Reconciling Chevron and Stare Decisis

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ARTICLE

Reconciling *Chevron* and Stare Decisis

RICHARD J. PIERCE, JR.*

In its 1984 decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court announced a two-step test applicable to judicial review of agency constructions of agency-administered statutes. The first step, hereinafter referred to as "*Chevron step one*," is to determine "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; 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, then it reaches the second step of the analysis, hereinafter referred to as "*Chevron step two*." In this step,

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.

Prior to *Chevron*, courts had frequently done what *Chevron* prohibited: they imposed their own constructions on ambiguous agency-administered statutes. When they did so, these courts created binding precedent. The resulting difficulty involves reconciling the highly deferential *Chevron* doctrine with the doctrine of stare decisis—a doctrine that requires adherence to prior decisions.

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2. *Id.* at 842-43.
3. *Id.*
4. *Id.*
6. See infra Part II.
Both doctrines create meta-principles—broad principles of law that govern large classes of cases.

The two-step test enunciated in *Chevron* and the doctrine of stare decisis have the potential to yield inconsistent results in a variety of contexts. Conflicts can arise between *Chevron* and both pre-*Chevron* and post-*Chevron* precedents. Conflicts can also arise between *Chevron* and precedents announced by three different institutions: the Supreme Court, circuit courts, and agencies. Finally, conflicts can arise between precedents and either *Chevron* step one or *Chevron* step two.

Neither the Supreme Court nor circuit courts have yet had occasion to resolve conflicts between *Chevron* and stare decisis in every context in which such conflicts can arise. Both have resolved a large number of conflicts in a variety of contexts, however. The Supreme Court has announced a series of mechanical rules for resolving most of the types of conflicts it has addressed to date. For example, Supreme Court precedents always trump the deference owed under *Chevron*, while agency and circuit court precedents appear to play no role in the process of applying the *Chevron* test in most contexts. Circuit courts have taken a distinctly different approach to resolution of conflicts between these two meta-principles. For example, when an agency announces a construction of a statute that conflicts with a circuit precedent, a court should reconsider the continuing validity of the precedent in light of the results of its application of the two-step test announced in *Chevron*.

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7. When an agency adopts a construction of a statute that a court would uphold as a “permissible” construction of an ambiguous statute under *Chevron* if the issue were res nova, but in circumstances where the Supreme Court previously adopted an inconsistent construction of the statute in a pre-*Chevron* decision, the court is resolving a conflict between a Supreme Court precedent and *Chevron*. The Court has held that stare decisis trumps *Chevron* in this context. Neal v. United States, 116 S. Ct. 763, 768-69 (1996); Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-37 (1992); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 111-12 (1989). See infra Part IIIA.

8. Thus, for instance, the Court seems to attach no significance to the existence of long-standing agency and circuit court precedents in the process of applying *Chevron* step one. See Brown v. Gardner, 513 U.S. 115 (1994); Director, Office of Workers’ Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994); City of Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994); Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994); see also infra Parts IIIb, IIIc.

9. In such circumstances, circuit courts have devised several creative and thoughtful means of attempting to integrate *Chevron* and stare decisis. The Tenth and Third Circuits have concluded that a court should analyze the precedent decisions with care to determine whether they reflect a judicial determination that the statute has a meaning that is inherently inconsistent with the agency construction at issue or reflect instead a judicial determination that a prior agency construction inconsistent with the present construction was “reasonable.” In the second class of cases, the apparent conflict between *Chevron* and stare decisis disappears through the process of accurate characterization of the precedent. See NLRB v. Viola Indus., 979 F.2d 1384 (10th Cir. 1992) (en banc); International Ass’n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988); see also infra text accompanying notes 136-43. The D.C. Circuit has concluded that *Chevron* requires a court to attempt to recharacterize a pre-*Chevron* precedent to determine whether the statutory interpretation adopted in the precedent decision is inconsistent with *Chevron*. If the court concludes that it is, the court must reconsider the precedent in light of *Chevron* and overrule it if it is inconsistent with the results of application of the *Chevron* two-step. See Chemical Waste Management, Inc. v. EPA, 873 F.2d
My goal in this article is to critique the ways in which courts have attempted to reconcile the Chevron and stare decisis doctrines to date and to suggest alternative methods of integrating these doctrines that would produce better results, as measured with reference to the values that underlie the two doctrines. In Part I, I describe the Chevron doctrine and the values it furthers. In Part II, I describe the doctrine of stare decisis and the arguments scholars have made in support of it, and I discuss the relevance of those arguments to administrative lawmaking. In Part III, I describe cases in which courts have attempted to reconcile the two doctrines in various contexts. In Part IV, I suggest a new analytical framework for attempting to maximize simultaneously the values that are furthered by the two doctrines and the conflict-resolving or conflict-avoiding rules that logically follow from application of that framework in the many contexts in which Chevron and stare decisis seem to require different results. I argue that circuit courts have identified and applied methods of reconciling the values of Chevron and stare decisis in several important contexts that are superior to the mechanical rules that the Supreme Court has generally adopted to date.

I. THE VALUES FURTHERED BY THE CHEVRON DOCTRINE

The Court's opinion in Chevron announced and applied fundamental principles of constitutional law. It is one of the most important constitutional law decisions in history, even though the opinion does not cite any provision of the Constitution. In Chevron, the Court set forth for the first time a coherent hierarchical relationship among the three branches of government that is consistent with the text of the Constitution, the intent of the Framers, and the basic principles of democracy the Framers were attempting to further. When read in conjunction with the Court's other modern opinions that resolve fundamental structural issues, Chevron also set forth, for the first time, a coherent analytical framework that anchors the modern administrative state securely within the boundaries of the Constitution.

1477 (D.C. Cir. 1989); see also infra text accompanying notes 144-48. The Second Circuit has interpreted the Supreme Court's decisions as conferring discretion on a circuit court either to adhere to a circuit precedent or to reconsider and overrule that precedent in light of the agency's construction and the Chevron doctrine. The Second Circuit applies that approach both to pre-Chevron precedents and to post-Chevron precedents. See Aguirre v. INS, 79 F.3d 315 (2d Cir. 1993); see also infra text accompanying notes 149-66.

10. Two lines of cases are particularly important in this respect. In Bowsher v. Synar, 478 U.S. 714 (1986), and INS v. Chadha, 462 U.S. 919 (1983), the Court held that Congress can act in a way that binds citizens and the President only by using the legislative process, including bicameralism and presentment. In Morrison v. Olson, 487 U.S. 654 (1988), and Buckley v. Valeo, 424 U.S. 1 (1976), the Court announced limits on the power of Congress to insulate agency heads from control by the President. See 1 Davis & Pierce, supra note 5, §§ 2.4-2.5; Richard J. Pierce, Jr., Morrison v. Olson, Separation of Powers, and the Structure of Government, 1988 SUP. CT. REV. 1 (1988); see also Pievsky v. Ridge, 98 F.3d 730, 737 (3d Cir. 1996) (interpreting Morrison v. Olson as conferring on the President plenary power to remove an officer who has the power to make policy decisions).

11. For efforts to integrate the Court's opinions that address structural issues, see 1 Davis & Pierce,
The Court accomplished these feats in a remarkably simple, logical manner. The Court began its analysis by reconceptualizing an entire class of disputes. Traditionally, the Court had characterized all disputes with respect to the interpretation of a statute as raising issues of law suitable for resolution by a court. In *Chevron*, the Court acknowledged the reality that the process of statutory construction often requires some institution or combination of institutions to resolve two dramatically different types of issues.

All issues that come before Congress are issues of policy until Congress addresses them in some manner. That is the only characterization that adequately describes the myriad issues Congress considers in the legislative process, such as decisions whether to establish a particular regulatory or benefit system, and decisions with respect to the substantive, procedural, and institutional characteristics of any such regulatory or benefit program. When Congress enacts a statute that creates a regulatory or benefit system, it invariably resolves some, but not all, of the hundreds of policy disputes that will arise in the process of implementing the system created by the statute. The *Chevron* Court provided a succinct summary of the reasons why the legislative process always leaves some policy disputes unresolved:

Perhaps [Congress] ... consciously desired the [agency] ... to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the [s]tate ... would be in a better position to do so; perhaps [Congress] ... simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.

The Court concluded that “[f]or judicial purposes, it matters not which of these things occurred.” The Court recognized that any time Congress enacts a statute that does not resolve an interpretive question that arises in the process of administering the statute, Congress has created the need for some other institution to resolve a policy dispute. Thus, the Court recognized that the process of adopting constructions of an ambiguous statute is not resolution of an issue of law, but resolution of a policy dispute. The Court assigned the task of resolving

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13. *Chevron*, 467 U.S. at 865. For a more detailed discussion of these characteristics of the legislative process, see Pierce, *supra* note 11, at 1244-47.


15. Id. at 865; see also Pauly v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991) (stating “resolution of ambiguity in a statutory text is often more a question of policy than of law”); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169 (1803) (“Questions ... which are, by the constitution and laws, submitted to the executive, can never be made in this court.”).
such policy disputes to agencies. By contrast, the process of determining whether a statute is sufficiently ambiguous to support an agency’s construction of the statute raises an issue of law that is suitable for judicial resolution.

The *Chevron* doctrine simultaneously furthers six goals: (1) it allocates policymaking power in a manner consistent with the need for political accountability; (2) it provides a method of enforcing the nondelegation doctrine; (3) it defines the constitutionally permissible place of agencies in government; (4) it provides the Supreme Court a means to enhance its ability to control the growing, decentralized, and ideologically diverse judicial branch; (5) it provides a means to further the values of due process and equal protection in the context of the administrative state; and (6) it provides a means through which agencies can construct consistent and coherent benefit and regulatory programs.

**A. ALLOCATION OF POLICYMAKING POWER**

The *Chevron* two-step establishes a simple constitutionally driven institutional hierarchy for resolving policy disputes. Step one places Congress and the legislative process at the top of the hierarchy. If Congress has made a policy decision through the constitutionally prescribed legislative process—including bicameralism and presentment—“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.”16 That part of the institutional hierarchy is not new, of course. The Court has long acknowledged the principle of legislative supremacy in the context of nonconstitutional decisionmaking.17

Step two of *Chevron*, however, reverses another part of the institutional hierarchy the Court had traditionally recognized:

> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of 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.18

Thus, agencies are in a position below Congress but above courts in the institutional hierarchy in the policymaking context.

The Court anchored that part of the new institutional hierarchy securely in the Constitution through a three-step process. First, the Court recognized that the process of adopting a construction of an ambiguous statute is the process of resolving a policy dispute.19 Second, the Court recognized that agencies are

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19. *Id.* at 865.
politically accountable institutions: "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices ..."20 In other words, the Court attributed to the President the policy decisions of agencies and implicitly invited the electorate to hold the President politically accountable for all such decisions. Once the Court equated the process of adopting constructions of ambiguous statutes with the process of resolving policy disputes and held that the President is vicariously responsible for all agency policy decisions, the third step in the process of divining a constitutionally permissible hierarchy followed logically from the dramatically different characteristics of the competing institutions:

Judges ... are not part of either political branch of the Government ... In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments ... In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.21

B. ENFORCEMENT OF THE NONDELEGATION DOCTRINE

The Court has long held that the Constitution assigns Congress exclusive power to legislate and that Congress cannot delegate that power to any other institution.22 The Court has encountered seemingly insurmountable problems in its efforts to enforce the nondelegation doctrine, however.23 With the exception of two unusual cases,24 decided the same day in 1935, the Court has upheld every statute that has been challenged as violative of the nondelegation doctrine.25 For the first two centuries of the Court's existence, its efforts to enforce the nondelegation doctrine can be characterized as a process of constantly reducing its expectations of the legislative process to accommodate the results of that process. The Court would announce a test for applying the doctrine, but it then would replace that test with a less demanding test as soon as it was confronted with a challenge to the constitutionality of a statute that could not pass the previously announced test.26 Through multiple iterations of this process, the Court was able to say that it was enforcing the doctrine without actually enforcing it.

