12-1-1992

The Stare Decisis "Exception" to the Chevron Deference Rule

Rebecca White
University of Georgia School of Law, rhwhite@uga.edu

Florida Law Review

VOLUME 44 DECEMBER 1992 Number 5

THE STARE DECISIS "EXCEPTION" TO THE *CHEVRON* DEFERENCE RULE

*Rebecca Hanner White**

I. INTRODUCTION

Eight years ago, the Supreme Court ushered in a new era of judicial review of agency lawmaking. In *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*,[1] the Court stopped waffling over whether agency interpretation of statutes is entitled to deference from the courts.[2] Coming down firmly on the side of judicial deference, the *Chevron* Court developed a review standard that commands, more often than not, that it is for the agency, not the Court, to say what

*Associate Professor of Law, University of Georgia. I thank Melinda Branscomb, Dan Coenen, John Garvey, and Paul Kurtz for their helpful comments on this article. I also thank my research assistants, Patricia Rhodes and Glenn Spencer, for their work.

1. 467 U.S. 837 (1984).

2. Prior to *Chevron*, two competing models of judicial review existed, one deferential to agencies, and the other far less so. *Chevron* "announced the end of judicial vacillation between these two interpretive models." Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 455 (1989); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972-75 (1992) (discussing varying pre-*Chevron* methods used by the Supreme Court in determining when to defer to agency interpretation of statutes); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986) (stating the *Chevron* decision was evolutionary because it refined a long line of Supreme Court precedent, reminding lower courts to defer to agencies' reasonable constructions of statutes).

the law is.[3] The Court's *Chevron* decision recognized statutory interpretation for the policymaking that it frequently is.[4] The *Chevron* review process placed policymaking into the hands of politically accountable agencies, instead of politically unaccountable courts.[5]

---

3. *Chevron* promulgated the following two-step approach to judicial review of agency interpretations of statutes:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the Court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43.

The decision has had considerable impact. As noted recently by a leading scholar, "*Chevron* promises to be a pillar in administrative law for many years to come. It has become a kind of *Marbury*, or counter-*Marbury*, for the administrative state." Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1991). Professor Sunstein's reference, of course, was to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), in which the Court determined "it is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177.

4. *Chevron*, 467 U.S. at 866. The Court noted that:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do.

Id.

Chevron thus equated the interpretation of ambiguous statutes to the making of policy choices. *See, e.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 281 (1988) ("[A] choice of an interpretation of an unclear statute is truly a choice among policies."); Sunstein, *supra* note 3, at 2087-88. Sunstein states:

> *Chevron* is best understood and defended as a frank recognition that sometimes interpretation is not simply a matter of uncovering legislative will, but also involves extratextual considerations of various kinds, including judgments about how a statute is best or most sensibly implemented. *Chevron* reflects a salutary understanding that these judgments of policy and principle should be made by administrators rather than judges.

Id.

Moreover, under *Chevron*, statutory silences or ambiguities are viewed as implied delegations of policymaking power to the agency. For discussion of this critical aspect of the *Chevron* decision, see, e.g., William V. Luneburg, *Judicial Review of Agency Statutory Interpretation: An Introduction*, 2 ADMIN. L.J. 243, 246 (1988); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 305 (1988).

5. *Chevron*, 467 U.S. at 865. *Chevron* expressly relied on agencies' greater political accountability to support the review standard it adopted. *Id.* When policy choices are to be made, the

However, despite its broad counter-*Marbury* mandate,[6] *Chevron* has not resulted in wholesale acquiescence by the Supreme Court to agency readings of statutes.[7] Rather, *Chevron* deference has emerged as just one canon of statutory construction.[8] There remain in place competing canons that at times conflict with *Chevron*.[9] In the face of such conflicts, when should *Chevron* deference prevail?[10]

In this article, I discuss how *Chevron* intersects with one important competing norm — stare decisis. Stare decisis counsels the Court to adhere to its own decisions, particularly statutory ones, absent substantial justification for departure.[11] To what extent should stare de-

---

Court determined that Congress generally would prefer those choices to be made by an entity accountable to the political process. *Id.* Moreover, *Chevron* "broke new ground by invoking democratic theory as a basis" for its deferential approach to judicial review. Merrill, *supra* note 2, at 978.

6. Sunstein, *supra* note 3, at 2075.

7. *See* Merrill, *supra* note 2. Professor Merrill denies that *Chevron* really is a counter-*Marbury*, at least as applied by the Supreme Court. Instead, he asserts *Chevron* is being used by the Court in only about one-half of the cases in which it would seem to apply. *Id.* at 969, 983-84. Its effect, he states, is greater at the lower court level, where the circuit courts have considered themselves bound to follow *Chevron*. *Id.* According to Professor Merrill, *Chevron*, while it has resulted in more deference, has not accomplished the "complete revolution" its analysis would seem to dictate. *Id.* at 980, 982-83.

8. Sunstein, *supra* note 3, at 2105; *see* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (stating that in the face of ambiguity, *Chevron* establishes a presumption that Congress intended to delegate interpretive authority to the agency). *See, e.g.*, Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757, 759-61 (1991); Farina, *supra* note 2, at 469-70; Merrill, *supra* note 2, at 988-89. Still others have read it more narrowly. *See, e.g.*, Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275.

9. *See, e.g.*, Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1235 (1991) (holding that the presumption against extraterritorial application of legislation outweighs the agency's opposing interpretation); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-78 (1988) (holding that the Court will construe the statute to avoid the constitutional question, despite a contrary interpretation by the agency).

10. *See* Sunstein, *supra* note 3, at 2108-19, for a discussion of *Chevron*'s intersection with constitutionally-inspired and various other norms. Professor Sunstein suggests, for example, that constitutionally-inspired norms trump *Chevron*, as evidenced by the Court's decision in *Edward J. DeBartolo Corp.*, 485 U.S. at 568. Sunstein, *supra* note 3, at 2110. *But see* Merrill, *supra* note 2, at 988-89 (citing Rust v. Sullivan, 111 S. Ct. 1759 (1991) (implying that constitutionally-inspired canons do not necessarily mandate against deference where regulation does not give rise to "grave and doubtful constitutional questions")).

11. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989). Under the doctrine of stare decisis, the Court follows its decisions unless they are overruled by Congress or by the Court itself. Decisions will be overruled by the Court only when substantial justification for doing so exists. *Id.* While the Supreme Court applies stare decisis in constitutional interpretation

cisis apply when an agency's interpretation of a statute, otherwise deserving of deference under *Chevron*, conflicts with a prior interpretation of the statute by the Supreme Court?

This article suggests the following answer: If the Court's prior opinion upheld the agency's interpretation as *one* reasonable reading of the statute, but not the only one possible, and the agency thereafter adopts a different interpretation, the new reading is entitled to deference under *Chevron*, free from the constraints of stare decisis. Deference to the agency poses no true conflict with stare decisis because the prior opinion has not purported to definitively construe the statute.[12]

However, when the Court has previously decided a case under a *Chevron* review standard and has rejected the agency's interpretation as inconsistent with clear statutory meaning or as irrational, the Court may rely upon stare decisis to reject the agency's request that the Court change its mind.[13] Similarly, the norm of stare decisis should prevail if the Court has previously upheld the agency's position as the *only* reasonable interpretation of the statute, and the agency later changes course.[14] Because in either case the initial decision gave the agency the full measure of *Chevron* deference, application of stare decisis in future cases poses no true conflict with the principles underlying *Chevron*.[15]

---

cases, the doctrine has added force in cases of statutory interpretation. Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. 560, 564 (1991). This "super strong" presumption of correctness accorded the Court's statutory decisions has been both criticized and praised. *Compare* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 426-29 (1988) (criticizing the Court's presumption of correctness in statutory decisions) *and* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (criticizing the Court's use of stare decisis in statutory decisions) *with* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989) (praising the strong presumption of correctness).

12. *See* Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1134-35 (9th Cir. 1988) (en banc), *cert. denied*, 498 U.S. 877 (1990); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 587 (1985); *infra* text accompanying notes 110-14.

13. *See infra* text accompanying notes 115-26.

14. *See* Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 142-44, 150 (1990).

15. *Chevron* does not require the Court to blindly accept the agency's statutory interpretation. Rather, the Court will first see whether the statute speaks clearly to the issue in question. *Chevron*, 467 U.S. at 842-43. If it does, the statutory language controls. *Id.* If the statute is silent or ambiguous, however, the Court will defer to the agency's rational interpretation of the statute. *Id.* at 843. A finding by the Court, for example, that Congress has clearly addressed the issue is a finding that no deference to the agency was ever conferred on the question at issue. *Id.* at 842.

A more difficult situation arises when the precedent was issued without the deference due under *Chevron*. For example, if the Court, prior to the issuance of *Chevron*, definitively construed a statute under an independent review standard[16] and the agency later urges the Court to take another look and this time to do it "right,"[17] should the Court apply *Chevron* or should it follow its pre-*Chevron* precedent? Here, the values served by stare decisis directly conflict with the principles underlying *Chevron*,[18] and the question becomes whether *Chevron* trumps stare decisis.[19] While I conclude it does not, *Chevron* does counsel against application of the "super strong" presumption of correctness usually afforded the Court's statutory construction decisions.[20]

However, a stare decisis "exception" to *Chevron* has the potential to swallow the rule. Accordingly, I suggest the *Chevron* review standard should apply to the agency's construction of the Court's precedents as well as to the agency's construction of the statute it administers.[21] Judicial interpretations of statutes in essence become part of the statutory scheme, until overruled by the Court or Congress,[22] and are binding on the agency. Thus, if the Court's prior decision speaks in clear and unambiguous terms to the precise issue at hand, the prior decision should be controlling.[23] But if the Court has not confronted the precise issue or if its holding is ambiguous, then the Court should uphold the agency's reasonable interpretation of the Court's prece-

---

16. *See infra* text accompanying note 33 for a discussion of the independent review standard.

17. In this sense, doing it "right" means reviewing the agency's interpretation under the *Chevron* review standard.

18. Unlike the situations described previously, no deference to the agency has ever occurred when the precedents issued under an independent review standard. Thus, application of the precedent to foreclose the agency's interpretation appears to be at odds with *Chevron*'s view that silent or ambiguous statutes imply a congressional desire that the agency, not the Court, resolve the policy question. *See Chevron*, 467 U.S. at 865-66.

