions interpretating that law whenever the law is ambiguous. Thomas also questioned whether the justices should continue to follow Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.* *(1984). That decision held that courts should defer to an agency’s reasonable interpretation of federal law. Why does Thomas think* Brand X/Chevron *deference misguided? Is he correct? Would abandoning* BrandX/Chevron *deference modify or substantially change the contemporary administrative state?*

 *Justice Thomas more briefly stated that* Chevron *deference violated the “vesting Clauses of the Constitution in his dissent to* County of Maui, Hawaii v. Hawaii Wildlife Fund *(2020).*

The petition for a writ of certiorari is denied.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2a69a56c361911eaadfea82903531a62), dissenting from the denial of certiorari.

Under [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) deference, courts generally must adopt an agency’s interpretation of an ambiguous statute if that interpretation is “reasonable.” *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.* (1984). Usually, the agency interprets the statute before any court has considered the question. But sometimes, the agency advances an interpretation after a court has already weighed in. In the latter instance, we have held that it “follows from [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))” that a court must abandon its previous interpretation in favor of the agency’s interpretation unless the prior court decision holds that the statute is unambiguous. *National Cable & Telecommunications Assn. v. Brand X Internet Services* (2005).

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Although I authored [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), “it is never too late to ‘surrende[r] former views to a better considered position.’ ”  [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) appears to be inconsistent with the Constitution, the Administrative Procedure Act (APA), and traditional tools of statutory interpretation. Because I would revisit [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), I respectfully dissent from the denial of certiorari.

My skepticism of [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) begins at its foundation—[*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) deference. . . . [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions. [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))compels judges to abdicate the judicial power without constitutional sanction. The Vesting Clause of Article III gives “[t]he judicial Power of the United States” to “one supreme Court, and ... such inferior Courts as the Congress may from time to time ordain and establish. . . . “[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.”  The Framers anticipated that legal texts would sometimes be ambiguous, and they understood the judicial power “to include the power to resolve these ambiguities over time” in judicial proceedings.  The Court’s decision in [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), however, “precludes judges from exercising that judgment.”

[*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) also gives federal agencies unconstitutional power. Executive agencies enjoy only “the executive Power.” But when they receive [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) deference, they arguably exercise “[t]he judicial Power of the United States,” which is vested in the courts. [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) cannot be salvaged by saying instead that agencies are “engaged in the ‘formulation of policy.’ ”  If that is true, then agencies are unconstitutionally exercising “legislative Powers” vested in Congress. See Art. I, § 1.

This apparent abdication by the Judiciary and usurpation by the Executive is not a harmless transfer of power. The Constitution carefully imposes structural constraints on all three branches, and the exercise of power free of those accompanying restraints subverts the design of the Constitution’s ratifiers. The Constitution shielded judges from both the “external threats” of politics and “the ‘internal threat’ of ‘human will’ ” by providing tenure and salary protections during good behavior and by insulating judges from the process of writing the laws they are asked to interpret.  The Constitution also restricted the legislative power by dividing it between two Houses that check each other, one of which was kept close to the people through biennial elections. When the Executive exercises judicial or legislative power, however, it does so largely free of these safeguards. The Executive is not insulated from external threats, and it is by definition an agent of will, not judgment. The Executive also faces election less frequently than do Members of the House, and its power is vested in a single person.

Perhaps worst of all, [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))deference undermines the ability of the Judiciary to perform its checking function on the other branches. The Founders expected that the Federal Government’s powers would remain separated—and the people’s liberty secure—only if the branches could check each other. The Judiciary’s checking power is its authority to apply the law in cases or controversies properly before it. When the Executive is free to dictate the outcome of cases through erroneous interpretations, the courts cannot check the Executive by applying the correct interpretation of the law.

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When 18th- and 19th-century courts decided questions of statutory interpretation in common-law actions or under federal-question jurisdiction, they did not apply anything resembling [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) deference. Judges interpreted statutes according to their independent judgment. . . . Courts did apply traditional interpretive canons that accorded respect to certain contemporaneous, consistent interpretations of statutes by executive officers. . . . This practice is consistent with the more general principle of “liquidation,” in which consistent and longstanding interpretations of an ambiguous text could fix its meaning. [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is not a species of liquidation because it “give[s] administrative agencies substantially more freedom to depart from settled understandings.” But the existence of liquidation by nonexecutive actors confirms that “the pedigree and contemporaneity of the interpretation” mattered in the early Republic, not the mere fact that it was an interpretation by the Executive.

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The rule in [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) thus differs from historical practice in at least four ways. First, it requires deference regardless of whether the interpretation began around the time of the statute’s enactment (and thus might reflect the statute’s original meaning). Second, it requires deference regardless of whether an agency has changed its position. Third, it requires deference regardless of whether the agency’s interpretation has the sanction of long practice. And fourth, it applies in actions in which courts historically have interpreted statutes independently.

Even if [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) deference were sound, I have become increasingly convinced that [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was still wrongly decided because it is even more inconsistent with the Constitution and traditional tools of statutory interpretation than [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

By requiring courts to overrule their own precedent simply because an agency later adopts a different interpretation of a statute, [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))likely conflicts with Article III of the Constitution. The Constitution imposes a duty on judges to exercise the judicial power. That power is to be exercised “for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.”  But [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) directs courts to give effect to the will of the Executive by depriving judges of the ability to follow their own precedent. This rule raises grave Article III concerns, no less than if it allowed judges to substitute their policy preferences for the original meaning of a statute.

. . . . [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) takes on the constitutional deficiencies of [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and exacerbates them. [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))requires judges to surrender their independent judgment to the will of the Executive; [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) forces them to do so despite a controlling precedent. [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) transfers power to agencies; [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) gives agencies the power to effectively overrule judicial precedents. [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) withdraws a crucial check on the Executive from the separation of powers; [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) gives the Executive the ability to neutralize a previously exercised check by the Judiciary. But, with this said, there is no need to question [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) in order to recognize the heightened constitutional harms wrought by [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

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Regrettably, [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) has taken this Court to the precipice of administrative absolutism. Under its rule of deference, agencies are free to invent new (purported) interpretations of statutes and then require courts to reject their own prior interpretations. [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) may well follow from [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), but in so doing, it poignantly lays bare the flaws of our entire executive-deference jurisprudence. Even if the Court is not willing to question [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))itself, at the very least, we should consider taking a step away from the abyss by revisiting [*Brand X*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006858300&pubNum=0000780&originatingDoc=I2a69a56c361911eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).