In 1989, the Court switched to a more candid description of its approach to

20. Id.
21. Id. at 865-66.
23. See 1 Davis & Pierce, supra note 5, § 2.6.
25. See 1 Davis & Pierce, supra note 5, § 2.6.
26. Id.
the nondelegation doctrine. The Court began to acknowledge the reality that it had abandoned its efforts to enforce the nondelegation doctrine because it had been unable to devise a justiciable standard that would allow it to distinguish between constitutionally tolerable and unconstitutional delegations of broad policymaking power to agencies. In an important sense, however, the Court has overstated its failure to devise an effective mechanism to enforce the nondelegation doctrine. The *Chevron* doctrine is such a mechanism. Indeed, the *Chevron* two-step may be the only viable mechanism to enforce the nondelegation doctrine that is both effective and justiciable.

*Chevron* sends a clear message to the Legislative Branch: If you make a policy decision through the legislative process, we will enforce that decision against the President through the application of *Chevron* step one; if, however, you decline to make a policy decision through the legislative process, we will deem your failure to so act as ceding the power to make that policy decision to the President. Prior to *Chevron*, Congress could enact a broad and ambiguous statute with the realistic expectation that the judiciary would make most of the policy decisions that arise under the statute through the process of statutory construction. Many members of Congress were perfectly content to avoid resolving major policy disputes and to take their chances that the judiciary

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27. Since 1989, the Court has upheld four statutes against claims that they violated the nondelegation doctrine. See *Loving v. United States*, 116 S. Ct. 1737, 1744-49 (1996) (upholding provisions of Uniform Code of Military Justice delegating to Executive power to determine aggravating factors warranting death penalty); *Touby v. United States*, 500 U.S. 160, 164-67 (1991) (upholding provisions of Comprehensive Drug Abuse Prevention and Control Act of 1970 delegating to Attorney General power to temporarily schedule controlled substance when "necessary to avoid an imminent hazard to public safety"); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-24 (1989) (upholding provisions of Consolidated Omnibus Reconciliation Act of 1985 delegating to Secretary of Transportation power to establish system of user fees to cover costs of administering certain federal pipeline safety programs); *Mistretta v. United States*, 488 U.S. 361, 371-97 (1989) (upholding provision of Sentencing Reform Act delegating to Sentencing Commission within the Judicial Branch power to promulgate Federal Sentencing Guidelines). Ironically, the most candid explanation of the Court's current approach is contained in the only dissenting opinion that was written in any of those cases. See *Mistretta*, 422 U.S. at 415-16 (stating "we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law") (Scalia, J., dissenting); see also id. at 373 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited ... to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 Am. U. L. Rev. 391, 393-403 (1987) (arguing that the Court cannot create any justiciable standard for applying nondelegation doctrine).


29. The Court sometimes attempts to enforce the nondelegation doctrine through use of an alternative remedy—adoption of a narrowing construction of an ambiguous statute. See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980). It is not at all clear that this remedy has the effect of deterring Congress from enacting vague and ambiguous statutes. It is reasonable to assume that a judicial decision that adopts a narrowing construction will please some members of Congress and displease others. Moreover, this remedy has precisely the vice the Court decried and prohibited in *Chevron*—it confers on politically unaccountable judges the power to make fundamental policy decisions.
would resolve those disputes in a manner consistent with their policy preferences. Given the institutional rivalry between Congress and the President, the Court could predict with confidence that Congress would react to *Chevron* by maximizing the number of policy decisions it makes through the legislative process and minimizing the number of policy decisions it cedes to the President. There is considerable evidence that Congress has understood, and acted in response to, this message. Since 1984, Congress has enacted or amended many statutes that delegate power to agencies. Those statutory enactments are extraordinarily long and detailed.\(^{30}\) They leave to the President much less policymaking discretion than did the typical pre-*Chevron* statute.

In this respect, *Chevron* can be considered one of the first judicial applications of modern understandings of the regulatory process. Regulatory scholars have long recognized that command and control regulation is both ineffective and inefficient.\(^{31}\) It can, and should, be replaced with what Richard Stewart calls "reconstitutive strategies"—methods of changing the incentives of individuals and institutions in ways that will induce them to behave in socially constructive ways.\(^{32}\) For two centuries, the Court attempted to enforce the nondelegation doctrine through use of command and control regulation of Congress. As has proven to be the case in many other contexts, that effort was ineffective and inefficient. The *Chevron* two-step reflects the Court’s decision to adopt a "reconstitutive strategy." By changing the incentives of Congress, the Court finally identified a method of enforcing the nondelegation doctrine that is both effective and efficient.

### C. FINDING A CONSTITUTIONALLY PERMISSIBLE PLACE FOR AGENCIES

Justices, Judges, and scholars have long struggled to reconcile the present structure of government with the structure prescribed by the Constitution.\(^{33}\) The Constitution makes no reference to agencies. Yet, hundreds of federal agencies possess, in the aggregate, enormous power to make policy decisions that bind

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the public. Critics of the modern administrative state decry this structural feature of modern government as legitimizing a "headless fourth branch" of government.\textsuperscript{34} Such a structure is inconsistent with the Framers' design because it enables "politically unresponsive administrators" to make "fundamental policy decisions."\textsuperscript{35}

\textit{Chevron} responds to this persistent criticism by finding a constitutionally permissible place for agencies within the structure devised by the Framers. Agencies are not a "headless fourth branch," and agency decisionmakers are not "politically unresponsive administrators." When an agency (or a court) makes a decision that is dictated by application of \textit{Chevron} step one, it is implementing a policy decision made by Congress through use of the legislative process. When an agency makes a policy decision that is "permissible" within the meaning of \textit{Chevron} step two, it "may . . . properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is and it is entirely appropriate for this political branch of the Government to make such policy choices . . . ."\textsuperscript{36}

Thus, agencies are inferior to both of the politically accountable branches, and all agency policy decisions are attributable to one of the two politically accountable branches. This placement of agencies within the structure of government is entirely consistent with the Court's treatment of a variety of related structural issues, including its treatment of so-called "independent" agencies.\textsuperscript{37}

\section*{D. CONTROLLING THE JUDICIAL BRANCH}

The Supreme Court's responsibilities include maintaining control over the decentralized Judicial Branch. The Court's ability to perform that critical function has been strained by the dramatic expansion and the increasing ideological diversity of the federal judiciary. The pre-\textit{Chevron} legal regime posed a significant threat to the Court's ability to maintain a tolerable degree of control over the Judicial Branch.\textsuperscript{38} Before \textit{Chevron}, each of hundreds of federal judges had substantial policymaking power. When confronted with a gap or ambiguity in an agency-administered statute, a judge was free to "impose [his] own construction on the statute." Given the wide variety of "tools of statutory construction" available to judges, and the resulting high degree of indeterminacy of the

\begin{itemize}
\item \textsuperscript{34} See, e.g., Freytag v. Commissioner, 501 U.S. 868, 921 (1991) (Scalia, J., concurring).
\item \textsuperscript{35} \textit{Industrial Union Dep't}, 448 U.S. at 686-87 (Rehnquist, J., concurring).
\item \textsuperscript{36} \textit{Chevron}, 467 U.S. at 865.
\item \textsuperscript{37} I have explained at length in another article why the Court's opinions relevant to the independent agency issue should be understood as conferring on the President plenary power to exercise control over policy decisions made by an agency. See \textit{Pierce}, supra note 10, at 21-41. In 1996, the Third Circuit adopted and applied that interpretation of the Court's opinions. See \textit{Pievsky v. Ridge}, 98 F.3d 730 (3d Cir. 1996) (interpreting Supreme Court's opinions as conferring on the President plenary power to remove officer who has power to make policy decisions).
\end{itemize}
process of statutory construction, the pre-
Chevron legal regime had the effect of
empowering each of hundreds of judges to make myriad policy decisions
guided primarily by each judge's own "views of wise policy." 39 That legal
regime created two serious problems. First, it conferred vast policymaking
power on judges who are "not part of either political branch of government." 40
Second, it created a large number of intercircuit, and even intracircuit, splits
with respect to the appropriate construction of ambiguous agency-administered
statutes. Without a major doctrinal change, that legal environment threatened to
render the Court incapable of maintaining control of the Judicial Branch. 41

By prohibiting judges from imposing their own construction on ambiguous
agency-administered statutes, Chevron rendered the Court's task far more man-
ageable.42 Indeed, Chevron has enhanced the Court's ability to control the
Judicial Branch to such an extent that the Court is now able to perform that task
with fewer resources, thereby enabling it to devote increased time and attention
to its other critical responsibility—resolving important issues of law. Simulta-
neously, Chevron restricted the power of politically unaccountable judges by
withdrawing their authority to make policy decisions under the guise of adopt-
ing judicial constructions of ambiguous agency-administered statutes.

E. FURTHERING THE VALUES OF DUE PROCESS AND EQUAL PROTECTION

One of the core principles of the Anglo-American system of justice is that
like cases should be decided in a like manner.43 While that principle long
antedated the U.S. Constitution, the Court has consistently held that it is
embodied in both the Due Process Clause and the Equal Protection Clause.44
The Court also applies the principle as one of the most important constraints on
agencies' discretionary decisionmaking. An agency is held to have acted in an
arbitrary and capricious manner if it decides similar cases in dissimilar
ways.45

The Chevron doctrine greatly enhances the likelihood that the U.S. system of
administrative justice will yield results consistent with the fundamental prin-
ciple that like cases should be decided in like manner. The reason is simple.
There is only one agency, while there are thirteen circuit courts. The pre-

39. See 1 DAVIS & PIERCE, supra note 5, § 3.6; Richard J. Pierce, Jr., The Role of Constitutional and
40. Chevron, 467 U.S. at 865.
41. See Strauss, supra note 38.
42. In the context of interpretations of agency-administered statutes, splits between circuits can arise
only if at least one circuit reverses the agency's interpretation. As of 1990, Chevron had reduced the
incidence of such judicial reversals of agency interpretations by 33%. Peter H. Schuck & Donald E.
43. See JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971); Frederick Schauer, Precedent, 39 Stan.
(1954); see generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1436 (2d ed. 1988).
45. See, e.g., Atchison T. & S.F.R. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973); see generally
1 DAVIS & PIERCE, supra note 5, § 11.5.
Chevron legal environment produced many splits among the circuits with respect to the appropriate judicial construction of an ambiguous agency-administered statute. In such an environment, no agency could adhere to the principle that like cases should be decided in like manner. To the contrary, agencies often were required to decide cases that arose in one region in a manner different from similar cases that arose in another region.\textsuperscript{46}

In the post-Chevron legal environment, disagreements among circuits with respect to the meaning of agency-administered statutes are much less frequent.\textsuperscript{47} Only the agency charged with responsibility to administer a statute has the power to engage in the policymaking process inherent in adopting a construction of an ambiguous statute. Moreover, agency violations of the principle that like cases must be decided in like manner are relatively rare and are easily detected and reversed by reviewing courts.\textsuperscript{48}

F. ENABLING AGENCIES TO CONSTRUCT CONSISTENT AND COHERENT PROGRAMS

Congress typically assigns to an agency responsibility for constructing a regulatory or benefit program that is consistent with a long, complicated statute. When that statute emerges from the sausage factory that is the legislative process, it invariably includes scores of gaps, ambiguities, and internally inconsistent provisions. The Telecommunications Act of 1996\textsuperscript{49} is illustrative. The Act is over one hundred pages long. It amends, but does not repeal, the "hodge-podge of overlapping and conflicting regulatory regimes" that were already in place when the Act was passed.\textsuperscript{50} The Act clearly resolves several important policy issues. The Act leaves many other important issues unaddressed, however, and it addresses other issues in vague or inconsistent ways. It is impossible to predict many of the most important characteristics of the new regulatory program that the Act will spawn based only on an analysis of language of the Act itself.