19. Precedent is not "sacrosanct"; given a strong enough justification for overruling its precedent, the Court will not hesitate to do so. Patterson v. McClean Credit Union, 491 U.S. 164, 172 (1989). Indeed, the Court has recently been criticized for too readily overruling its precedents. *See Leading Cases*, 105 HARV. L. REV. 177, 182-87 (1991).

20. *See infra* notes 167-78 and accompanying text.

21. While the Court, in *Chevron*, determined that courts generally should defer to agency interpretations of statutes, it has not squarely confronted whether to defer to agency interpretations of the Court's precedents construing statutes. *See Chevron*, 467 U.S. at 844.

22. *See* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 392 (1988) (defining judicial interpretation of a statute as "the final and necessary step in the legislative process").

23. This parallels the *Chevron* rule that if the statute speaks directly to the precise issue in question, the statute is controlling. *See Chevron*, 467 U.S. at 842-43.

dent.[24] This approach reconciles the values of stability, predictability, and rule of law underlying stare decisis[25] with the advantages of flexibility and political accountability underlying *Chevron*.[26]

In addressing this problem, I focus on Supreme Court review of the decisions of a particular agency, the National Labor Relations Board (NLRB). I do so for several reasons. First, review of NLRB decisions presents a particularly strong case for application of *Chevron* deference.[27] Second, there is a body of Supreme Court precedent construing the National Labor Relations Act (NLRA), much of it issued without regard to *Chevron* deference principles.[28] Third, the Supreme Court's most recent review of an NLRB decision, *Lechmere v. NLRB*,[29] raises the problem explored in this article and illustrates the need for a thoughtful resolution of the conflict between judicial precedent and agency discretion. Without a coherent approach, application of stare decisis becomes simply a vehicle for judicial displacement of agency

---

24. This parallels the *Chevron* rule that the court will defer to the agency's construction of a silent or ambiguous statute, even if that is not the interpretation the Court itself would have chosen. *Id.* at 843, n.11; *see* Caust-Ellenbogen, *supra* note 8, at 2074.

25. Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. 560, 563-64 (1991); *see* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (discussing the benefits of stare decisis).

26. *See infra* notes 70-86 and accompanying text.

27. *Chevron* has been criticized as being too broad since it presumably applies to review of decisions of all administrative agencies. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 466-69 (1987). *Chevron*'s strength as an interpretive principle arguably could depend on the likelihood that Congress actually intended to confer policymaking authority on a particular agency. *See infra* notes 85-86 and accompanying text. It is likely Congress intended to confer such authority on the NLRB. *See infra* notes 87-98 and accompanying text.

28. The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988), has been in existence in some form since 1935, yet *Chevron* was not decided until 1984. Throughout this 50 year period, the Court often took a nondeferential approach. *See, e.g.*, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). Moreover, the Court often has been criticized for substituting its view of the statute for the NLRB's. *See, e.g.*, KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 29:12 (2d ed. 1984); Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 73-74.

Additionally, the NLRB primarily uses adjudication, not rulemaking, to resolve statutory questions. This use of adjudication to determine policy issues poses the conflict between *Chevron* and stare decisis more directly and frequently than would a rulemaking approach.

29. 112 S. Ct. 841 (1992).

interpretations the Court dislikes, the antithesis of the *Chevron* standard of review.[30]

II. THE *CHEVRON* REVIEW STANDARD

A. Chevron *as a Turning Point*

Chevron marked a turning point in the Court's approach to judicial review of agency lawmaking.[31] Prior to *Chevron*, two distinct approaches to judicial review of agency statutory interpretation existed — the independent review model and the deferential review model.[32] Under the independent review model, the Court would undertake its own, independent search for statutory meaning, considering the agency's viewpoint as merely a factor to be considered.[33] Under the deferential review model, illustrated by *NLRB v. Hearst Publications, Inc.*,[34] the Court's role was limited to determining whether the agency's interpretation of the statute was reasonable.[35] If so, it was entitled to deference.[36]

---

30. The *Lechmere* decision already has been criticized as judicial policymaking. Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of* Lechmere, Inc. v. NLRB, 9 HOFSTRA LAB. L.J. 1, 16 (1991). Gorman states:

> It appears, given its failure to defer to the Board in *Lechmere*, that the Court's attachment to the *Chevron* doctrine — a congenial doctrine for a Court committed to "judicial restraint" — waxes and wanes, depending less upon the Court's identification of statutory ambiguity than upon its approval or its dislike of the principle endorsed by the agency in the case under review.

Id.

Whether the Court acted correctly in refusing to defer to the NLRB in *Lechmere* is discussed *infra* notes 208-27 and accompanying text.

31. *Chevron*'s groundbreaking status has been widely recognized. *See, e.g.*, Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron's *Step Two*, 2 ADMIN. L.J. 255, 255 (1988); Farina, *supra* note 2, at 456-57; Merrill, *supra* note 2, at 971; Sunstein, *supra* note 3, at 2074-75.

32. For a discussion of the Court's divergent approaches to judicial review, prior to *Chevron*, see, e.g., Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976), *aff'd sub nom.* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); Breyer, *supra* note 27, at 366-67; Caust-Ellenbogen, *supra* note 8, at 764-70; Farina, *supra* note 2, at 453, 454; Scalia, *supra* note 8, at 513.

33. *See* Farina, *supra* note 2, at 453-54, for a description of the independent review model. For cases illustrating the Court's application of the independent review model, see, e.g., First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

34. 322 U.S. 111 (1944).

35. *Hearst*, 322 U.S. at 131; *see* NLRB v. Transportation Mgt. Corp., 462 U.S. 393 (1983); Ford Motor Co. v. NLRB, 441 U.S. 488 (1979); Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978).

36. *See, e.g.*, Breyer, *supra* note 27, at 366, 371; Callahan, *supra* note 8, at 1279; Caust-Ellenbogen, *supra* note 8, at 764-66; Kmiec, *supra* note 4, at 279; Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 28-30 (1983).

In *Chevron*, the Court essentially endorsed the *Hearst* model.[37] *Chevron* involved review of an Environmental Protection Agency (EPA) decision construing the term "source" in the Clean Air Act.[38] The EPA had previously construed this term to mean any pollution-emitting device within a plant.[39] However, in 1981, the EPA changed its position, adopting a plant-wide definition of "source."[40] The D.C. Circuit rejected the EPA's definition, substituting its own interpretation of "source" for that of the agency.[41] The Supreme Court reversed.[42]

In reversing, the Court set forth a two-step approach to judicial review of agency lawmaking.[43] First, the reviewing court must determine whether the statute speaks directly to the precise issue in question.[44] If so, the clear statutory meaning must control.[45] In *Chevron*, the Court found Congress had not addressed whether a "source" was the plant itself or each pollution emitting device within the plant.[46] Thus, because Congress had not "directly addressed the precise question at issue," the agency's interpretation could not be rejected at step one.[47]

---

37. *Chevron*, 467 U.S. at 843; *see* Farina, *supra* note 2, at 455. Although the Court in *Chevron* applied a deferential review model, its grounds for doing so extend beyond the reasoning advanced in *Hearst*. *See Chevron*, 467 U.S. 862-66.

38. *Chevron*, 467 U.S. at 839.

39. *Id.* at 857-59.

40. *Id.*

41. National Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom.*, Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

42. *Chevron*, 467 U.S. at 866.

43. *Id.* at 842-43; *see also* Pierce, *supra* note 4, at 305 (discussing the two-step approach of *Chevron*); Kenneth W. Starr, et al., *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353 (1987) (same).

44. *Chevron*, 467 U.S. at 842-43. *But cf.* Merrill, *supra* note 2, at 990 (arguing the Court has shifted from a "specific intent" to a "plain meaning" approach at step one, giving the Court more latitude to "say what the law is").

45. *Chevron*, 467 U.S. at 842-43. In determining whether a clear meaning is present, the Court remains free to use the "traditional tools of statutory construction," including canons of construction and legislative history. *Id.* at 843 n.9; *see* Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 681 (1992); Sunstein, *supra* note 2, at 2096, 2110; Rebecca Hanner White, *The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive Under the National Labor Relations Act*, 53 OHIO ST. L.J. 1, 20 (1992).

46. *Chevron*, 467 U.S. at 860-61.

47. *Id.* at 842.

The Court then explained the second step of its inquiry.[48] At this step, the agency's interpretation of a silent or ambiguous statute must be accepted by the reviewing court if the agency's position "is based on a permissible construction of the statute."[49] In other words, if Congress has not specifically addressed the question at issue, the agency's reasonable interpretation of the statute will control.[50] Because the EPA's plant-wide definition of "source" was a reasonable reading of the statute, the agency's interpretation was upheld.[51]

Chevron's deferential approach to agency lawmaking was not novel. This approach had been occasionally relied upon since the days of *Hearst*.[52] Nonetheless, *Chevron* has become celebrated as one of the most important administrative law decisions in recent years.[53] It has also become the leading case on questions of judicial deference to agency lawmaking.[54] *Chevron*'s preeminence derives not only from its two-step model for review of agency interpretations but from its analysis of why such a model is appropriate.[55]

First, *Chevron* recognized that interpretation of silent or ambiguous statutes involves making policy choices.[56] Such policy choices, the Court said, are better made by branches of government that are

---

48. *Id.* at 843.

49. *Id.*

50. *Id.* at 843-44; *see* Sunstein, *supra* note 3, at 2074 ("The *Chevron* principle means that in the face of ambiguity, agency interpretations will prevail so long as they are 'reasonable.'").

51. *Chevron*, 467 U.S. at 845.

52. While *Hearst* has been credited with "foreshadowing" *Chevron*, Kmiec, *supra* note 4, at 279, *Hearst* also has been described as less sweeping than *Chevron*, because it was based on an "express delegation" to the NLRB, *id.*, and because it involved a mixed question of law and fact, instead of a pure question of statutory construction, Breyer, *supra* note 27, at 371. *See also* Farina, *supra* note 2, at 456-57 ("*Chevron* defined deference in a way that, while not entirely unprecedented, was far more extreme than earlier articulations of the model had been.").

53. Starr, *supra* note 2, at 284. Judge Starr has described the *Chevron* decision as "both evolutionary and revolutionary." *Id.*

54. *See* Byse, *supra* note 31, at 255 ("In *Chevron*, the Supreme Court crafted a model or paradigm to govern the federal judiciary's review of administrative interpretations."); Ronald M. Levin, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 356 (1987) (describing *Chevron* as "*the* leading case" on questions of deference to administrative agencies); Pierce, *supra* note 4, at 302 ("[*Chevron*] has transformed dramatically the approach taken by courts in reviewing agency interpretations of statutory provisions."); Sunstein, *supra* note 3, at 2075 ("[*Chevron*] has established itself as one of the very few defining cases in the last twenty years of American public law.").