In their excellent book analyzing the Act, Peter Huber, Michael Kellogg, and John Thorne identify myriad gaps, ambiguities, and internal inconsistencies in the Act.\textsuperscript{51} In many cases, the construction of a single ambiguous provision of the Act will have enormous effects on the future contours of the U.S. telecommunications industry.\textsuperscript{52} An agency's task in this typical situation is to construct a coherent regulatory program within the boundaries created by the statutes that limit the agency's discretion. In that process, some institution or combination of institutions must adopt constructions of scores of ambiguous statutory provisions.

\begin{thebibliography}{9}
\bibitem{46} See Strauss, supra note 38.
\bibitem{47} See supra note 42.
\bibitem{48} See 2 DAVIS & PIERCE, supra note 5, § 11.5.
\bibitem{51} Id.
\bibitem{52} See, e.g., id. § 1.1.7.
\end{thebibliography}
Even under *Chevron*, courts play a critical role in this process. Courts are assigned the task of policing the statutory boundaries to the extent that those boundaries are clear.\textsuperscript{53} They are not permitted, however, to impose their own constructions on ambiguous statutory provisions. *Chevron* assigns that task solely to the agency, "rely[ing] upon the incumbent administration’s views of wise policy to inform its judgments."\textsuperscript{54}

The Court’s assignment of the task of statutory construction exclusively to agencies is critical to their ability to construct a coherent regulatory program. Again, the Telecommunications Act illustrates the point. The agency charged with the responsibility of administering the Act can choose one of a dozen or more regulatory models that are consistent with the statutory boundaries limiting its discretion. The agency’s choice of one of those models over competing models will be determinative of the constructions it adopts with respect to scores of ambiguous statutory provisions. Thus, the agency must approach the task of statutory construction as a complicated, integrated task in which each construction must fit with scores of other constructions to create a coherent regulatory program that is consistent both with the language of the Act and with the regulatory philosophy of the incumbent administration.\textsuperscript{55}

If reviewing courts were free to impose on an agency judicial constructions of ambiguous statutory provisions, the results would be easy to predict and extremely unpalatable. Assume that the incumbent administration is politically moderate with respect to telecommunications regulatory issues. Accordingly, the agency will choose a "moderate" model of telecommunications regulation. The agency will adopt scores of constructions of ambiguous statutory provisions that are consistent with its politically moderate model. In the case of the Telecommunications Act, the agency is required to issue eighty rules in the initial process of implementing the Act. Most of those rules will include one or more constructions of ambiguous statutory language. Each of the rules and agency constructions will be reviewed by a court. Scores of judges in several circuits will participate in the review process. The policy views of those judges will span a broad spectrum from liberal to conservative. If each judge were free to impose on the agency the judge’s preferred construction of a particular ambiguous provision of the statute, the review process inevitably would yield "liberal" judicial constructions of some provisions and "conservative" judicial constructions of other provisions. The result would be an incoherent legal regime in which the agency would have no viable options.\textsuperscript{56} It would be precluded from adopting any coherent model of telecommunications regulation.

\textsuperscript{53} See, e.g., Iowa Utils. Bd. v. FCC, 109 F.3d 418 (8th Cir. 1996) (staying FCC rule based on determination that rule probably violates statute).

\textsuperscript{54} Chevron, 467 U.S. at 865.


\textsuperscript{56} See id. at 763-76; see also Pierce, supra note 11, at 1252-54; Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?*, 77 GEO. L.J. 2031, 2036-39 (1989).
Thus, the *Chevron* doctrine furthers simultaneously a long list of social values that span a broad spectrum from constitutional and political theory to prosaic details of the process of governing a complicated nation. It also provides a coherent constitutional framework within which other issues of law and policy can be evaluated and debated. It follows that the *Chevron* doctrine is entitled to great respect by courts. What should a court do, however, if it perceives a conflict between *Chevron* and another doctrine that is entitled to the respect of courts—stare decisis? To explore that question, I will begin by describing stare decisis and the values it furthers.

II. THE VALUES FURTHERED BY STARE DECISIS

Stare decisis refers to the common practice of adhering to precedent even when the precedent is, or may be, wrong in some sense. No institution adheres to precedent in all circumstances. For example, any institution will overrule a precedent when it concludes that the precedent is manifestly wrong or when it concludes that the precedent is producing significant adverse effects. Both courts and agencies rely on some version of stare decisis, but agencies generally are more willing to depart from precedent than are courts.

The process of determining whether a case is governed by a precedent often requires an institution to engage in an exercise in characterization. The institution must first abstract from the precedent decision a rule for which the precedent stands, and then determine whether that rule dictates the outcome of the pending case. Careful analysis and characterization of a precedent often can avoid the need to choose between overruling a precedent and reaching an appropriate result in a case.

Support for stare decisis has always been controversial. Courts rarely address the issue, and scholars are divided with respect to the legitimacy of the practice and the circumstances in which an institution should overrule a precedent. Some scholars view stare decisis as an indefensible and unconstitutional practice. Others view it as indispensable. Scholars have attempted to explain and to support the practice on many grounds, each of which varies in persuasive power depending on the context in which the issue arises. Among these grounds are: (1) conserving scarce institutional resources; (2) encouraging decisionmakers to exercise foresight in announcing new rules; (3) protecting institutional reputation; (4) reducing variations among decisionmakers; (5) enhancing intertemporal equity; and (6) protecting reliance interests. This Part discusses these grounds and their applicability in the context of administrative lawmaking.

60. See generally Monaghan, *supra* note 33 (arguing that stare decisis is a means of maintaining political stability and continuity); Schauer, *supra* note 43 at 595-602 (arguing that stare decisis promotes fairness, predictability, and strengthened decisionmaking).
A. CONSERVATION OF SCARCE RESOURCES

Stare decisis is justifiable in part as a means of conserving scarce institutional resources.\(^{61}\) Formulating rules is a difficult and time-consuming process. No institution has the luxury of addressing every issue as if it were res nova in every case in which the issue arises. This justification alone may be sufficient to support the practice of stare decisis in the vast majority of cases in which it is employed. It is inadequate to support the practice in any interesting case, however. I use the term "interesting case" to refer to a case in which an institution has good reason to believe that the applicable precedent is wrong in some sense or is producing destructive effects. In such cases, the institution's skepticism with respect to the wisdom of retaining the precedent surely justifies some commitment of scarce institutional resources to the process of reconsideration of the precedent, even if the institution decides to retain the precedent for reasons independent of its desire to conserve its scarce resources. Of course, this reasoning applies to all institutions that adhere to the practice of stare decisis—the Supreme Court, circuit courts, and agencies. Every institution should be willing to devote resources to the process of reconsidering a precedent when it has reason to believe that it is wrong and/or destructive in its effects.

B. INDUCING FORESIGHT IN DECISIONMAKING

The practice of adhering to precedent encourages decisionmakers to exercise foresight when they announce a new rule in the process of deciding a case.\(^{62}\) Decisionmakers must attempt to anticipate the range of future cases to which a rule will apply. Further, they must predict the consequences of future applications of the rule in the process of deciding whether to announce a new rule as the basis for deciding a case as well as in choosing the rule to announce.

There is a troubling circularity to this justification for stare decisis, however. In a legal environment that includes a strong version of stare decisis, it is undoubtedly important to induce decisionmakers to exercise foresight in the process of deciding a case. Conversely, decisionmakers can perform their functions responsibly without any use of foresight in a legal environment with no stare decisis doctrine, and can responsibly devote less time and effort to the process of attempting to predict the future consequences of announcing a decisional rule in an environment with a weak form of stare decisis.\(^{63}\) Thus, the need to exercise foresight in crafting decisional rules inevitably depends on the existence of other justifications for stare decisis.

Moreover, it is extraordinarily difficult for a decisionmaker to anticipate all of

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61. See Monaghan, supra note 33, at 744-46 (describing agenda-limiting function of stare decisis); Schauer, supra note 43, at 599 (noting that a system of precedent conserves decisional resources).
63. See Jerome Frank, Law and the Modern Mind 153-55 (1930) (arguing that judges become distracted from doing justice when they become overly concerned with the precedential effects of their rulings).
the future situations to which a rule will apply and to predict with tolerable accuracy the consequences of each of those potential future applications of a decisional rule. Agencies have powerful comparative advantages over courts in this respect. Judges typically have little knowledge of the complicated regulatory and benefit programs that agencies administer. Moreover, they typically have little understanding of the disciplines relevant to predicting the consequences of announcing alternative decisional rules applicable to disputes that arise in the process of administering those programs. Such disciplines span a broad spectrum that includes economics, engineering, chemistry, physics, toxicology, meteorology, and medicine. Judges also lack access to decisionmaking procedures through which they can educate themselves with respect to either those disciplines or the many characteristics of a regulatory or benefit program that can cause a decisional rule to have unintended adverse consequences. Even if they had access to procedures appropriate for that purpose, judges lack the time necessary to obtain such an education. Thus, it would be a mistake to assume that courts can perform the difficult task of predicting the future consequences of a judicially crafted decisional rule applicable to a regulatory or benefit program with tolerable accuracy.

An agency charged with responsibility to administer a regulatory or benefit program has obvious comparative advantages over a court with respect to its understanding of both the characteristics of the program and the disciplines relevant to the program. Agencies have two other advantages over courts that are even more important for this purpose. First, agencies have access to a decisionmaking procedure—notice and comment rulemaking—that is vastly superior to judicial decisionmaking procedures for the purpose of predicting the future consequences of alternative decisional rules.64 Second, agencies can devote much more time and many more resources to that difficult prediction process than can a court. Typically, a court can allocate no more than a few days of highly skilled legal talent to the task. By contrast, when an agency uses notice and comment rulemaking to shape and announce a new decisional rule, it typically devotes tens of thousands of person hours to the task of predicting the future consequences of alternative decisional rules.65 Moreover, the agency's decisionmaking team invariably includes individuals with expertise in each of the fields relevant to the difficult predictive process.

Thus, the Chevron doctrine actually furthers this value better than the practice of stare decisis. Because courts have extremely limited ability to predict the consequences of a decisional rule announced in the context of an agency-administered regulatory or benefit system, they should assume a minimalist role in that process; i.e., they should adhere to Chevron and announce such a rule only when the language of a statute requires them to do so. Courts also should

65. Id. at 60-62.
adopt rules and practices that recognize that agencies have significant comparative advantages over courts in predicting the effects of alternative decisional rules applicable to agency-administered regulatory and benefit systems. Two corollaries logically follow from these principles. First, a court should be particularly receptive to an agency argument that a rule previously announced by a court is wrong and/or is having unintended adverse effects. Second, a court should be particularly reluctant to reverse a decisional rule adopted by an agency.

C. PROTECTING INSTITUTIONAL REPUTATION

An institution that changes its decisional rules with frequency is likely to experience a diminution of its reputation. It is also likely to induce cynicism among those who become aware of that institutional characteristic. This reality provides a potentially powerful justification for stare decisis. Its justificatory power varies, however, with several factors.

First, its strength varies depending on the nature of the institution and the source of the decisional rule. A court that announces rules of law risks significant reputational harm if it overrules precedents with considerable frequency. Those who are aware of that characteristic of the institution will begin to perceive it as a political institution rather than a judicial institution, and they will begin to perceive law as simply a part of the political process. An agency that announces decisional rules predicated on policy analysis is exposed to lower risks of reputational harm as a result of frequent changes in its decisional rules. The policymaking process should be dynamic. It should produce relatively frequent changes in decisional rules attributable both to changes in our understanding of fields such as economics, engineering, toxicology and medicine, and to changes in the policy preferences of the electorate, as those changes are reflected in the results of presidential and congressional elections. Moreover, agencies are, and should be, political institutions, as the court recognized in Chevron. They make policy. They need not be, and should not pretend to be, judicial institutions.

Second, the strength of the reputational justification varies depending on the institution’s ability to provide persuasive reasons in support of a decision to change a decisional rule. This variable applies to some extent to all institutions and to all decisional rules. A well-reasoned judicial decision overruling a

66. See Monaghan, supra note 33, at 752-54.
67. See id.
69. Chevron, 467 U.S. at 865-66; see also Sierra Club v. Costle, 657 F.2d 298, 405-08 (D.C. Cir. 1981) (discussing authority of, and necessity for, the President to control and supervise administrative agencies).
RECONCILING CHEVRON AND STARE DECISIS

Precedent often elicits widespread praise rather than criticism or cynicism. The strength of this justification also varies to some extent, however, depending on the nature of the institution and the source of the rule. Typically, it is easier for an agency to provide a persuasive explanation for changing a policy-based decisional rule than it is for a court to provide a persuasive explanation for changing a rule of law.

Third, the strength of the reputational justification depends in part on the characteristics of the relevant audience. In some contexts, this variable can be very important. Henry Monaghan draws a useful distinction between the “elites,” who study an institution’s decisions with care, and the general public. In most contexts, the only relevant audience consists of the relatively few elites, but in some cases the relevant audience includes the general public.

*Roe v. Wade* provides a good example of the potential significance of this distinction. Many elites who study the Supreme Court’s opinions with care believe that the rule announced in *Roe* is manifestly wrong as a matter of constitutional law, independent of their views with respect to abortion. Many elites would applaud a well-reasoned opinion that overruled *Roe*. In the context of a case like *Roe*, however, elites are neither the only relevant audience nor the most important audience for purposes of predicting the reputational effects of an overruling.

A majority of the general public supports the rule announced in *Roe*. They have never read the opinion. They know nothing about the Court’s reasoning in support of the rule or about its fragile constitutional underpinnings. If the Court were to overrule *Roe*, it would be highly unlikely that the general public would read that opinion or understand the reasoning in support of such a change in a rule of constitutional law.

As a result, even a well-reasoned opinion reversing *Roe* would be likely to create severe harm to the Court’s reputation with a majority of the general public and to induce increased public cynicism about the law and the role of the courts. The potential for such a socially costly public reaction is enhanced by the widespread public perception that several members of the present Court were nominated because of their willingness to overrule *Roe*. Thus, the reputational injury justification for adhering to precedent is powerful. The Court referred to this factor in the process of reaffirming *Roe* under circumstances in which a majority of Justices appeared to believe that *Roe*’s rule is wrong.

Very few precedents are remotely comparable to *Roe* in this respect. More

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70. See Monaghan, supra note 33, at 749-53 (suggesting legitimation to elites as primary goal of rule of law theories about Supreme Court).
typically, an institution's decision to overrule a precedent is known only to the elites who study the institution's decisions. In that situation, the elites comprise the only audience relevant to predicting the degree of reputational injury the institution will suffer as a result of overruling a precedent. In that common situation, the institution may avoid any injury to its reputation attributable to a decision to overrule a precedent if it provides a good explanation for that decision. Indeed, such a decision is likely to enhance the reputation of the institution.

This factor also demonstrates the close relationship between the merits of a decision to overrule a precedent and the reputational harm attributable to such a decision. If an institution is not capable of providing a good reason for a decision overruling a precedent, it should not make such a decision, both because it lacks a sufficient meritocratic justification for doing so and because it is likely to suffer reputational harm as a result of issuing such a decision. Conversely, an institution should overrule a mistaken precedent if it can provide a good reason for that action, unless the "audience" that is aware of the precedent is broader than the elites who study the institution's decisions or the institution has reasons for adhering to the precedent that are independent of its desire to avoid injury to its reputation.

The value of preserving an institution's reputation is furthered both by stare decisis and by *Chevron*. It is furthered directly by stare decisis because that practice reduces the number of occasions when an institution changes a decisional rule. It is also furthered indirectly by *Chevron* because *Chevron* reduces the number of future occasions when a court must make the difficult choice between adhering to a decisional rule it now regrets having announced or acquiescing to an agency's well-reasoned argument in support of an alternative decisional rule.

The value of reputational interests also varies with the institution whose reputation is at stake. In this context, a good argument can be made to support a hierarchy in which we place the highest value on the reputation of the Supreme Court, because it is the most salient symbol of the rule of law in our society, and the lowest value on the reputation of agencies, both because they have less symbolic value and because we expect agencies to change their decisional rules more often than courts change rules of law. Any institution, including the Supreme Court, can overrule most decisional rules with no adverse effect on its reputation, however, if it provides good reasons for its action.

**D. REDUCING VARIATIONS AMONG INDIVIDUAL DECISIONMAKERS**

The individual decisionmakers within an institution change over time. A strong tradition of stare decisis dampens the variation in institutional decision-making that otherwise would result from those changes in the individual composition of the institution. Some scholars view this effect as an independent justification for the practice. 74

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74. See, e.g., Schauer, supra note 43, at 600.
It is hard to identify any social value that is furthered by this effect of stare decisis, however, that is independent of the values furthered by other justifications. This effect is advantageous if it adds credence to the incantation that ours is a nation of laws rather than men. But, that is just another way of describing the reputational harm justification for stare decisis.75 The variation dampening effect of stare decisis also has the advantage of enhancing intertemporal equity, but that is a justification that merits independent consideration. Of course, if reducing variations among individual decisionmakers is an independent value that is furthered by stare decisis, it would seem to be furthered equally by stare decisis at each of the three levels: the Supreme Court, circuit courts, and agencies.

E. ENHANCING INTERTEMPORAL EQUITY

Stare decisis enhances longitudinal, or intertemporal, equity. It creates a legal environment in which like cases produce like results independent of the time when the dispute arises or the conduct takes place.76 This is certainly a positive attribute of the practice, ceteris paribus. It is not a particularly persuasive reason for adhering to precedent in any interesting case, however. Interesting cases involve institutional decisions that continue to apply a rule that the institution now believes to be wrong in some important sense. It is hard to justify intentionally applying the "wrong" rule to all future cases simply because an institution unintentionally applied that "wrong" rule in all past cases.77 Any institution must be free to correct its own errors.

The case in support of horizontal, or intratemporal, equity is much more powerful than the case in support of intertemporal equity. It is hard to conceive of any meritocratic justification for applying different outcome-determinative decisional rules to like cases that are decided during the same time period. A legal system can produce results of that type only through one of two mechanisms: intentional, irrational discrimination attributable to inappropriate institutional motives, or unintentional, irrational discrimination attributable to flaws in the institutional structure of the legal system. The U.S. legal system includes many judicially enforced doctrines that are designed to detect, deter, or punish instances of intentional irrational discrimination. It also should choose doctrines that are likely to minimize unintentional, irrational discrimination. Although *Chevron* serves this purpose,78 stare decisis does not. Indeed, in one important context, stare decisis interferes with this goal: When a circuit court chooses to adhere to a circuit precedent instead of deferring to an agency's reasonable interpretation of ambiguous statutory language, it risks creating a legal environment characterized by unintentional, irrational discrimination.

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75. See supra Part IIc.
77. See Alexander, supra note 57, at 9-13.
78. See supra Part III.
F. PROTECTION OF RELIANCE INTERESTS

In some important contexts, a rule announced in a precedent induces significant, irrevocable actions taken in reliance on the assumption that the rule is valid and will remain in effect. In such circumstances, overruling a precedent can have extraordinarily destructive effects. The Legal Tender Cases provide a good illustration of this sometimes powerful justification for stare decisis. Scholars generally agree that the Court's decisions authorizing the government to substitute paper money for metal money were clearly wrong as a matter of constitutional law. Yet, it is unimaginable that the Court would overrule those precedents. The entire U.S. economy has been constructed on the premise that paper money is legal tender. The Court would be behaving in an extraordinarily irresponsible manner if it overruled a precedent in circumstances in which its decision destroyed trillions of dollars of investments made in reliance on that precedent.

The strength of the detrimental reliance justification for stare decisis varies with the context in which the precedent decision is issued. All rules of law probably induce some detrimental reliance. The nature and magnitude of the reliance interest varies over a wide spectrum, however. Moreover, an institution often can devise means of protecting reliance interests when it overrules a precedent. The Supreme Court's frequent practice of giving only prospective effect to its holdings with respect to new rules of constitutional criminal procedure is illustrative in this regard.

Agency precedents can also give rise to significant reliance interests. Individuals and institutions often act in reliance on the assumption that an agency decision announcing a rule of law or a construction of a statute will remain viable in the future. Agency or judicial decisions overruling or reversing such an agency precedent can yield significant harm to reliance interests. There is a major difference, however, between the effects of an agency decision that overrules an agency precedent and the effects of a judicial decision that overrules or reverses an agency precedent. Agencies usually provide means of protecting reliance interests when they overrule an agency precedent that gave rise to such interests. If an agency fails to do so, its decision to overrule the

79. See Alexander, supra note 57, at 13-14; Monaghan, supra note 33, at 744-46.
81. Id. at 389.
82. See, e.g., Stovall v. Denno, 388 U.S. 297 (1967) (announcing three criteria for determining whether new rules of criminal procedure should be applied retroactively).
83. Order No. 888, F.E.R.C. Stats. & Regs. (CCH) ¶ 31,036 (1996), is illustrative. The agency requires electric utilities to provide "open access" to their transmission lines. That new requirement exposes utilities for the first time to the risk that competitive market forces will preclude them from recovering over one hundred billion dollars of their investments in generating plants. The agency recognizes, however, that those investments were made in reliance on the prior methods of regulating electric utilities. To avoid the arguable unfairness that otherwise would result from its major change in regulatory rules, the agency states that utilities will be allowed to recover their stranded investments through use of an agency-authorized surcharge.
precedent is highly vulnerable to rejection by a reviewing court as arbitrary and capricious. By contrast, a judicial decision reversing or overruling an agency precedent usually has the effect of destroying completely the value of all investments made in reliance on the agency precedent. A court can protect reliance interests when it overrules a precedent, as many of the Supreme Court’s constitutional criminal procedure decisions illustrate. In most contexts, however, including judicial decisions to reverse or overrule agency precedents, courts rarely take any action to protect the reliance interests that have been created by the precedent.