55. *See, e.g.*, Caust-Ellenbogen, *supra* note 8, at 772-76; Merrill, *supra* note 2, at 976-78.

56. *Chevron*, 467 U.S. at 862-66; *see* Kmiec, *supra* note 4, at 280-81; Pierce, *supra* note 4, at 305-07; Sunstein, *supra* note 3, at 2086-88.

politically accountable rather than by courts, which are not.[57] Second, the Court relied on this concept of political accountability to imply, from silent or ambiguous statutes, a delegation of power from Congress to administrative agencies to resolve such policy questions.[58]

Chevron's scope has been the object of considerable debate.[59] A "strong" reading of *Chevron* has emerged as the dominant interpretation.[60] This reading applies *Chevron* to both "pure" questions of law and mixed questions of law and fact[61] in decisions by all administrative

---

57. *Chevron*, 467 U.S. at 865-66. The Court stated,

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. . . . 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 — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id.; *see* Byse, *supra* note 31, at 257; Kmiec, *supra* note 4, at 281; Pierce, *supra* note 4, at 307; Sunstein, *supra* note 3, at 2087-89.

58. *Chevron*, 467 U.S. at 865-66. This implied delegation may be contrasted with an express delegation of interpretive authority to the agency. In cases of express delegation, deference to rational agency views must occur so long as sufficient "standards" are present to guide the agency. *See* Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 652-59 (1980); Batterton v. Francis, 432 U.S. 416, 424-26 (1977); Sunstein, *supra* note 3, at 2084-85. In practice, however, vague and imprecise standards have been deemed sufficient, perhaps due to Congress' inability to be more precise when delegating policymaking power to agencies. Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 474-98 (1985).

What *Chevron* did was to move beyond deference to express delegations with imprecise standards and to presume silent or ambiguous statutes are implied delegations of interpretive authority, also deserving of deference from the courts. *See* Kmiec, *supra* note 4, at 277; Merrill, *supra* note 2, at 979; Scalia, *supra* note 8, at 516; Starr, *supra* note 2, at 310. This implied delegation approach is in large measure what has made *Chevron* so important and so controversial. Daniel A. Farber, *Legislative Deals and Statutory Bequests*, 75 MINN. L. REV. 667, 678 (1991); Luneberg, *supra* note 4, at 246-47 (1988); Merrill, *supra* note 2, at 977.

59. *See* Breyer, *supra* note 27; Byse, *supra* note 31, at 260-61; Caust-Ellenbogen, *supra* note 8, at 772-76, 786-820; Farina, *supra* note 2, at 455-57, 460-61, 464-76; Merrill, *supra* note 2, at 993-1003; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445-46 (1989).

60. Caust-Ellenbogen, *supra* note 8, at 761, n.22; Pierce, *supra* note 4, at 303; Sunstein, *supra* note 3, at 2093-2105. *But see* Callaghan, *supra* note 8, at 1296 (viewing *Chevron* as a self-imposed "prudential limitation" on the courts that supports a narrow reading of *Chevron*).

61. Some have argued *Chevron* should not apply when the agency is construing the words of the statute, as opposed to filling in a statutory gap. *See, e.g.*, Breyer, *supra* note 27, at 371; Byse, *supra* note 31, at 263-64; Sunstein, *supra* note 27, at 376-77, 466. The Court's opinion in Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) helped foster

agencies with rulemaking or adjudicative power.[62] Despite criticism, *Chevron* sets forth the review standard the Court now endorses, at least as a general operating principle.[63] At the same time, the post-*Chevron* Court has sometimes rejected agency interpretations without applying the *Chevron* framework.[64] Determining when, if ever, *Chevron*'s two-step analysis should be set aside, particularly on the basis of stare decisis, requires further exploration of the reasoning underlying *Chevron*.

B. *The Underpinnings of* Chevron

Despite some suggestions to the contrary, one may safely state that the Court does not regard the *Chevron* review standard as constitutionally compelled.[65] First, prior to *Chevron*, the Court assumed

---

this debate. *But see* NLRB v. Food & Commercial Workers, 484 U.S. 112, 130 (1987). Professor Sunstein's opinion on this issue appears to have shifted over several years to favor the "strong" reading. Sunstein, *supra* note 3, at 2094-96.

Others argue *Chevron* deference should not occur when the court disagrees with the agency's admittedly reasonable reading of the statute. *See* Caust-Ellenbogen, *supra* note 8, at 761 n.22.

62. Caust-Ellenbogen, *supra* note 8, at 813. Even some "strong" readings of *Chevron* would distinguish between an agency that has been given the power to administer a statute, through rulemaking or adjudication, and one that has not. *See* Sunstein, *supra* note 3, at 2094; *cf.* Litton Fin. Printing v. NLRB, 111 S. Ct. 2215, 2223 (1991) (NLRB not entitled to deference in its interpretation of collective bargaining agreement, but only to its interpretation of statute). *But see* Diver, *supra* note 12, at 593-94 (arguing that while agencies that have been delegated rulemaking or adjudicative power have a stronger argument for deference, agencies that lack such authority, such as the Equal Employment Opportunity Commission, are still deserving of deference).

63. Even when the Court is purporting to apply *Chevron*, however, it displaces the agency's interpretation with some frequency, most commonly because the agency's interpretation is found to be at odds with the statute's "plain meaning." *See, e.g.*, Dole v. United Steelworkers, 494 U.S. 26, 43 (1990); Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171 (1989). Determining whether a statute does speak clearly to the issue at hand has been called the "primary battleground on which litigation over agency interpretations [will be] fought." Starr, *supra* note 2, at 298; *see* Scalia, *supra* note 8, at 520-21. Professor Merrill has suggested the Court in fact is using *Chevron*'s step one as an opportunity to declare the law, despite *Chevron*'s "counter-Marbury" mandate. *See* Merrill, *supra* note 2, at 970.

64. *See, e.g.*, Lechmere v. NLRB, 112 S. Ct. 841 (1992); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568 (1988). *See also* Merrill, *supra* note 2, at 981-82 & app. (discussing cases that have rejected agency interpretations without applying *Chevron*).

65. *See* Farina, *supra* note 2, at 456 (reading *Chevron* as constitutionally based and criticizing the *Chevron* approach); *see also* Callahan, *supra* note 8, at 1277 (contending *Chevron* has been interpreted as being constitutionally compelled and then taking issue with that contention). *But see* Caust-Ellenbogen, *supra* note 8, at 790-813 (contending that *Chevron* is unconstitutional in that it violates separation of powers principles).

without difficulty that nondeferential review was constitutionally permissible and appropriate.[66] Second, in *Chevron* itself, the Court justified deferential review, not as a constitutional imperative, but as the more appropriate reading of congressional intent.[67] Finally, even after *Chevron*, the Court has had no difficulty departing from a deferential review model.[68] It is therefore clear that the Court perceives the *Chevron* rule as subconstitutional, rather than constitutional, in nature.[69]

In essence, *Chevron* adopted, as a norm of statutory construction, a view that silent or ambiguous statutes imply a delegation by Congress to the administrative agency to resolve the resulting policy choices Congress itself left unresolved.[70] This implied delegation has

---

But *Chevron*, while not constitutionally required, is constitutional. Broad delegation to agencies of authority to implement statutes has been established as constitutional. Therefore, the delegation of interpretative power necessary for the statute's implementation also should be seen as lawful. *See* Diver, *supra* note 12, at 569; Farber, *supra* note 58, at 677-78; Monaghan, *supra* note 36, at 27-28; Pierce, *supra* note 58, at 496 (1985); Sunstein, *supra* note 3, at 2084 n.64; *see also* Kmiec, *supra* note 4, at 286 ("If expansively worded delegations of legislative authority are permissible, interpretations made in pursuit of that authority merit juidical deference.").

66. *See supra* notes 32-33 and accompanying text.

67. *See* 467 U.S. at 842-43; Scalia, *supra* note 8, at 516.

68. *See* cases cited *supra* note 64; *see also* Callahan, *supra* note 8, at 1294-95 (relying on the Court's flexible application of *Chevron* as an indicator that it does not view *Chevron* as being constitutionally required).

69. Even *Chevron*'s strongest supporters do not argue that the *Chevron* two-step approach is constitutionally compelled. Rather, they contend it is theoretically sound, as well as a pragmatic exercise in judicial self-restraint. *See, e.g.*, Diver, *supra* note 12, at 599 (advocating a strong deferential approach, without discussion of *Chevron*); Kmiec, *supra* note 4, at 281; Pierce, *supra* note 4, at 307-08; Starr, *supra* note 2, at 308-09; Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). *See also* Scalia, *supra* note 8, at 516 (arguing the deferential model is based on congressional intent).

70. *See* Sunstein, *supra* note 3, at 2094 (positing that *Chevron* is best viewed as an interpretive principle designed to determine congressional intent); *see also* Scalia, *supra* note 8, at 516 (referring to *Chevron* as establishing a presumption of congressional intent to delegate law interpreting authority). As an interpretive principle or presumption designed to determine congressional intent, *Chevron* thus can be overcome by the absence of an intent to delegate. Sunstein, *supra* note 3, at 2094.

In contrast, Professor Callahan views *Chevron* as a prudential limitation self-imposed by the Court, similar to the doctrine of abstention. Callahan, *supra* note 8, at 1277. Under her view, the Court may refuse to defer under *Chevron* when it finds deference inappropriate. *Id.* at 1294; *see also* Luneberg, *supra* note 4, at 252 (arguing that in some cases courts, not Congress, may decide whether to accept an agency interpretation).

been characterized as a fiction,[71] as Congress more often than not never considered the precise issue in question or whether to delegate its resolution to the agency.[72] But a "fictional" basis for an interpretive norm does not invalidate the norm.[73] Rather, as a general principle of statutory construction, *Chevron* represents the Court's best guess as to who Congress intended should resolve statutory ambiguities or silences.[74] Moreover, Congress now knows that when it enacts ambiguous or broadly drafted statutes, it is the agency, not the courts, that in most instances will supply the statute's meaning or fill in the holes.[75]

As an interpretive norm, there is much to be said in favor of *Chevron*.[76] The decision allocates to a politically responsive branch the making of what often are crucial policy decisions.[77] Although administrative agencies are less politically accountable than Congress, they

---

71. Scalia, *supra* note 8, at 517 ("[A]ny rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate."); *see also* Breyer, *supra* note 27, at 370 (arguing that while courts claim to examine legislative intent in determining deference to agencies, courts actually defer when circumstances suggest it would be best); Merrill, *supra* note 2, at 979 (stating *Chevron*'s assertion that Congress expressly delegated statutory gaps or ambiguities to agencies is a legal fiction).

72. *See* sources cited *supra* note 71; *see also* Callahan, *supra* note 8, at 1284. Professor Callahan notes Justice Scalia's position and agrees that "[c]ommon sense tells us that in many instances no intent either way can be discerned because Congress did not consider the matter at all." *Id.* Professor Callahan, however, disagrees with viewing *Chevron* as being based on an inferred congressional intent to delegate interpretive authority. *Id.* at 1285. She asserts that because all statutes are inherently ambiguous, Congress may in fact have expected the courts to interpret the statute. *Id.* Thus, a congressional delegation of final interpretive authority to agencies would be constitutionally suspect. *Id.*

73. *Chevron* operates as an interpretive principle when an express delegation is absent. *See* Batterton v. Francis, 432 U.S. 416, 425 (1977). When an express delegation is present, there is no need to infer congressional intent; Congress has told the Court to defer to the agency, and the Court will defer to the agency's construction, so long as it is not arbitrary or capricious. *Id.* at 425-26.

74. *See* Sunstein, *supra* note 3, at 2076. Moreover, as Professor Sunstein notes, "even if the *Chevron* principle is not accurate in every case, it is perhaps as accurate as any bright-line alternative, and it therefore has the significant virtue of combining a fair degree of accuracy with a reasonably clear rule." *Id.* at 2091.

75. Scalia, *supra* note 8, at 517; *see also* Kmiec, *supra* note 4, at 282 (arguing Congress will adopt a more cautious drafting approach knowing that agencies will interpret statutes).

76. For defenses of the *Chevron* rule, see Kmiec, *supra* note 4, at 281; Pierce, *supra* note 4, at 307-08.

77. *See Chevron*, 467 U.S. at 865; *supra* notes 56-58 and accompanying text; *see also* Pierce, *supra* note 4, at 305 ("When a court 'interprets' imprecise, ambiguous, or conflicting statutory language in a particular manner, the court is resolving a policy issue.").

are more accountable to the electorate than are the courts.[78] Even the "independent" agencies, such as the NLRB, have proved themselves, over time, to be politically responsive.[79]

Entrusting statutory interpretation to the agencies, moreover, promotes flexibility.[80] Unlike courts, agencies are not traditionally bound by their *own* prior decisions on statutory meaning.[81] Furthermore, position switches attributable to changes in administrations reflect the political accountability hailed by the *Chevron* Court.[82]

---

78. Moreover, *Chevron* may encourage more congressional involvement in policy decisions. *See* Kmiec, *supra* note 4, at 282 (suggesting Congress may be more willing to reverse agency decisions it disapproves than decisions by the judicial branch); Starr, *supra* note 2, at 311 (arguing *Chevron* may lead Congress to legislate more carefully if it wants to curb agency power).

79. An independent agency is one whose decisions are not subject to review by either the President or a Cabinet Secretary and whose members are appointed by the President to fixed terms. *See* Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 198 (1982). In discussing the NLRB, for example, Professor Moe observes, after reviewing NLRB decisions over a number of years, "the decisional balance does seem to change systematically across administrations, and in the expected direction." *Id.* at 211; *see also* Winter, *supra* note 28, at 54. Winter notes NLRB policy has been affected by shifts in political power. "Board members, unlike federal judges, are not well insulated from the swings of the political process. Since their appointment is for only five years, they seem exceptionally subject to the process and deliberately so." *Id. See generally* David L. Gregory, *Proposals to Harmonize Labor Law Jurisprudence and to Reconcile Political Tensions*, 65 NEB. L. REV. 75, 89-92 (1985) (noting the NLRB's responsiveness to changes in the political climate and the presidency). *But see* Merrill, *supra* note 2, at 1011 (arguing the decisions of independent agencies should be given less deference by the courts).

80. T. Alexander Aleinkoff, *Updating Statutory Interpretations*, 87 MICH. L. REV. 20, 43 (1988) ("Current policy considerations rather than 'original intent of the legislature,' is likely to guide agency interpretations of statutes. Pleasing a sitting President and a sitting Congress is going to keep an agency funded and out of trouble."); Diver, *supra* note 12, at 580 ("When a legislature entrusts implementation of a statute to an agency . . . it insures that the 'deal' will remain flexible and adaptive to changing political fashions."); *see also* Byse, *supra* note 31, at 259; Pierce, *supra* note 4, at 313; Scalia, *supra* note 8, at 517-19; Starr, *supra* note 2, at 297; Sunstein, *supra* note 3, at 2103.

81. *Chevron*, for example, involved the EPA's changed interpretation of a statutory term. *See* NLRB v. Curtin-Matheson Scientific, Inc., 494 U.S. 775 (1990) (stating a NLRB rule is entitled to deference even if it represents a departure from the NLRB's prior policy); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 947 (1965).

82. As noted by Professor Sunstein:

> Under *Chevron*, agency views receive deference not because they capture a unitary intended meaning, but because the resolution of statutory ambiguities should be undertaken by accountable, specialized administrators, not by courts. Under this approach, it matters relatively little whether the agency decision is longstanding and consistent or not. Regulatory shifts from one administration to another should be entirely expected and indeed welcomed as a healthy part of democratic self-gov-

In addition, agencies, charged with overseeing the implementation and administration of a statute on a day-to-day basis, should have a more expert view of how a particular interpretation will fit into the entire statutory scheme.[83] Finally, judicial deference by circuit courts to an agency's reasonable reading of a statute promotes national uniformity.[84]

But the degree to which the *Chevron* two-step approach makes sense as an interpretive principle depends upon the actual presence of the above-described advantages in the context of a given agency and its enabling act.[85] In other words, judicial deference to agency lawmaking may be more defensible vis-à-vis some agencies than others.[86] Assuming this is true, the potential conflict between *Chevron*

> ernment or as a recognition of changed circumstances. So long as the statute is ambiguous, those shifts reflect legitimate changes of policy.

Sunstein, *supra* note 3, at 2103. Professor Sunstein adds, however, that perhaps agency departures from past interpretations should receive "somewhat less deference." *Id.*

83. The agency expertise argument has figured prominently in discussions of deferential review. *See* Byse, *supra* note 31, at 258; Diver, *supra* note 12, at 591; Starr, *supra* note 2, at 309-10; Strauss, *supra* note 69, at 1115; Winter, *supra* note 28, at 58. *But see* Scalia, *supra* note 8, at 514 ([A]sserting that agency expertise means the agency is "more likely than the courts to reach the correct result. That is, if true, a good practical reason for accepting the agency's views, but hardly a valid theoretical justification for doing so.").

84. Deference leaves less room for circuit courts to displace an agency's nationwide ruling, thereby helping to attain uniformity. Byse, *supra* note 31, at 259, 260; Pierce, *supra* note 4, at 313; Strauss, *supra* note 69, at 1121.

85. *See* Sunstein, *supra* note 3, at 2085-2105. Professor Sunstein reasons that because *Chevron* is best understood as a reconstruction of congressional intent, *Chevron* deference should depend on the likelihood that Congress delegated interpretive authority to the agency. *Id.* He contends, for example, that when an agency has not been given authority to implement a statute, it is unlikely Congress intended to give the agency law-interpreting authority, and vice versa. *Id.*

In an earlier article, Professor Sunstein argued that whether *Chevron* deference was appropriate should depend on whether the issue in question was one of policy. In other words, he would find deference more appropriate when the agency was filling in a gap, than when it was construing a statutory term. Sunstein, *supra* note 27, at 466-67. The broader and vaguer the statute, the more likely Congress intended the agency to make the interpretation.

Professor Callahan, who views *Chevron* as a prudential limitation, argues *Chevron* should apply only "where the interpretive task involves the weighing of competing policy concerns, the statute is technical and complex, and the agency has engaged in a lengthy and detailed decisionmaking process of its own," or when the Court otherwise finds an "implicit delegation of policymaking authority to an agency." Callahan, *supra* note 8, at 1295. *See also* Breyer, *supra* note 27, at 373 (criticizing the interpretation of *Chevron* as "laying down a blanket rule, applicable to all agency interpretations of law" and contending such interpretation would be "seriously overboard, counterproductive and sometimes senseless").

86. For example, it is more reasonable to find Congress intended to confer law-interpreting authority on an agency to which it confided the administration and enforcement of a broadly-worded statute. Having made the "first-level" policy decision to regulate in a particular area,

and other interpretive principles is at its highest when the Court reviews the decision of an agency particularly deserving of *Chevron* deference.

The NLRB is such an agency. The National Labor Relations Act (NLRA),[87] which regulates the law of collective bargaining and other forms of concerted activity in the private sector, is a broadly drafted, frequently ambiguous statute that addresses fundamental policy concerns.[88] Through the NLRA, Congress has made the determination that concerted activities are deserving of protection, but the parameters of that protection are strikingly amorphous.[89] In determining whether certain acts are protected, unprotected or prohibited by the NLRA, the NLRB frequently must strike a balance among competing interests and policy concerns.[90] Most people, moreover, have very specific ideas about how that balance should be struck; few would disagree that "labor law is a field in which strong convictions hold sway."[91] When the policy choices presented are controversial as well as fundamental, the need for political accountability is particularly strong.[92]

---

it has left to agencies the "second- or third-level policy decisions" that must be made in order to implement the first-level policy choice. *See* Pierce, *supra* note 58, at 496-97 (1985).

87. 29 U.S.C. §§ 151-169 (1988).

88. Since its inception in 1935, the breadth and vagueness of the NLRA has been a frequent subject of the Court's and commentators' remarks. *See, e.g.*, Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500-01 (1978) (recognizing the need for the NLRB's "authority to . . . fill the interstices of the broad statutory provisions"); Clyde W. Summers, *Politics, Policy Making and the NLRB*, 6 SYRACUSE L. REV. 93, 95-96 (1955); Winter, *supra* note 28, at 57.