The Supreme Court’s decision in City of Chicago v. Environmental Defense Fund demonstrates this effect. The Environmental Protection Agency (EPA) issued a rule in 1980 in which it interpreted the Resource Conservation and Recovery Act of 1976 (RCRA) to exempt from regulation ash generated by municipal incinerators that burn household waste. Over the ensuing fourteen years, municipalities invested hundreds of millions of dollars in 150 incinerators in reliance on their expectation that the agency rule would remain viable. When the Supreme Court reversed the EPA rule in 1994, it placed that entire investment in jeopardy.

The effects of the reversal of the RCRA rule also illustrate another important point. A decision to overrule or to reverse a long-standing precedent usually causes much greater harm to reliance interests than does a decision to overrule or to reverse a recently announced rule. If a court had reversed the EPA’s incinerator ash rule in 1982, instead of in 1994, its decision would have caused little, if any, harm to reliance interests. This and many other cases show the strong relationship between the age of a precedent and the magnitude of the injury to reliance interests caused by a decision to overrule, or to reverse, that precedent.

84. Smiley v. Citibank (South Dakota), N.A., 116 S.Ct. 1730, 1734 (1996) ("change that does not take account of legitimate reliance on prior interpretation . . . may be 'arbitrary, capricious [or] an abuse of discretion' . . ." (citations omitted)); see, e.g., General Elec. Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) (holding that agency could not impose fine based on one plausible interpretation of rule because firm had relied on another plausible interpretation); Association of Gas Dist. v. FERC, 824 F.2d 981, 1028-30 (D.C. Cir. 1987) (holding that agency did not engage in reasoned decisionmaking when it made major change in regulatory rules that had effect of exposing regulatees to risk of loss of billions of dollars in contractual commitments made in reliance on prior regulatory rules without adequately discussing potential means of allowing regulatees to mitigate damage to their reliance interests); Retail, Wholesale and Dep’t Store Union v. NLRB, 466 F.2d 380 (D.C. Cir. 1972) (reversing agency’s retroactive application of new policy on basis that regulatee had relied to its detriment on prior policy); see also J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and Breach of the Regulatory Contract, 71 N.Y.U. L. Rev., 851 (1996) (arguing that agencies are constitutionally required to provide compensation for reliance interests when they change policies).
87. City of Chicago, 511 U.S. at 347-48 n. 10 (Stevens, J., dissenting).
88. See Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991) (reversing an EPA rule that had shaped
In some contexts, individuals and institutions begin to take significant actions in reliance on the continued viability of a rule shortly after the rule is announced. In such circumstances, the judiciary has only a brief window of opportunity in which it can reverse the agency rule without doing significant damage to reliance interests. A rule issued by the Federal Energy Regulatory Commission in 1992 illustrates this phenomenon.  

The rule required all natural gas pipelines to "unbundle" their functions, i.e., to sell separately gas, transportation services, and storage services. By the time a court issued a decision with respect to the validity of that rule in 1996, every pipeline had completely restructured its operations, terminated or amended thousands of pre-existing contracts, and entered into thousands of new contracts in reliance on the continuing validity of the rule. Fortunately, the court upheld the basic elements of the rule. A decision reversing the rule four years after it was issued would have produced hundreds of millions of dollars of damage to reliance interests.

Detrimental reliance on a rule or precedent also comes into play when Congress relies on the continuing vitality of a judicial or agency precedent. A Veterans Administration (VA) precedent interpreting the World War Veterans' Act provides such an example. In 1930, the VA interpreted the Act to authorize compensation only for injuries attributable to negligent treatment at VA hospitals and not for injuries attributable to nonnegligent treatment. Over the next sixty years, Congress took numerous actions in reliance on the assumption that the agency precedent would remain viable. Congress reenacted the Act without changing the language that had formed the basis for the agency interpretation. It also made numerous budgetary decisions based on the implicit assumption that the rule announced in the agency precedent had continuing vitality. In 1994, the Court reversed that long-standing agency precedent. Its decision was one of four Supreme Court opinions issued in 1994 alone that reversed long-standing agency precedents on which Congress had relied to its detriment.

the conduct of both the agency and its regulatees for over a decade even though the agency had used the rule as the foundation on which it had built its entire complicated system of regulating toxic wastes).

90. See United Distrib. Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996). Many agency rules begin to create substantial reliance interests within about two years. This aspect of reality has three functional implications in addition to its implications for resolving conflicts between Chevron and stare decisis. First, pre-enforcement review of rules often yields benefits for both agencies and regulatees, as the Court predicted in Abbott Laboratories v. Gardner, 387 U.S. 136, 154-55 (1967). Second, strict statutory time limits on the availability of judicial review of regulatory rules often have powerful socially-beneficial effects. See Adamo Wrecking Co. v. U.S., 434 U.S. 275 (1978) (upholding time limit on availability of judicial review of emissions rules). Third, courts should expedite the process of reviewing agency rules.

93. Id. at 117-22.
To summarize my treatment of the values underlying stare decisis, two of these values—conserving judicial resources and reducing variations among individual decisionmakers—justify only a weak form of stare decisis. They are insufficient to support a decision to decline to reconsider a precedent when an institution has reason to believe that the precedent is, or may be, wrong and/or destructive in its effects. Moreover, these values are furthered equally by adherence to the practice at all levels: the Supreme Court, circuit courts, and agencies.

Similarly, although stare decisis furthers the value of enhancing intertemporal equity, that value can support only a weak version of stare decisis, and it provides no basis to distinguish among the institutions that follow the practice. Enhancing intratemporal equity is an important social value, but that value is furthered by *Chevron* rather than by stare decisis. Moreover, in the context of circuit court review of agency actions, stare decisis interferes with pursuit of the value of intratemporal equity. A circuit court that adheres to circuit precedent rather than according an agency *Chevron* deference risks creating a legal environment in which similar cases yield disparate results.

Stare decisis can further the important value of inducing decisionmakers to use foresight in announcing decisional rules. Agencies have enormous advantages over courts, however, in the process of crafting decisional rules that are likely to yield socially desirable results in the context of agency-administered regulatory or benefit programs. Thus, *Chevron* furthers this value more effectively than stare decisis, and stare decisis at the agency level furthers this value to a greater extent than does stare decisis at the judicial level.

Stare decisis also furthers the important value of protecting reliance interests. *Chevron* also furthers this value, however, and administrative stare decisis protects reliance interests more effectively than judicial stare decisis. Indeed, courts often destroy important reliance interests when they reverse agency decisional rules, particularly rules that have existed for many years. By contrast, agencies invariably consider, and usually protect, reliance interests when they overrule their own precedents.

Finally, stare decisis furthers the important value of protecting an institution's reputation. This is the only value of stare decisis that clearly favors judicial stare decisis over administrative stare decisis. A court that engages in frequent changes in the rules it applies risks serious injury to its reputation. The Supreme Court's reputation is uniquely valuable to society. Thus, stare decisis is uniquely valuable in Supreme Court decisionmaking. Yet, any institution, including the Supreme Court, can preserve, or even enhance, its reputation while departing from precedent, as long as it does so only in circumstances in which it provides

regulation ash generated by municipal incinerators that burn household waste); Central Bank of Denver v. First Interstate Bank, 511 U.S. 164, 171-91 (1994) (reversing agency precedent that private plaintiffs could maintain "aiding and abetting" actions under Securities Exchange Act § 10(b)); see also Pierce, *supra* note 55, at 754-62.
reasons for its action that are considered persuasive by the relevant audience. In the vast majority of cases, the relevant audience consists only of the elites who study the institution's decisions.

III. JUDICIAL DECISIONS RESOLVING CONFLICTS BETWEEN CHEVRON AND STARE DECISIS

Conflicts can arise between Chevron and stare decisis in at least five contexts: (1) conflicts between Supreme Court precedents and Chevron step two; (2) conflicts between agency precedents and Chevron step one; (3) conflicts between circuit court precedents and Chevron step one; (4) conflicts between agency precedents and Chevron step two; and (5) conflicts between circuit court precedents and Chevron step two. Courts have taken disparate approaches to resolving conflicts between Chevron and stare decisis depending on the context in which the conflict arises.

A. CONFLICTS BETWEEN SUPREME COURT PRECEDENTS AND CHEVRON STEP TWO

The Court has issued four opinions in which it has resolved conflicts between the deference Chevron requires to an agency's interpretation of an ambiguous statute and rules announced in the Court's own pre-Chevron decisions adopting judicial constructions of those statutes.\(^9\) In this context, the Court has consistently held that stare decisis trumps Chevron. A passage from the majority opinion in Golden State Transit Corp. v. City of Los Angeles,\(^9\) a post-Chevron decision, provides an accurate description of the Court's approach to such conflicts:

> While it is true that the rule of [Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n\(^9\)] \ldots is not set forth in the specific text \ldots of the NLRA, that might well also be said with respect to any number of rights or obligations that we have found implicit in a statute's language. A rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute.

The Court adopted the "Machinists rule" as a construction of the National Labor Relations Act (NLRA) in 1976.\(^9\) The rule created a "free zone from which all regulation, 'whether federal or state,' is excluded."\(^9\) As the Court acknowledged in Golden State Transit, the Machinists rule is inconsistent with the Chevron doctrine. It is one of many illustrations of the Court's pre-Chevron

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95. Prior to Chevron, the Court frequently made policy decisions by adopting constructions of ambiguous, agency-administered statutes. See supra cases cited in note 10.
98. Id. at 153.
practice of imposing its own construction on an ambiguous agency-administered statute—a practice the Court held to be inappropriate and illegitimate in *Chevron*. Nevertheless, the Court in *Golden State Transit* adopted this pre-*Chevron* judicial construction of the NLRA over the interpretation of the National Labor Relations Board (NLRB).

One of the other cases involving this type of conflict also arose under the NLRA. In *Lechmere, Inc. v. NLRB*, the Court reviewed an order issued by the NLRB in which the agency concluded that an employer had committed an unfair labor practice by barring union organizers from distributing handbills in the employer’s parking lot. The Court reversed the agency order as inconsistent with the rule the Court had announced in 1956 in *NLRB v. Babcock & Wilcox Co.* The Court repeated its prior explanation of the relationship between *Chevron* and pre-*Chevron* Supreme Court precedents: “Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge the agency’s later interpretation of the statute against our prior determination of the statute’s meaning.”

The Court’s characterization of its decision in *Babcock & Wilcox* as a determination of the “clear meaning” of the NLRA is, however, misleading. In *Babcock & Wilcox*, the Court “interpreted” the statutory term “unfair labor practice” to authorize an employer to prohibit nonemployees from distributing union literature on the employer’s property if the union has access to other reasonable means of communicating with employees. The rule announced in *Babcock & Wilcox* may be good public policy, but it is also a classic example of the Court’s pre-*Chevron* practice of doing that which it held to be impermissible in *Chevron*—imposing its own construction on an ambiguous agency-administered statute.