89. *See* Winter, *supra* note 28, at 56-57. An example of the NLRA's ambiguity is the extent to which "an employer, without transgressing the commands of [section 8(a)(1)], [may] prohibit union solicitation on his property," a question Professor Winter suggests Congress most likely never considered. *Id.*

90. *See* Summers, *supra* note 88, at 97-98; Winter, *supra* note 28, at 56-58. Winter argues:

> [I]n none of [the cases posing questions for which the statute provides no clear answers] are the purposes unidirectional. In each instance, the problem can be resolved only by weighing the different purposes and by subordinating some in favor of others. The act, therefore, at least in its unelaborated, pristine condition, presents herculean problems of statutory interpretation.

Id. at 58.

91. Robert S. Vance, *A View from the Circuit: A Federal Circuit Judge Views the NLRA Appellate Scene*, 1 LAB. LAW. 39, 40 (1985).

92. *See* Winter, *supra* note 28, at 58-59 (stating "[t]o many, an agency responsive in part to the political process and not required always to base its decisions on generalized principles is better suited to the task of 'fleshing out' such legislation"); *see also* Gregory, *supra* note 79, at 91-92.

Congress created the NLRB to administer and enforce the NLRA against a backdrop of hostility toward judicially-created labor policy.[93] The broadly worded statute and its anti-judicial origins support an implied delegation of law interpreting authority to the NLRB.[94] Thus, in the NLRB context, the *Chevron* "fiction" that Congress intended the agency, rather than the courts, to resolve statutory ambiguities appears grounded in fact.

In addition, interpretation of the statute by an agency with the ability to change its mind is important. Congress has proven relatively incapable of amending the NLRA, given the political sensitivity of the NLRA's subject matter.[95] The broad wording and significant gaps in the NLRA, however, have allowed the United States' labor policy to change over time, often in response to changes in administrations.[96]

Furthermore, interpretation by an agency charged with the day-to-day administration and enforcement of the statute helps ensure that the NLRA operates as a coherent whole.[97] Requiring deference by

---

93. The NLRB's creation may be attributed to congressional displeasure with the courts' handiwork on labor relations matters. Winter, *supra* note 28, at 59 n.5. *See generally* Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" when Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 651-52 (1991) (discussing this point and collecting relevant authorities).

94. Winter, *supra* note 28, at 58. Winter notes that "[t]he quality and quantity of ambiguities in the act — amounting in effect to a broad delegation of authority — were so great that it was perfectly sensible to leave initial adjudication to a single tribunal." *Id.* Writing two decades before *Chevron*, Winter outlines the reasons why the Court should defer to the NLRB and criticizes the Court for its frequent lack of deference. Professor Winter goes so far as to suggest the Court's failure to defer to the NLRB "may raise a serious issue of separation of powers," apparently based on his view that Congress' delegation of lawmaking authority to the NLRB is tantamount to an express delegation, for the reasons set forth above. *Id.* at 74.

While I do not contend Congress has expressly delegated interpretive power to the NLRB, the NLRA's breadth, ambiguity and historical background lend strong support to *Chevron*'s interpretive approach when reviewing decisions of the NLRB.

95. Gregory, *supra* note 79, at 91; Winter, *supra* note 28, at 65. Illustrative are recent attempts to amend the NLRA to prohibit employment of permanent replacements during economic strikes. *See* H.R. 4552, 100th Cong., 2d Sess., 134 Cong. Rec. 3125 (May 10, 1988).

96. Gregory, *supra* note 79, at 89-92; Moe, *supra* note 79, at 210-11; Winter, *supra* note 28, at 63-67 (stating this flexibility is premised on the agency's "relative freedom from the doctrine of stare decisis").

97. *See* Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 619 (1989); Strauss, *supra* note 65, at 1115; White, *supra* note 93, at 675-78; Winter, *supra* note 29, at 58.

the lower courts to NLRB decisions promotes uniformity of national labor policy by reducing the likelihood that the agency's nationwide rule will be overturned by a particular circuit court.

These considerations suggest that there are agency decisions, including those by the NLRB, that are particularly appealing candidates for *Chevron* deference, decisions that illustrate why the *Chevron* deference principle makes particular sense as an interpretive norm. But as an interpretive principle, not a constitutionally required review standard, there can be times when *Chevron*'s two-step analysis points in the direction of deference while other norms point in favor of setting the agency's interpretation aside.[98]

In an important recent article, Professor Cass Sunstein addresses the intersection of *Chevron* and various other interpretive norms.[99] His general conclusion is that whether *Chevron* or a competing principle will triumph depends upon the function served by the competing norm.[100] For example, in his view *Chevron* does not override norms designed to ascertain legislative intent or that require a clear legislative statement.[101] On the other hand, *Chevron* does trump interpretive norms designed to promote rationality or to achieve "just" results.[102]

An issue not addressed by Professor Sunstein is the proper reconciliation of *Chevron*'s deference principle and the rule of stare decisis.[103]

---

98. *See, e.g.*, Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992); Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990); Edward J. DeBartalo Corp. v. Florida Gulf Const. Bldg. & Constr. Trades Counsel, 485 U.S. 568 (1988).

99. Sunstein, *supra* note 3, at 2105-20.

100. *Id.*

101. *Id.* Professor Sunstein concludes, for example, that syntactic norms and interpretive instructions, designed to ascertain congressional intent, usually will triumph over *Chevron*. He further suggests that principles requiring a clear legislative statement overcome *Chevron*.

102. *Id.* Norms designed to correct "absurd or unjust results" do not overcome *Chevron*, because, what is "absurd" or "unjust" often depends on one's point of view. *Id.* at 2109-20. Whether or not Professor Sunstein is correct on each intersection he discusses, he makes a sound point that *Chevron* deference should not occur when it is unlikely Congress intended the courts to defer.

See also Callahan, *supra* note 8, at 1299 (recognizing that after *Chevron*, the question becomes "whether *Chevron*'s preference for political decisionmakers in the resolution of hard policy questions is overcome under given circumstances. *Chevron* thus provides a baseline against which judicial decisions to defer or not to defer to agency interpretations are now measured.").

103. However, Professor Sunstein does discuss the role of stare decisis in determining the reach of *Chevron*. *Id.* at 2102-04.

Moreover, while this article was in press, the following student commentary appeared on this topic: Susan K. Goplen, Note, *Judicial Deference to Administrative Agencies' Legal Interpre-*

But this particular conflict is likely to occur with considerable frequency.

Stare decisis is itself an interpretive principle.[104] When asked to construe a statute it has construed before, the Court often will rely on precedent to resolve the interpretive issue.[105] When the Court's precedent conflicts with the agency's reading of the statute, when, if ever, should *Chevron*'s deference principle apply? The remainder of this article considers this question.

III. DETERMINING WHEN A "TRUE CONFLICT" BETWEEN *CHEVRON* AND STARE DECISIS IS PRESENT

As set forth above, *Chevron* generally commands the Court to defer to an agency's construction of a silent or ambiguous statute. When the Court is confronted with a clean slate — the agency's present interpretation of the statute and no other — no conflict with stare decisis exists. But when the agency's present interpretation conflicts with either past agency or judicial interpretations of the statute, one must consider what weight, if any, the prior interpretation should be given.

Cases involving prior agency interpretations present little difficulty. If the flexibility and political accountability underlying *Chevron* are to be realized, agencies must be free from the constraints of

---

tations After Lechmere, Inc. v. NLRB, 68 WASH. L. REV. 207 (1993); Johan Sharifi, Note, *Precedents Construing Statutes Administered by Federal Agencies After the* Chevron *Decision: What Gives?*, 60 U. CHI. L. REV. 223 (1993).

104. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 404 (1949-50) (citing as a canon of construction that "[a]fter enactment, judicial decision upon interpretation of particular terms and phrases controls"). Interestingly, he posits as the countervailing canon that "[p]ractical construction by executive officers is strong evidence of true meaning." *Id.*

While Llewellyn's point was that canons of construction are so contradictory as to be meaningless, the crucial question is which opposing canon should control. Professor Sunstein counters Llewellyn's point and asserts "[i]n the face of ambiguity, outcomes must turn on interpretive principles of various sorts; there is simply no other way to decide hard cases." Sunstein, *supra* note 3, at 2106 (noting and criticizing Llewellyn's dismissal of interpretive principles).

105. *See infra* notes 128-29 and accompanying text.

intra-agency stare decisis.[106] A change in interpretation in response to a change in administrations, moreover, does not deprive the new interpretation of the deference to which it otherwise would be entitled.[107] Despite periodic suggestions from the Court to the contrary,[108] *Chevron* commands that the agency be free to change its mind without sacrificing judicial deference to its changed position.[109]

When the prior interpretation has been ruled upon by a reviewing court, however, the question becomes more difficult. Consider an agency interpretation approved by a reviewing court as a reasonable interpretation of the governing statute. If the agency thereafter changes its interpretation, should the court's prior decision preclude the court from deferring to the agency's new position?

---

106. Unlike courts, agencies traditionally have not considered themselves bound by stare decisis at the agency level. *See, e.g.*, Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982); General Knit of California, Inc., 239 N.L.R.B. 619 (1978); Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311 (1977); Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962); Shapiro, *supra* note 81, at 947. The lack of agency stare decisis has been relied upon to support a deferential review model because it allows national policy to change over time without the need for congressional action. *See* Byse, *supra* note 31, at 257, 259; Marianne Koral Smythe, *Judicial Review of Rule Recissions*, 84 COLUM. L. REV. 1928, 1934 (1984). Moreover, "[t]he more open-ended or ambiguous the delegating language the more free the agency should be to change policy in accordance with administrative preference." *Id.* at 1964.

Commenting specifically on the NLRB, Professor Winter has stated:

> If the Labor Board is to be able to experiment with different rules and to respond to changes in the political climate, it must be permitted to overrule prior doctrine within the area of discretion permitted by the statute and in the light of its experience as a specialized agency. And this means that the courts must not require strict adherence by the agency to the doctrine of *stare decisis* but must permit it to vary principles of general application within the confines outlined above.

Winter, *supra* note 28, at 71.

107. "This theory holds that the Board should be free, after shifts in political power, to reverse prior decisions, not simply because they have been found to be inadequate through experience, but because the 'new' Board gives different weights to the various conflicting purposes of the statute." Winter, *supra* note 28, at 64; *see* Pierce, *supra* note 4, at 313; Starr, *supra* note 2, at 297-98; Sunstein, *supra* note 3, at 2103.

108. *See* sources cited in Sunstein, *supra* note 3, at 2102 n.142.