The third Supreme Court decision holding that Supreme Court precedents trump *Chevron* arose in the context of the Interstate Commerce Commission’s (ICC) efforts to oversee the transition from pervasive government regulation of trucking to deregulation of trucking. Congress deregulated the trucking industry by enacting the Motor Carrier Act of 1980 (MCA of 1980). That Act rendered it impossible for the ICC to continue to regulate trucking by authorizing each trucking company to set its own rates and by eliminating regulatory barriers to entry into the trucking industry. As usual, however, Congress left intact most of the provisions of predecessor statutes such as the Interstate Commerce Act of 1887 (ICA) and the Motor Carrier Act of 1935 (MCA of

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106. *See Pierce*, supra note 55, at 771-76.
1935), even though those statutes were inherently inconsistent with the competitive trucking market created by the MCA of 1980.107

The ICC discovered that some unscrupulous trucking companies were relying on a 1915 Supreme Court precedent to support the legality of a patently fraudulent practice.108 A trucking company would enter into a contract with a shipper to ship specific goods at a specific negotiated rate, commit to file the contract with the ICC, ship the goods but not file the contract, and then sue the shipper years later for the difference between the rate agreed to in the contract and the much higher rate the trucking company had on file with the ICC. Trucking companies claimed to be entitled to twenty-seven billion dollars in excess freight charges through use of this fraudulent practice.109 The ICC issued a rule in which it prohibited the practice as “unreasonable” within the meaning of the ICA.110

Six circuit courts upheld the ICC rule,111 but the Supreme Court reversed the rule in Maislin Industries, U.S., Inc. v. Primary Steel, Inc. on the basis of its alleged inconsistency with the rule announced in the Court’s 1915 precedent.112 The Court held that stare decisis trumps Chevron even when: (1) the rule announced in the precedent decision was predicated on policy considerations that have no application to the dispute before the Court; (2) that rule had become an anachronism in the wake of the enactment of the MCA of 1980; (3) the precedent was easily distinguishable; and (4) application of the precedent had the effect of legitimating a multi-billion dollar fraud.113 The Court has had to decide three more cases in this area in an effort to reduce the damage produced by its unfortunate decision in Maislin.114

By the time the Court decided the fourth case that raised the conflict issue, the Court stated the relationship between its precedents and Chevron in the form

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107. See id. at 766-76.
108. The Court announced the “filed rate doctrine” in Louisville & N.R.R. v. Maxwell, 237 U.S. 94 (1915). The ICC had concluded that it could not enforce the statutory prohibition on unduly discriminatory rail rates unless it could compel a shipper or passenger to pay the rate filed with the ICC notwithstanding the existence of a secret, then-unlawful rebate agreement between the shipper or passenger and the railroad. In Louisville & N.R.R., the Court agreed with the judgement of the ICC. Id. at 99-100. Thus, the doctrine originated as a judicially-approved, agency-requested, aid to the agency’s enforcement of the system of pervasive rate regulation created by the ICA of 1887.
109. See Pierce, supra note 55, at 166-76.
110. See Maislin Indus., 497 U.S. at 121-22.
111. See id. at 139 (Stevens, J., dissenting); Delta Traffic Serv. v. Transtop, Inc., 902 F.2d 101, 108 (1st Cir. 1990); Delta Traffic Serv. v. Appco Paper & Plastics Corp., 893 F.2d 472, 474-75 (2d Cir. 1990); Orscheln Bros. Truck Lines v. Zenith Elec. Corp., 899 F.2d 642, 645 (7th Cir. 1990); West Coast Truck Lines v. Weyerhaeuser Co., 893 F.2d 1016, 1026 (9th Cir. 1990); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 879 F.2d 400, 404-05 (8th Cir. 1989); Seaboard Sys. R.R. v. United States, 794 F.2d 635, 639 (11th Cir. 1986).
112. Chevron, 497 U.S. at 131.
113. Pierce, supra note 55, at 166-76; see supra note 108.
of a simple, mandatory rule. In *Neal v. United States*, the Court referred to the deference due to an agency's statutory construction under *Chevron*, but it disposed of the conflict between *Chevron* and its precedent with a single sentence: "In any event, principles of stare decisis require that we adhere to our earlier decision."116

Circuit courts have complied with the Supreme Court's instructions with respect to resolution of conflicts between Supreme Court precedents and *Chevron*, sometimes with interesting results. In *Chamber of Commerce v. Reich*, for instance, the D.C. Circuit held an Executive Order invalid on the basis that it conflicted with a 1938 Supreme Court precedent that "interpreted" the NLRA.118 Like a large proportion of such pre-*Chevron* "interpretations" of the NLRA, the rule announced in the 1938 precedent would have constituted an impermissible judicial "imposition of its own construction of an [ambiguous agency-administered] statute" within the meaning of *Chevron* if the issue had first arisen after *Chevron*.119 In another case, *United States v. O'Hagan*, the Eighth Circuit held that a SEC rule issued in 1970 was invalid because it was inconsistent with the "model created by" two Supreme Court precedents, even though the rule is consistent with the language of the statute.121 Thus, in this context, the Supreme Court has created a simple, mechanical rule, strictly adhered to by the lower courts, that its own precedents must prevail over *Chevron*'s command.

B. CONFLICTS BETWEEN CIRCUIT COURT AGENCY PRECEDENTS AND CHEVRON STEP ONE

The Court has repeatedly held that the requirement of *Chevron* step one trumps agency precedents, including agency precedents that have long been regarded as settled law. In 1994 alone, the Court held that the "plain meaning" of the language of four statutes required it to invalidate long-standing agency precedents.122 The agency precedents the Court rejected through application of *Chevron* step one during 1994 had existed for sixty years,123 forty-eight years,124 thirty-one years,125 and fourteen years,126 respectively. In at least three of those

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116. Id. at 766.
117. 74 F.3d 1322, aff'd, 83 F.3d 439 (D.C. Cir. 1996).
118. Id. at 1330-32.
121. Id. at 625.
123. See Brown, 115 S. Ct. at 556.
124. See Greenwich Collieries, 512 U.S. at 284.
125. See Central Bank of Denver, 511 U.S. at 192.
126. See Environmental Defense Fund, 511 U.S. at 332.
cases, the agency precedents had given rise to significant reliance interests.\textsuperscript{127} In all four cases, the Court seemed to attach no significance to the existence of the long-standing agency precedents. In three of the four cases, the Court’s characterization of the language of the statute as “clear,” rather than ambiguous, was highly debatable.\textsuperscript{128}

C. CONFLICTS BETWEEN CIRCUIT COURT PRECEDENTS AND CHEVRON STEP ONE

The Court seems to treat circuit court precedents as equivalent to agency precedents when it resolves conflicts between circuit court precedents and \textit{Chevron} step one. The Court attaches no apparent significance to the existence of contrary circuit court precedents, including long-standing precedents, when it concludes that such precedents are inconsistent with the “plain meaning” of a statute. Thus, for instance, in \textit{Central Bank of Denver v. First Interstate Bank},\textsuperscript{129} the Court held that the plain meaning of section 10(b) of the Securities Exchange Act does not encompass aiding and abetting the commission of a securities fraud even though every circuit had issued a decision adopting a contrary interpretation of the statute during the twenty-five year period that preceded the Court’s decision.\textsuperscript{130}

D. CONFLICTS BETWEEN AGENCY PRECEDENTS AND CHEVRON STEP TWO

The Court consistently applies \textit{Chevron} step two as the basis to uphold an agency’s construction of a statute that is inconsistent with agency precedents. The unanimous opinion in \textit{Smiley v. Citibank (South Dakota), N.A.}\textsuperscript{131} explains the basis for this method of resolving disputes between agency stare decisis and \textit{Chevron}: “change is not invalidating, since the whole point of \textit{Chevron} is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”\textsuperscript{132} Thus, given the rationales underlying \textit{Chevron}, this practice is not surprising.

The Supreme Court does attach some significance to the existence of contrary agency precedents, however. An agency must provide a reasoned basis for its changed construction of an ambiguous statute in order to avoid a judicial characterization of its construction as arbitrary and capricious.\textsuperscript{133} Of course, this qualification is also entirely consistent with step two of \textit{Chevron}, since a court is required to uphold only “permissible” or “reasonable” agency constructions of

\begin{itemize}
  \item \textsuperscript{127} See supra Part II.
  \item \textsuperscript{128} See Pierce, supra note 55, at 754-62. The Court had a sound textual basis for its holding in \textit{Brown v. Gardner}.
  \item \textsuperscript{129} 511 U.S. 164.
  \item \textsuperscript{130} See id. at 192 n.1 (Stevens, J., dissenting); see also \textit{Greenwich Collieries}, 512 U.S. 286-95 (Souter, J., dissenting) (reversing fifty-year-old circuit court precedent).
  \item \textsuperscript{131} 116 S. Ct. 1730 (1996).
  \item \textsuperscript{132} Id. at 1734.
\end{itemize}
An agency construction that is not adopted through a process of reasoned decisionmaking does not qualify as a "reasonable" construction. That process of reasoned decisionmaking must include explicit consideration of the reliance interest created by the agency precedent. In the context of an agency decision overturning the agency's own precedent, the Supreme Court has therefore engaged in a straightforward application of *Chevron* step two in which it integrates with care the values furthered by *Chevron* and the values furthered by stare decisis.

E. CONFLICTS BETWEEN CIRCUIT PRECEDENT AND *CHEVRON* STEP TWO

The Supreme Court has not had occasion to address the relationship between circuit court precedents and *Chevron* step two. The circuits that have considered the issue have split on what rule to adopt. Some circuit court opinions interpret the Court's opinions that resolve conflicts between Supreme Court precedents and *Chevron* step two as controlling the resolution of conflicts between circuit court precedents and *Chevron* step two as well. Those opinions simply cite the Court's opinions for the broad proposition that stare decisis always trumps *Chevron* deference. Other circuit court opinions recognize, however, that the relationship between circuit court precedents and *Chevron* is, or should be, more complicated than can be captured by the simple, mechanical rule that stare decisis trumps *Chevron*. Four circuit court opinions contain particularly thoughtful analyses of the relationship between circuit court precedents and *Chevron*.

In *NLRB v. Viola Industries*, the Tenth Circuit recognized that many apparent conflicts between judicial precedents and *Chevron* can be resolved through the process of careful characterization of the judicial precedents. In the order that was subject to review in *Viola*, the NLRB had adopted a construction of the NLRA that was arguably inconsistent with three pre-*Chevron* circuit precedents. After careful analysis of the circuit precedents, however, the court concluded that there was no conflict. The Tenth Circuit reasoned that the basis for those judicial decisions was not clear. Specifically, the court could not determine from reading the prior circuit opinions whether they were based on an independent judicial construction of the statute or were instead based on a judicial determination that the agency's construction was reasonable.

The circuit precedents cited, and relied upon, a pre-*Chevron* Supreme Court precedent. That precedent was also difficult to interpret, however. The Court had applied the then-existing agency construction that was inconsistent with the

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134. The Court uses "permissible" and "reasonable" interchangeably. Compare *Chevron*, 467 U.S. at 842-43, 866 (agency's construction must be "permissible") with *Chevron*, 467 U.S. at 844-45, 865 (agency's construction must be "reasonable"). For an explanation of the relationship between *Chevron* and the "reasonableness" of agency construction, see KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.4 (3d ed. Supp. 1996).


136. 979 F.2d 1384 (10th Cir. 1992) (en banc).

137. *Id.* at 1394.

new agency construction at issue in Viola to a dispute between private parties. The Court did not indicate whether its decision was based on a judicial determination that the statute could only bear that construction or a judicial determination that the agency's construction was reasonable. However, this Supreme Court precedent cited and relied upon a prior Supreme Court precedent. The court analyzed that opinion with care and concluded that it was based on the Court's determination that the agency construction was "reasonable," and not on an independent judicial determination that the statute could only bear the agency's construction.

Once the court concluded that none of the circuit or Supreme Court precedents were based on a judicial determination that the statute could bear only the construction that was inconsistent with the agency construction at issue in Viola, it found that there was no conflict between stare decisis and Chevron. Thus, the court was required to review the agency's construction at issue in Viola through application of Chevron's two-step test. The court upheld the new agency construction based on its determinations that the statutory language was sufficiently ambiguous to support the new agency construction and that the new agency construction was "reasonable," in the sense that the agency had provided an adequate explanation for its decision to change its construction of the Act based on its reassessment of the effects of its prior construction. The Tenth Circuit cited a Third Circuit opinion that had reached the same conclusion through use of similar reasoning.

One judge dissented in Viola. He agreed with the majority's characterization of one of the Supreme Court's precedent decisions and with the majority's conclusions that the agency's construction of the statute was both "defensible" and "more effectively achieves the objectives of the statute." Viola, 979 F.2d at 1397 (Baldlock, J., dissenting). He disagreed, however, with the majority's characterization of the other Supreme Court precedent and of the circuit precedents. Id. at 1397-99. He noted that the second Supreme Court opinion was not issued in the context of judicial review of an agency decision but in the context of judicial resolution of a dispute between two private parties. Thus, even though the Court relied on its prior decision that had upheld the agency's construction as "reasonable," the dissenting judge expressed the view that the second decision necessarily was based on a judicial determination that the agency's prior construction was correct, rather than merely "reasonable." Id. at 1398-99. He also interpreted the three circuit precedents as adopting the prior agency construction as a rule of law rather than merely as a permissible construction of an ambiguous statute. Id. at 1399. Based on his interpretation and characterization of the pre-Chevron judicial precedents, the dissenting judge expressed the view that the court was constitutionally precluded from according the new agency construction Chevron deference. In his words, "once the Supreme Court states what the law is, . . . the agency loses its authority to interpret the statute in a contrary, albeit reasonable, manner." Id. That assertion is accurate, of course—neither an agency nor a circuit court has the power to overrule a Supreme Court precedent—but it is based on a mistaken premise. Contrary to the view expressed by the

139. NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335 (1978).
140. Viola, 979 F.2d at 1393.
141. Id. at 1394.
142. Id. at 1394-96.
143. Id. at 1394 (citing International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 775-77 (3d Cir. 1988) (holding earlier Supreme Court opinions merely reviewed and upheld prior agency interpretation of NLRA, rather than imposing a judicial construction of the statute)).
The D.C. Circuit’s decision in *Chemical Waste Management v. EPA*\(^ {144}\) goes a step beyond the Tenth and Third Circuit opinions interpreting and characterizing judicial precedents under the NLRA. In *Chemical Waste Management*, the court was called upon to review an agency rule that adopted a construction of the statutory term “public hearing.” The agency concluded that the requirement to provide such a hearing could be met by providing an opportunity for a written exchange of data and views. That construction of the term conflicted with a pre-*Chevron* circuit precedent that interpreted “public hearing” to mean an oral evidentiary hearing.\(^ {145}\) The circuit precedent could only be interpreted as a judicial interpretation of the statute, since the court reversed an agency construction identical to the construction at issue in *Chemical Waste Management*. Thus, the court could not characterize the circuit precedent in a manner that eliminated any conflict between stare decisis and *Chevron*.

The court considered the issuance of the new agency rule an appropriate vehicle for reconsideration of its pre-*Chevron* circuit precedent. The court concluded that it had to overrule the circuit precedent as inconsistent with *Chevron*.\(^ {146}\) It concluded that the circuit precedent constituted an impermissible judicial imposition of its own construction of an ambiguous agency-administered statute. The court went on to uphold the agency construction as “reasonable,” and to overrule the circuit precedent.\(^ {147}\) The panel decision in *Chemical Waste Management* was a de facto unanimous en banc decision, since the panel circulated the draft opinion to all members of the circuit for their approval before the decision was issued.\(^ {148}\)

The Second Circuit’s opinion in *Schisler v. Sullivan*\(^ {149}\) goes a step beyond the D.C. Circuit’s opinion in *Chemical Waste Management*. In *Schisler*, the court reviewed a legislative rule issued by the Department of Health and Human Services (HHS) in which the agency announced criteria for determining whether an individual is disabled within the meaning of the Social Security Act. The criteria announced in the rule were inconsistent with four circuit precedents.\(^ {150}\)

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\(^{144}\) 873 F.2d 1477 (D.C. Cir. 1989) (en banc).
\(^{145}\) Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1444 & n.12 (D.C. Cir. 1984).
\(^{146}\) *Chemical Waste Management*, 873 F.2d at 1482.
\(^{147}\) *Id.* at 1482-83.
\(^{148}\) *Id.* at 1482.
\(^{149}\) 3 F.3d 563 (2d Cir. 1993).
Two of those precedents were pre-Chevron, but the other two were post-Chevron.

The pre-Chevron circuit precedents were obvious examples of judicial impositions of statutory constructions that Chevron prohibited prospectively. The circuit nevertheless continued to adhere to those precedents in its two post-Chevron decisions. The court initially refused to reconsider those precedents in light of Chevron because the agency had not announced its contrary construction in a form that was entitled to Chevron deference. In the prior cases, HHS had announced its construction in the form of an interpretative rule. Most courts and scholars believe that Chevron deference does not, or at least should not, apply to statutory constructions announced in interpretative rules.

In Schisler, the court distinguished between the modest deference due an agency construction adopted in an interpretative rule and the much greater deference due the same construction when it is contained in a legislative rule that is promulgated through use of the notice and comment procedure. The court held that it was required to accord Chevron deference to an agency construction adopted in a legislative rule. It then concluded that the construction contained in the HHS rule was a “reasonable” construction of an ambiguous statute. In reaching that conclusion, the court was influenced by the agency’s use of notice and comment procedure to consider with care the likely effects of adopting various alternative constructions of the statute and the agency’s reasoning supporting the construction it had chosen. The court concluded that, “[b]ecause the regulations are valid, they are binding on the courts. Any other conclusion would result in . . . chaos . . . .” The “chaos” to which the court referred was the prior situation in which the agency’s Administrative Law Judges confronted inconsistent, putatively binding instructions from HHS and from various circuit courts.

The Second Circuit’s opinion in Aguirre v. INS illustrates a variation of the theme reflected in opinions like Schisler and Chemical Waste Management. The

152. See, e.g., Kelley v. E.I. DuPont de Nemours & Co., 17 F.3d 836, 841-42 (6th Cir. 1994) (reasoning EPA’s interpretive rule not entitled to Chevron deference because not published for comment or made to undergo other regulatory formalities); Motor Vehicle Mfrs. Ass’n v. New York State Dept’ of Envtl. Conservation, 17 F.3d 521, 535-36 (2d Cir. 1994) (reasoning EPA’s interpretive rule not entitled to Chevron deference because not a regulation); Koray v. Sizer, 21 F.3d 558, 561 (3d Cir. 1994) (reasoning Bureau of Prison’s interpretation not entitled to Chevron deference because merely internal agency guidelines not subject to rigors of Administrative Procedure Act); see also 1 Davis & Pierce, supra note 5, § 3.5; Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts? 7 Yale J. On Reg. 1 (1990). For a discussion of the many confusing and conflicting opinions addressing this issue, see Davis & Pierce, supra note 134, § 3.5.
153. Schisler, 3 F.3d at 568.
154. Id. at 568-69.
155. Id. at 566-69.
156. Id. at 568.
157. 79 F.3d 315 (2d Cir. 1996).
court was called upon to review a decision by the Immigration and Naturalization Service (INS) that was predicated on an agency construction of the relevant statute that was inconsistent with a circuit precedent. The opinion in the precedent case was issued long after *Chevron*, and the reasoning in the precedent opinion left no doubt that the court had resolved an issue of law. The precedent opinion stated that the statutory interpretation it adopted was compelled by the "plain language" of the "unambiguous" statute. Thus, the court was confronted with a clear conflict between a circuit precedent announcing a statutory interpretation as a rule of law within the meaning of *Chevron* and the agency's new construction of the statute. No amount of characterization or recharacterization of the precedent could eliminate that conflict.

Yet, the court upheld the agency construction. The court noted that INS had announced its intention not to acquiesce to the statutory interpretation contained in the circuit precedent in cases that arise outside the circuit. It also recognized that the Supreme Court was unlikely to resolve the conflict between the circuit's interpretation and the agency's construction promptly, if ever. Thus, the court described the situation as creating "a tension between our traditional respect for Circuit precedent ... and our frequently expressed concern to avoid disparate treatment of similarly situated aliens under the immigration laws."

The court interpreted the Supreme Court's decisions resolving conflicts between stare decisis and *Chevron* as holding that "Chevron deference "cannot compel a court to forgo the principle of stare decisis." It concluded, however, that those opinions do not prevent a court from:

making an independent decision whether a particular case now requires a revised reading of a statute .... "The issue here is not whether courts *must* take direction from an agency ruling, but whether they may voluntarily accept such guidance for the purpose of achieving a satisfactory statutory interpretation."

The court determined that the agency decision adopting a new construction of the statute, combined with the lack of national uniformity created by its circuit precedent, justified its reconsideration of that precedent. On reconsideration, the court concluded that the "statutory point is fairly debatable" and that the agency's construction is reasonable. With the approval of the members of the panel who decided the precedent case, and with the acquiescence of all other

158. Jenkins v. INS, 32 F.3d 11 (2d Cir. 1994).
159. Id. at 14.
160. Aguirre, 79 F.3d at 317.
161. Id.
162. Id.
163. Id.
164. Id. (emphasis added) (quoting United States v. Kinder, 64 F.3d 757, 771 (2d Cir. 1995) (Leval, J., dissenting), cert. denied, 116 S. Ct. 931 (1996)).
165. Id. at 317-18.
members of the circuit, the court overruled the circuit precedent and upheld the agency construction.\textsuperscript{166}

To summarize, each of four circuit court decisions I have described and one subset of the Supreme Court decisions—the Court's decisions resolving conflicts between \textit{Chevron} and administrative stare decisis—reflect a careful attempt to identify the values that are furthered by the two doctrines and to resolve conflicts, or apparent conflicts, between them in a manner that maximizes their net value to society and to the legal system. In contrast, the Supreme Court's opinions that simply adopt mechanical rules for resolving conflicts that arise in other contexts and the circuit opinions that simply transpose those rules into the context of conflicts between \textit{Chevron} and circuit precedents reflect little consideration of the values that underlie the two doctrines. As a result, those mechanical rules create suboptimal results by attaching too little significance to the values that are furthered by \textit{Chevron} and by administrative stare decisis, and attaching undue significance to the values that are furthered by judicial stare decisis.