109. *See Chevron*, 467 U.S. at 865 (developing the two-step approach despite the EPA's change in position following a change in administrations); NLRB v. Curtin-Matheson Scientific, Inc., 494 U.S. 775 (1990) (deferring to NLRB's refusal to adopt a presumption that strike replacements oppose the union, even though NLRB's position represented a change in approach). For commentary on this point, see Aleinkoff, *supra* note 80, at 45 n.109; Scalia, *supra* note 8, at 517; *cf.* Sunstein, *supra* note 3, at 2101-04 (recognizing agencies must be permitted the freedom to change their interpretations without losing their entitlement to deference but contending that an agency's departure from longstanding interpretations should receive "somewhat less deference" from the courts).

Here again, *Chevron*'s logic commands that deference to the agency occur. In this situation, the court's prior decision would have upheld the agency's past interpretation as *one* reasonable reading of the statute, not the only one. Implicit in any such decision is the conclusion that other reasonable, and thus permissible, interpretations are available.[110] Accordingly, the agency's decision to adopt a different reasonable interpretation would not conflict with the court's prior decision.[111] Moreover, the values underlying *Chevron* demand that the agency be free to shift from one reasonable reading to another.[112] Because the precedent has approved only one reasonable reading, without excluding others, no true conflict with the precedent actually exists. Because there is no conflict between stare decisis and *Chevron* deference, *Chevron* deference should occur.

Chevron itself illustrates this point. In *Chevron*, the D.C. Circuit had refused to approve the EPA's changed construction of "source," when the new definition conflicted with circuit precedent interpreting the statute differently.[113] The Court reversed the lower court for failing to defer to the agency, citing the need for flexibility and the benefits of political accountability.[114] While the circuit previously had found another reading to be reasonable, but not statutorily mandated, the Court held this was not a sufficient basis on which to reject the agency's revised position.

What happens, however, when the Supreme Court has upheld the agency's old interpretation as the *only* possible interpretation of the

---

110. Diver, *supra* note 12, at 587 ("Judicial approval of a contested interpretation as merely 'reasonable,' . . . implies that alternative meanings could also lie within the bounds of reason.").

111. *See* NLRB v. Bufco Corp., 899 F.2d 608 (7th Cir. 1990); Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1136 (9th Cir. 1988) (en banc), *cert. denied*, 498 U.S. 877 (1990); International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 775-76 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1989); Diver, *supra* note 12, at 587; White, *supra* note 93, at 675.

For criticism of the *Mesa Verde* decision, see Ursula M. McDonnell, Comment, *Deference to N.L.R.B. Adjudicatory Decision Making: Has Judicial Review Become Meaningless?*, 58 U. CIN. L. REV. 653, 674-80 (1989).

112. *See* sources cited *supra* note 111.

113. National Resources Defense Council v. Gorsuch, 685 F.2d 718, 725-26 (D.C. Cir. 1982), *rev'd sub nom.* Chevron U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984). The D.C. Circuit had rejected the agency's construction in favor of its own, despite its express recognition that Congress had not explicitly intended the court's construction. *Id.* at 723. The Supreme Court found the lower court had erred in applying its own construction "when [the court] had decided that Congress itself had not commanded that definition." *Chevron*, 467 U.S. at 842; *see* Merrill, *supra* note 2, at 989.

114. *Chevron*, 467 U.S. at 865-66.

statute? When the agency thereafter changes its mind, does *Chevron* command deference to the agency's new position? The Court has correctly said that it does not. As stated by the Court in *Maislin Industries, United States, Inc. v. Primary Steel, Inc.*,[115] "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."[116]

In *Maislin*, the Court rejected the Interstate Commerce Commission's (ICC) determination that an independently negotiated rate relieved a shipper of the duty to pay the filed rate.[117] The *Maislin* Court found the ICC's position inconsistent with the "filed rate doctrine" previously accepted by the ICC and approved by the Court.[118] Under the filed rate doctrine, a shipper must pay the filed rate unless the ICC finds that rate to be unreasonable.[119] In rejecting the ICC's new construction, the Court pointed out that its past decisions affirming the ICC's filed rate doctrine had been based on the statute's clear meaning.[120] In other words, using the language of *Chevron*'s step one,

---

115. 497 U.S. 116 (1990).

116. *Id.* at 131. Properly read, this language means only that an agency may not swerve from an interpretation the Court has previously determined to be required by the statute. It does not mean the agency cannot depart from a reading the Court has upheld as a permissible one. For a similar reading of *Maislin*, see Sunstein, *supra* note 3, at 2103; *see also* Diver, *supra* note 12, at 587. *But see* Merrill, *supra* note 2, at 990 (contending *Maislin* precludes an agency from disregarding Supreme Court precedent, without distinguishing between precedent that upholds the agency's position as the *only* permissible reading and precedent that upholds the agency's position as *a* permissible reading).

117. *Maislin*, 497 U.S. at 120-21.

118. *Id.* at 134-35.

119. *Id.* at 128.

120. The Court stated:

> For a century, this Court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. By refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination the Act *by its terms* seeks to prevent.

Id. at 130 (emphasis added). Thus, the Court made clear in *Maislin* its view that the filed rate doctrine was not simply a permissible statutory interpretation but a doctrine mandated by the statute's fixed and clear terms.

One, of course, could take issue with the Court's construction of both the statute and its past decisions. *See id.* at 138-53 (Stevens, J., dissenting); Merrill, *supra* note 2, at 989; Sunstein, *supra* note 3, at 2103 n.149. But for present purposes, it matters less whether the Court reached the correct result under *Chevron*'s step one than that it had performed the step-one analysis dictated by *Chevron*.

the Court previously had found Congress to have addressed the precise question at issue. Because Congress had not altered the statutory language, the Court refused to revisit the issue, relying on stare decisis to reject the agency's new construction.[121]

This reliance on stare decisis does no violence to *Chevron*. Under *Chevron*'s step one, the Court will examine a statute to determine whether Congress has clearly spoken to the precise issue at hand.[122] If it finds a clear and unambiguous congressional intent, the Court gives effect to that intent, whether or not it is consistent with the agency's position.[123] The finding that Congress has clearly addressed the issue is a finding that Congress did not intend to confer interpretive authority on the agency but instead itself resolved the policy choice.[124] Thus, when the Court refuses to defer to the agency's changed position, relying on its previous construction of the statute, it is not flouting *Chevron*.[125] Rather, the Court's prior opinion had fully considered whether deference was due under *Chevron* and concluded it was not.

---

121. *Maislin*, 497 U.S. at 131. Of course, the Court remains free to reject its precedent if it is persuaded by the agency that it should do so.

122. *See supra* notes 44-45 and accompanying text.

123. *Chevron*, 467 U.S. at 843 n.9; *see* Dole v. United Steelworkers, 494 U.S. 76 (1990); Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989).

124. Professor Winter correctly recognized that such an interpretation by the Supreme Court would bind the agency and urged the Court to be more mindful of its limited role in reviewing NLRB determinations. Winter, *supra* note 28, at 72-73. Otherwise the Court's decisions will frustrate the NLRB's ability to shift the statute's meaning in response to changed circumstances. *Id.*

125. The same reasoning should follow when the Court previously has rejected an agency's construction, either under *Chevron*'s step one as inconsistent with the statute's plain meaning, or under *Chevron*'s step two as arbitrary and capricious, and the agency continues to press the same construction before the Court. In rejecting the agency's view in its initial decision, the Court has given the agency the benefit of any *Chevron* deference it was due.

In a prior article, I have urged a somewhat different approach for the circuit courts when reviewing NLRB interpretations. *See* White, *supra* note 93. When a circuit court, using a *Chevron* review standard, has rejected the NLRB's interpretation as irrational or has upheld it as the *only* permissible reading of the statute, *Chevron* does not *require* the circuit to disregard its precedent. *Id.* at 675 n.232. Nonetheless, because the primary benefits underlying the law of the circuit doctrine frequently are not realized in NLRB cases, due to the broad venue provisions governing judicial review of NLRB orders, I have suggested that circuit courts avoid rigid adherence to circuit law. *Id.* at 671-84. The circuit should instead review the NLRB's interpretation, even one at odds with circuit precedent, without regard to the precedent. *Id.*

But when it is a Supreme Court precedent at issue, the considerations are different, as the NLRB itself has recognized. *Id.* at 644 n.25. There, the values of stare decisis are fully implicated. When the prior decision gave the agency any *Chevron* deference it was due, no compelling reason exists to ignore the policies underlying stare decisis. *See Maislin*, 497 U.S. at 131.

Reliance on precedent in these circumstances poses no conflict with *Chevron* deference, because the Court has found no deference to the agency was intended.[126]

More difficult, however, are cases where the Court's precedent rejected the agency's view under an independent review model, without regard to the policies underlying the *Chevron* interpretive principle. When the agency thereafter asks the Court to defer to the agency's view, a true conflict between the values of stare decisis and *Chevron* deference occurs.

IV. SHOULD STARE DECISIS DISPLACE *CHEVRON*?

Properly viewed, *Chevron* is a canon of statutory construction that presumes Congress intended to confer on administrative agencies the power to interpret statutory silences or ambiguities in their enabling acts.[127] Stare decisis, in the context of statutory adjudication, also operates as an interpretive norm.[128] When the Court interprets a statute, it tells Congress, and the rest of us, "this is what the statute means." Stare decisis lets us know the meaning the statute will be given in the future, absent a compelling reason for change.[129]

---

126. *But see* Merrill, *supra* note 2, at 989-90, 1023 (contending *Maislin* is inconsistent with *Chevron*). Professor Merrill contends the "logic" of *Chevron* would permit an agency to overrule Supreme Court decisions. He argues *Chevron* should be replaced by an "executive precedent" model, under which agency interpretations should be given the same respect one circuit court gives to the decisions of a sister circuit. *Id.* at 990, 1003-13.

A problem with Professor Merrill's analysis is his failure to distinguish between Supreme Court decisions upholding an agency's interpretation as permissible and those finding it to be required. *Chevron* permits the agency to "depart" from the Court's precedent only in the former situation, in essence because no real departure has occurred. *See supra* notes 109-12 and accompanying text. In these cases, the Court has upheld one agency view of the statute without foreclosing others. When the agency thereafter changes course, it has not "overruled" a Supreme Court decision; instead, it has overruled only its own precedent, something *Chevron* not only permits but perhaps encourages. *See supra* notes 80-82 and accompanying text.

127. *See supra* notes 70-75 and accompanying text.

128. *See supra* note 104; Maltz, *supra* note 22, at 367.