\textbf{IV. INTEGRATING \textit{CHEVRON} AND STARE DECISIS}

Any systematic framework for resolving conflicts, or apparent conflicts, between \textit{Chevron} and stare decisis should be shaped in part by recognition of the reality that many of the values underlying stare decisis apply to agency precedents and circuit court precedents as well as to Supreme Court precedents. That analytical framework should recognize that the \textit{Chevron} doctrine also furthers many of the values that justify the practice of stare decisis. In Part II, I identified six values that are furthered by stare decisis: (1) conserving scarce resources; (2) inducing foresight in decisionmaking; (3) protecting institutional reputation; (4) reducing variations among individual decisionmakers; (5) enhancing intertemporal equity; and (6) protecting reliance interests. All of these values, except for the protection of institutional reputation, are furthered by stare decisis at the agency and circuit court levels to the same extent that they are furthered by stare decisis at the Supreme Court level. Indeed, one of the values—protecting reliance interests—is furthered by administrative stare decisis to a greater extent than it is furthered by judicial stare decisis. Moreover, another of the values—inducing foresight in decisionmaking—is furthered to a greater extent by deferring to an agency's statutory construction as required by \textit{Chevron} than by unblinking adherence to judicial precedents.\textsuperscript{167}

Of the five categories of conflict between \textit{Chevron} and stare decisis discussed in Part III, only in conflicts between agency precedents and \textit{Chevron} step two has the analytical approach taken by the Supreme Court recognized this reality.\textsuperscript{168} It has done so by requiring agencies to reconcile conflicts between the

\begin{footnotesize}
\textsuperscript{166} Id. at 316, 318 & n.2.  \\
\textsuperscript{167} See supra Part IIb.  \\
\textsuperscript{168} See supra Part IIIb.  \\
\end{footnotesize}
values of *Chevron* and the values of administrative stare decisis. A court will uphold an agency decision that adopts a new construction of an ambiguous agency-administered statute that is inconsistent with an agency precedent if, and only if, the agency provides an adequate explanation for its change in policy.\(^{169}\) That explanation must include explicit recognition of the reliance interests created by the agency precedent and discussion of the mechanisms the agency has adopted in an effort to protect those reliance interests.\(^{170}\)

Thus, the current judicial approach to this type of conflict is faithful to the values underlying both *Chevron* and stare decisis. The Court’s opinions resolving conflicts between *Chevron* and stare decisis in the other contexts do not reflect a similarly thoughtful effort to integrate the values furthered by the two doctrines, however. In other contexts, the Court has adopted mechanical rules that implicitly attach dispositive significance to Supreme Court precedents and no significance to agency precedents, to circuit court precedents, or to the values furthered by *Chevron*. With this failing in mind, this Part proposes an alternative methodology for reconciling conflicts between *Chevron* and stare decisis, first with respect to conflicts between Supreme Court or circuit precedents and *Chevron* step two, and second with respect to the conflicts between circuit or agency precedents and *Chevron* step one. My proposed methodology is modeled on the Supreme Court’s method of resolving conflicts between *Chevron* and administrative stare decisis and on the method illustrated by the four circuit court opinions discussed in Part IIIE.

A. CONFLICTS BETWEEN SUPREME COURT OR CIRCUIT PRECEDENTS AND *CHEVRON* STEP TWO

When a conflict exists between a Supreme Court precedent and *Chevron* step two, the Supreme Court has followed a strict rule of adhering to its own precedents. The lower courts have adhered to this rule, and some circuits have applied it by analogy in adhering to their own precedents over an agency’s statutory interpretation. The only value of stare decisis that is, in some sense, unique to Supreme Court precedents is protecting institutional reputation. Of course, every institution has a legitimate interest in protecting its reputation, but the Supreme Court’s is uniquely powerful. Any diminution in the Court’s reputation has the potential to induce cynicism that can have destructive effects that are deep, broad, and long-lasting.

Recognition of this potentially powerful justification for adherence to Supreme Court precedents does not support the Court’s present purely mechanical method of resolving apparent conflicts between Supreme Court precedents and *Chevron* step two, however. The Court can (and often does) overrule a prece-


\(^{170}\) See supra note 84.
dent without suffering any injury to its reputation.\textsuperscript{171} Except in relatively rare cases in which the relevant audience extends beyond the "elites" that study the Court's opinions with care, the Court can enhance its institutional reputation by issuing an opinion in which it explains with care why it has decided to overrule a precedent.\textsuperscript{172}

In the context of conflicts between stare decisis and \textit{Chevron} step two, the circuit court opinions described in Part III illustrate ways in which courts can further simultaneously the values of \textit{Chevron} and stare decisis. There is no evidence to suggest that the Second, Third, Tenth, or D.C. Circuits have suffered any diminution in institutional reputation, or caused any other damage to the values of stare decisis, through the actions they took in those cases. Conversely, those decisions furthered the values that underlie the \textit{Chevron} doctrine.

A court that is confronted with an apparent conflict between \textit{Chevron} step two and stare decisis should begin by following the lead of the Third and Tenth Circuits to determine whether an agency's construction of an ambiguous statute truly does conflict with that precedent.\textsuperscript{173} It should analyze with care the precedent that appears to conflict with the agency construction at issue. If the precedent merely upheld a prior inconsistent agency construction, there is no conflict between stare decisis and \textit{Chevron}. The Court could have avoided the devastating effects of its misguided decision in \textit{Maislin} simply by taking this logical first step.\textsuperscript{174} The 1915 precedent the Court applied in \textit{Maislin} merely upheld a prior agency construction of the ICA.\textsuperscript{175} That agency construction was consistent with the regulatory policies the agency was implementing in 1915, but it was totally inconsistent with the deregulatory policies the agency was required to implement in 1990.\textsuperscript{176} Properly characterized, the precedent was not inconsistent with the agency construction of the ICA.

If careful analysis of the precedent decision yields a conclusion that the precedent is inconsistent with the agency's construction of an ambiguous statute, a court should follow the lead of the Second and D.C. Circuits.\textsuperscript{177} It should use the occasion of the announcement of the agency construction as an indication of the need to reconsider the precedent. In a significant proportion of such cases, the court is likely to conclude that it should overrule the precedent and


\textsuperscript{172} See supra Part IIc.

\textsuperscript{173} See NLRB v. Viola Industries, 979 F.2d 1384 (10th Cir. 1992) (en banc); International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988); see also supra notes 136-43 and accompanying text.

\textsuperscript{174} See supra text accompanying notes 104-14; see also Pierce, supra note 55, at 766-76.

\textsuperscript{175} See Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94 (1915); see also supra text accompanying notes 104-14.

\textsuperscript{176} See Pierce, supra note 55, at 766-76.

\textsuperscript{177} See supra notes 144-66 and accompanying text.
uphold the agency construction through application of Chevron, as the Second Circuit did in Schisler and Aguirre and the D.C. Circuit did in Chemical Waste Management. As long as the court provides an adequate explanation for its decision to overrule the precedent and to uphold the agency's construction, it need have no concern that its action will harm any of the values that are furthered by stare decisis.\(^\text{178}\) The Second Circuit and D.C. Circuit gave two reasons for overruling the circuit precedents at issue in Schisler and Chemical Waste Management: (1) the statute was sufficiently ambiguous to support the agency construction, and (2) the agency provided persuasive reasons in support of its new construction of the statute.\(^\text{179}\) Those reasons should be sufficient to justify a Supreme Court decision to overrule a Supreme Court precedent as well, particularly when the agency has adopted the new construction through the painstaking process of notice and comment rulemaking.\(^\text{180}\)

Of course, in some cases, a court will reconsider the precedent in light of the agency construction but decide for good reasons that it should reaffirm the precedent or reject the agency construction on other grounds. A court could justify such a decision on any of four grounds. First, a court might conclude that the statutory construction announced in the precedent is compelled by the language of the statute. Second, a court might reaffirm a precedent because the statutory interpretation announced in the precedent is required in order to avoid the need to address a serious question with respect to the constitutionality of the statute. Many precedents interpreting the NLRA, including the precedents at issue in Lechmere and Golden State Transit, probably fall in this category.\(^\text{181}\) Third, a court might refuse to uphold an agency construction inconsistent with a precedent because the agency provided insufficient reasoning in support of its

\(^{178}\) Of course, if the precedent created reliance interests, overruling it could harm those interests. In that case, however, a court is more likely to uphold the precedent unless the agency has adopted sufficient measures to protect those interests, or has provided a sufficient explanation to justify harming those interests. See infra text accompanying note 182.

\(^{179}\) Schisler, 3 F.3d at 568-69; Chemical Waste Management, Inc. v EPA, 873 F.2d 1477, 1487-83 (D.C. Cir. 1989).

\(^{180}\) The Second Circuit added a third reason in support of its decision in Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996)—it could further the interest in obtaining national uniformity by overruling its precedent and upholding the agency construction. Id. at 317. That consideration is obviously irrelevant in the process of reconsidering a Supreme Court precedent, however, since national uniformity will be achieved by any decision the Court makes.

\(^{181}\) In Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992), the Court applied the rule announced in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). In Babcock & Wilcox, the Court reasoned that the rule it announced “preserves property rights,” an apparent reference to the Fifth Amendment Takings Clause problems that would be raised by a rule that allowed union organizers to recruit on company property in broader circumstances. See Babcock & Wilcox, 351 U.S. at 112.

In Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989), the Court applied the rule announced in Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976). The rule announced in Machinists was based on a combination of the NLRA and the Supremacy Clause. Id. at 155.

Similarly, the D.C. Circuit's opinion in Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996), applied the rule announced in NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). The rule announced in Mackay was influenced by the Takings Clause of the Fifth Amendment. See id. at 347-48.
construction. Finally, a court might refuse to uphold an agency construction because the precedent created significant reliance interests and the agency did not adopt sufficient measures to mitigate the damage to those interests that the agency construction would cause or provide reasons in support of the new construction that are sufficient to justify the resulting harm to reliance interests.

B. CONFLICTS BETWEEN CIRCUIT COURT OR AGENCY PRECEDENT

The Court also can improve on its approach to resolution of conflicts between Chevron step one and precedents at the agency and circuit court level in deciding “whether Congress has directly spoken to the precise question at issue.” The Court has taken a wide variety of inconsistent approaches to answering this question. In some cases, the Court appears to be willing to characterize as “ambiguous” any statute that has given rise to conflicting interpretations. Thus, in its unanimous opinion in Smiley v. Citibank, the Court stated that, in light of the prior conflicting state court interpretations of the statutory term at issue, “it would be difficult indeed to contend that the [statutory term] is unambiguous with regard to the point at issue here . . . .” In other cases, however, the Court seems to attach no significance whatsoever to the existence of long-standing agency and circuit court interpretations of statutes in the process of deciding whether a statute has a “plain meaning” at variance with the long-standing interpretations of the agency and of many circuit courts. In these cases, the Court seems willing to go to extreme lengths to find “plain meaning” in language that all other institutions have determined either to be ambiguous or to support a different plain meaning.

In deciding cases of this type, the Court should recognize that stare decisis furthers important values at the agency and circuit court level, as well as at the Supreme Court level. The Court should exercise caution when it is asked to overturn a long-standing agency interpretation of a statute, particularly when multiple circuit courts have long upheld that agency interpretation. Caution is appropriate in this context for two reasons. First, as the Court recognized in Smiley, if other legal institutions have adopted different interpretations of the statute, it is probably ambiguous. When “Congress has directly spoken to the

183. See supra note 84.
186. Id. at 1732-34.
188. See Pierce, supra note 55, at 754-64.
precise question at issue," the statute rarely elicits differing interpretations. Second, long-standing agency precedents and circuit court precedents often create substantial reliance interests that can be damaged, or destroyed, by a judicial decision overruling those precedents issued many years after the announcement of the agency's interpretation. 

Thus, in this context, courts should set a high standard for finding that a statute has a plain meaning. By defining "unambiguous" narrowly, the values underlying both the *Chevron* doctrine and stare decisis would be well served.

V. CONCLUSION

Both *Chevron* and stare decisis further important values. By engaging in thoughtful integration and coordination of the two doctrines in two contexts—conflicts between *Chevron* and administrative stare decisis and conflicts between *Chevron* and circuit precedents—courts have maximized the value of the two doctrines. In other contexts, however, courts have adopted mechanical rules that unnecessarily sacrifice some of the valuable effects of the two doctrines. Courts can improve the performance of the legal system by extending into those contexts the careful methods of integration and conflict resolution that have produced large net gains in social welfare in the two contexts in which courts have applied them.

190. See supra Part II.F.