Under the doctrine of stare decisis, judges are required to follow precedents, even those with which they disagree, unless substantial reasons for departure exist. *Id.*

Stare decisis can be of two forms: vertical and horizontal. The vertical form requires lower court judges to follow the precedents of courts above them. The horizontal form requires a court to follow its own precedents. Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 90 n.89 (1991). Because my focus is on the Supreme Court's treatment of its own precedents, this article primarily involves the horizontal form of stare decisis.

129. *See* Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 757 (1988) ("In the American common law, stare decisis states a conditional obligation: precedent binds absent a showing of substantial countervailing considerations.").

Stare decisis is not constitutionally required but instead is a judicially crafted canon designed to effectuate important policies.[130] The Court has recognized that stare decisis "is of fundamental importance to the rule of law,"[131] finding it "indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon an arbitrary discretion."[132]

The values promoted by stare decisis are many. When followed by the Supreme Court,[133] stare decisis promotes consistency and coherence in the law, as well as equity and fairness.[134] In addition, it makes the law predictable, enabling those governed to plan their affairs and to structure their conduct, aware of the consequences of their acts.[135] It also reduces the workload of the Court.[136] Moreover, stare decisis serves to legitimatize the legal process, as well as the Court itself.[137]

---

130. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2797 (1992); *see* Eskridge, *supra* note 11, at 1361; Marshall, *supra* note 11, at 220; John P. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983) (describing stare decisis as "one of the oldest of judge-made rules").

131. Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987).

132. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

133. I draw a distinction here between horizontal stare decisis at the Supreme Court level and horizontal stare decisis at the circuit court level (commonly referred to as "the law of the circuit"), because circuit law may provide few of the benefits of stare decisis when the circuit reviews administrative agency decisions. Some agencies, such as the NLRB, cannot know in which circuit their decisions will be reviewed, given the broad venue provisions of their enabling acts. *See* White, *supra* note 93. Thus, the law of any particular circuit is not available as a source of certainty or predictability. *Id.*

Supreme Court decisions, however, are national in scope. Thus, the full benefits of stare decisis are applicable when the high Court decides a case.

134. *See* J. DAVID MURPHY & ROBERT REUTER, STARE DECISIS IN COMMONWEALTH APPELLATE COURTS 93-97 (1981); Gerhardt, *supra* note 128, at 76-90; Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 544 (1989); Maltz, *supra* note 22, at 368-72; Monaghan, *supra* note 129, at 744-47; Stevens, *supra* note 130, at 1.

135. *See* sources cited *supra* note 134.

136. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.").

137. Stevens, *supra* note 130, at 2. As described by Justice Stevens,

> Adherence to the doctrine of stare decisis also enhances the reputation of judges and makes their work product more acceptable to the community at large. For a rule that orders judges to decide like cases in the same way increases the likelihood that judges will in fact administer justice impartially and that they will be perceived to be doing so. This perception, which obviously enhances the institutional strength

Stare decisis "supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law."[138]

While the Court follows stare decisis in its constitutional and common law adjudications, it has developed what has been termed a "super strong presumption of correctness" for its statutory precedents.[139] One explanation for the heightened stare decisis effect given the Court's statutory precedents "is that each judicial interpretation of a statute is a building block upon which private parties, Congress, and the Court itself build."[140] In essence, the Court's interpretation becomes part of the statute, and for the Court to change its mind is akin to a statutory amendment.[141] Furthermore, Congress has the power to overrule the Court's interpretation by amending the statute. This power distinguishes statutory precedents from constitutional ones.[142]

> of the judiciary, is of greatest importance because of its stabilizing effect on the private ordering of economic relationships and on the entire system of government.

Id.

138. Monaghan, *supra* note 129, at 752.

139. *See* Eskridge, *supra* note 11, at 1362 (criticizing the "super strong presumption of correctness" enjoyed by statutory precedents); *see also* Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. 560, 564 (1991) (commenting that stare decisis has special force in the area of statutory interpretation because Congress is free to overrule the Court); Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction.").

In contrast, an argument could be made that the Court's statutory decisions should have no precedential effect at all, because it is the text of the statute that controls, not the case law interpreting it. *See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 365 (1985); *see also* Easterbrook, *supra* note 11 (criticizing the precedential weight of the Court's statutory decisions).

140. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1043 (1989).

141. Eskridge, *supra* note 11, at 1366; Maltz, *supra* note 22, at 392; Marshall, *supra* note 11, at 211.

142. *Patterson*, 491 U.S. at 172-73 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); *see* William N. Eskridge, Jr., *Overruling Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991). Professor Eskridge documents that Congress does overrule Supreme Court decisions "with a frequency heretofore unreported." *Id.* He reports that congressional overrides most frequently occur within two years of the Court's decision. *Id.* at 345; *see, e.g.*, The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 2 U.S.C. §§ 1201-1224 and 42 U.S.C. §§ 1981, 1981a, 2000e) (overruling and modifying a number of employment discrimination decisions handed down by the Supreme Court in 1989).

Professor Marshall has relied on Congress' overruling power to urge an absolute rule of stare decisis for the Court's statutory decisions. Marshall, *supra* note 11, at 208-15.

In addition, Congress, as well as the public, may have relied on the interpretation. Thus overruling the statute could "unsettle a vast cluster of public and private expectations."[143]

The Court interprets some statutes which have no agency responsible for their administration and enforcement. For example, the Sherman Act is a broad and vague statute that has required the Court to develop a body of governing law.[144] But other similarly broad and vague statutes, such as the NLRA, have agencies to whom Congress has entrusted the statute's administration and enforcement.[145] When the Court has interpreted those statutes under an independent review model, as it did often in the pre-*Chevron* era, should the Court in the post-*Chevron* era continue to afford those decisions a "super strong" presumption of correctness? More fundamentally, should the Court afford those decisions any precedential effect at all?

One example of such precedent is *NLRB v. Babcock & Wilcox Co.*[146] At issue in *Babcock* was whether an employer committed an unfair labor practice when it excluded union organizers from its private property.[147] The NLRB, relying on the Court's previous decision in

---

143. Eskridge, *supra* note 11, at 1367; *see* Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. 560, 564 (1991). These reliance concerns, of course, are present in constitutional and common law cases as well. Planned Parenthood v. Casey, 111 S. Ct. 2791, 2797 (1992). 2797 (1992).

144. *See* Eskridge, *supra* note 140, at 1052, 1054, 1401 (describing the Court's development of the law under statutes such as the Sherman Act as evolutive in nature, because it is developed on a case-by-case basis); *see also* Pierce, *supra* note 4, at 305 (distinguishing between the Court's making of policy choices under statutes where no agency is involved, such as the Sherman Act, and those where an agency is in the picture).

In applying stare decisis, the Court has not distinguished between decisions based on clear statutory text and those based on interpretation of ambiguous statutes. The Court has stated that "[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." Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 112 (1989). The question is whether the Court should make such distinctions when an administrative agency is charged with enforcement of the statute.

145. *See, e.g.*, Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500-01 (1978) (stating that broad provisions of the NLRA require the NLRB to formulate specific administrative application); White, *supra* note 93.

146. 351 U.S. 105 (1956).

147. *Id.* at 107. In *Babcock*, organizers were seeking access to the employer's parking lot in order to distribute union literature. *Id.* The plant, its parking lot, and driveway all were located on the employer's privately-owned property, from which anyone distributing pamphlets was routinely excluded. *Id.*

Republic Aviation Corp. v. NLRB,[148] found the employer had no right to exclude the organizers unless the employer's managerial interests outweighed the interference with employees' rights to self-organization provided by section 7 of the NLRA.[149] The NLRB applied to union organizers the rule developed in *Republic Aviation* concerning acts directed toward the employer's own employees.[150] The Supreme Court reversed the NLRB decision, finding the NLRA drew a distinction "of substance" between "employees" and "nonemployee" union organizers. Thus, the Court held the access rights of "nonemployees" must be governed by a standard different than that for employees.[151]

Babcock illustrates the Court's use of an independent review model. The NLRA is silent on questions of access to private property. Most likely this is a question Congress never considered.[152] However, resolving the access questions involves the balancing of important, and opposing, interests.[153] In rejecting the NLRB's resolution of this policy issue, the Court made no effort to anchor in the language of the statute its "distinction of substance" between employees of the employer in

148. 324 U.S. 793 (1945).

149. *Babcock*, 351 U.S. at 113. In *Republic Aviation*, the Court upheld the NLRB's determination that an employer commits an unfair labor practice when it prohibits its employees from engaging in union solicitation on nonwork time. 324 U.S. at 805. In *Babcock*, the Court described the *Republic Aviation* standard as stating that no restriction on organizational activities may occur "unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *Babcock*, 351 U.S. at 113.

150. The NLRB had applied the same test to the organizers' request for access in *Babcock* and had found access should be granted, because no interference with production or discipline had been shown. Babcock & Wilcox Co., 109 N.L.R.B. 485, 494 (1954), *aff'd sub nom.* NLRB v. Ranco, Inc., 222 F.2d 543 (6th Cir. 1955), *rev'd sub nom.* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

151. *Babcock*, 351 U.S. at 113.

152. *See* Jay Gresham, Note, *Still as Strangers: Nonemployee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 119 (1983), which points out that *Babcock* "is written in simple declarative form, as if the Court were merely restating well-established rules of law or deferring to the express intent of Congress. In fact, Congress had not expressed its intent concerning the issue before the Court," nor was there any legislative history on the question. *Id.*; *see also* Winter, *supra* note 28, at 56-57 (referring to Congress' failure to foresee the property access issues that would arise under the NLRA).

153. In short, access questions involve the balancing of an employer's property rights against employees' rights under section 7 of the NLRA to engage in concerted activities for the purpose of collective bargaining. *See Babcock*, 351 U.S. at 112; Hudgens v. NLRB, 424 U.S. 507, 521-23 (1976); Central Hardware Co. v. NLRB, 407 U.S. 539, 544 (1972); Jean Country, 291 N.L.R.B. 11, 14 (1988).

question and the "nonemployee" organizers.[154] Nor could it have, for no such distinction is found in the NLRA.[155] Because the NLRA does not specifically address the precise issue in question, the NLRB's position could not have been rejected under *Chevron*'s step one.[156] Had the Court given the NLRB the deference it was due under *Chevron*'s step two, it is unlikely the NLRB's position would have been rejected

---

154. *Babcock*, 351 U.S. at 112-13. At no place in the *Babcock* opinion does the Court cite to any statutory language supporting, much less commanding, the distinction it makes.

155. If anything, the statutory language points in the opposite direction. The term "employee" is defined in the NLRA to include "any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise." 29 U.S.C. § 152(3) (1988). This expansive definition of the term "employee" was a result of the Court's prior construction of the term to encompass only the employees of a particular employer. This narrow construction led to the passage of the Norris-LaGuardia Act. Thus, any search for clear statutory language to support the Court's "distinction of substance" between the employees of Babcock & Wilcox and "nonemployees" fails. Presumably, the organizers in *Babcock* were employed by someone, most likely the union, and thus would seem to be "employees" within the meaning of the NLRA. Certainly, there is no statutory language supporting their exclusion. *See* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 61-62 (1983); *see also* Gorman, *supra* note 30, at 11 (stating that *Babcock* may have incorrectly held that non-company employees have no section 7 rights).

In addition, it is worth noting the NLRA contains no express protection for (or even any discussion of) employers' property rights. ATLESON, *supra*, at 62; *see also* Gorman, *supra* note 30, at 11 (stating that the NLRA does not even mention property rights). Moreover, the language of section 8(a)(1) is categorical: employers shall not interfere with employees' exercise of their section 7 rights. Nonetheless, the NLRB and Court have each rejected a literal reading of the statute, recognizing the need to soften the statutory prohibition. *See* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING 133 (1976).

My point here is not that *Babcock* was wrong but that it was not (and could not have been) based on clear statutory language, within the meaning of *Chevron*'s step one.

156. *See* Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 852 (1992) (White, J., dissenting). However, the majority in *Lechmere* stated that "[b]y reversing the Board's interpretation of the statute for failing to distinguish between the organizing activities of employees and nonemployees, we were saying, in *Chevron* terms, that § 7 speaks to the issue of nonemployee access to an employer's property." *Id.* at 848. *Cf.* Gorman, *supra* note 30, at 15 (terming the Court's description of *Babcock* "mind boggling").

Lechmere involved the question of when an employer lawfully could exclude union organizers from property open to the public. *Lechmere*, 112 S. Ct. at 884. The NLRB had adopted a balancing test for resolving this issue in *Jean Country*, 291 N.L.R.B. at 14, and had applied it in *Lechmere* to order that access be granted. Lechmere v. NLRB, 907 F.2d 143 (1990), *rev'd*, 112 S. Ct. 841 (1992). The Supreme Court reversed, finding the NLRB's *Jean Country* test foreclosed by the Court's decision in *Babcock*. *Lechmere*, 112 S. Ct. at 848.

The Court's mischaracterization of *Babcock* was a desperate attempt to shoehorn it into *Chevron*. *Lechmere* demonstrates the need for a thorough analysis of the correct interplay between *Chevron* and decisions like *Babcock*.

as an irrational reading of the NLRA.[157] Instead, the Court independently resolved this important policy question.[158]

Should *Babcock*, and similar decisions, then be binding on the agency, or does *Chevron* instead compel the Court to disregard such decisions in favor of agency deference? Professor Thomas Merrill has suggested that *Chevron*'s logic dictates that the agency be free to disregard precedent, because *Chevron* demands that policy choices be made by politically accountable agencies, as opposed to politically unaccountable courts.[159] But this argument ignores *Chevron*'s position as simply a presumption of congressional intent, which can be overcome.[160] Deference to the agency should occur only when the Court finds that Congress most likely intended that result.[161] The question, properly put, is whether Congress intended to confer on the agency the authority to overrule Supreme Court decisions.

It is unlikely Congress ever intended to confer such authority, even assuming it constitutionally could do so.[162] At the least, refusing to imply such intent from a grant of administrative authority to the agency is a reasonable interpretive approach. *Chevron* deference makes sense because it is likely, as a general operating principle, that

---

157. *See Lechmere*, 112 S. Ct. at 852-53 (White, J., dissenting) (stating that, "The *Babcock* Court should have recognized that the Board's construction of the statute was a permissible one and deferred to its judgment. . . . Had a case like *Babcock* been first presented for decision under the law governing in 1991, I am quite sure that we would have deferred to the Board, or at least attempted to find sounder ground for not doing so.").

158. *Babcock* has been described as exemplifying the "judicial deradicalization of the Wagner Act." Peter J. Ford, *The NLRB*, Jean Country *and Access to Private Property: A Reasonable Alternative to Reasonable Alternative Means of Communication Under* Fairmont Hotel, 13 GEO. MASON U. L. REV. 683, 684 (1991) (quoting Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978)).

159. Merrill, *supra* note 2, at 989-90. While suggesting *Chevron* would dictate such a result, Professor Merrill believes the Court in *Maislin* correctly rejected that approach. As he states, "There would be something unsettling about a world in which executive branch administrators could 'overrule' Supreme Court decisions. Again, however, the outcome [of *Maislin*] does not follow from the logic of *Chevron* and must be counted as yet another qualification on that doctrine." *Id.* at 989-90.

160. *See supra* notes 98-102 and accompanying text.

161. Sunstein, *supra* note 3, at 2084 (stating that the "central point [of *Chevron*] is this: *Courts must defer to agency interpretations if and when Congress has told them to do so*").

162. Whether Congress constitutionally could confer such authority is questionable. *See* Caust-Ellenbogen, *supra* note 8, at 803-10; Farina, *supra* note 2, at 485-88, 498.

Congress intended to confer interpretive authority on the agency.[163] When it is unlikely Congress intended to confer authority on the agency, *Chevron* deference should not apply.[164] Because it is unlikely Congress intended to vest the agency with authority to override the Court, no deference to an agency's attempt to do so should occur.[165] The values underlying stare decisis, particularly its role in legitimatizing the legal process, weigh heavily against an implied congressional intent to delegate such authority.[166] Thus, were the NLRB, for example, to take the position that *Babcock* no longer was binding authority because it was issued by the politically unaccountable Supreme Court, as opposed to the agency, the Court should reject that attempt to expand *Chevron.*

But should the Court apply to *Babcock,* and to similar decisions, the "super strong" presumption of correctness usually afforded statutory decisions? In other words, when there is an agency charged with the administration and enforcement of the statute and the Court has issued its precedent without deference to that agency, should the Court be more willing to reconsider its precedent if asked to do so by the agency?

Here, *Chevron*'s underlying policies suggest the Court should avoid application of the "super strong" presumption. To some extent, the

---

163. Sunstein, *supra* note 3, at 2101. Sunstein asserts that "*Chevron*'s principle of deference, then, is an attempted reconstruction of congressional instructions, one that is responsive to the comparative advantages of the agency in administering complex statutes. It follows that the principle is inapplicable when the best reconstruction argues against deference." *Id.*

Sunstein further contends that "courts demand a clear statement from the principal lawmaker and do not regard a vague or general grant of authority as genuine democratic authorization for constitutionally troublesome decisions." *Id.* at 2113 n.195. Thus, he argues, if Congress wants to authorize a constitutionally questionable result, it must do so clearly; intent to do so will not be implied by the Court. *Id.*

Under that analysis, the Court would not infer a congressional intent to delegate to agencies the power to overrule the Court's statutory decisions. Instead, the Court would require a clear statement from Congress to that effect, because of the constitutional issues lurking behind a delegation of authority to override the Court.

164. Sunstein, *supra* note 3, at 2097-101 (arguing that *Chevron* deference should not extend to questions involving an agency's jurisdiction or to a question of agency bias because it is unlikely Congress would have intended to confer such authority on the agency).

165. *Id.*

166. *Cf.* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy,* 78 GEO. L.J. 281, 315 (1989) (arguing that legislators presumably would favor application of stare decisis, even if the precedent were "wrong," because of the costs of legal instability); Daniel A. Farber, *Statutory Interpretation, Interaction and Civil Rights,* 87 MICH. L. REV. 1, 11-14 (1988).

values promoted by stare decisis and by *Chevron* conflict. Stare decisis promotes certainty and predictability; once a meaning is fixed by the Court, it remains fixed, absent a congressional overruling or compelling reasons for change.[167] But *Chevron* is premised, in part, on a recognition of the need for flexibility and political responsiveness in the interpretation of statutes.[168] Congress created agencies to administer statutes, allowing statutes to change over time in response to new circumstances, shifts in public sentiment, or shifts in political power.[169]

If the Court's construction of a statute, not based on the statute's clear wording but instead on the Court's resolution of an open policy choice,[170] freezes that meaning, then the Court has deprived the statute of some of the flexibility Congress presumably intended it to have. In these circumstances, the "super strong" presumption makes less sense as an interpretive principle.[171]

---

167. The Court has required "special justification" for the overruling of its statutory precedents. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989). Precedent will be overruled where the law has evolved away from the precedent thus weakening its underpinnings, where the precedent creates confusion or incoherence, or where it has, through experience, shown itself to be unjust. *Id.*; *Leading Cases*, 105 HARV. L. REV. 177, 182 (1991); *see also* Eskridge, *supra* note 11, at 1369 (asserting that "[t]he willingness of the Supreme Court to reconsider statutory precedents depends upon: (1) the thoroughness of the Court's consideration of the issue in the precedent; (2) the degree to which Congress has left development of the statutory scheme to the courts; and (3) the degree to which the precedent has generated public and private reliance").

168. *See supra* notes 77-82 and accompanying text; *see also* Scalia, *supra* note 8, at 517 (noting that "[o]ne of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever [sic] and ever; only statutory amendment can produce a change").

169. *See supra* notes 77-82 and accompanying text; *see also* Aleinkoff, *supra* note 80, at 43-45 (describes *Chevron* as "a major route for the updating of statutes"); Byse, *supra* note 31, at 257. As Byse observes in describing the "pros" of the *Chevron* review standard:

> Broad delegations of authority to administrative agencies enable the citizenry, through the mechanism of electing a President, to effect a change in governmental policies without incurring the high transaction costs of securing enactment of specific legislation. *Chevron*, then, can be viewed as furthering the democratic values of governmental responsiveness and accountability.

Id.

170. When the Court's interpretation is based on the clear wording of the statute, *i.e.*, on congressional resolution of the precise question at issue, it finds Congress has opted to itself resolve the policy question, rather than to leave its resolution up for grabs in response to changed conditions or shifting political views.

But when the Court does not base its interpretation on the clear wording of the statute, no such finding has been made. The Court instead has made the policy choice Congress presumably intended the agency to make.

171. Indeed, one could argue the decision should have no precedential effect at all, because

The Court instead should be more willing to reconsider its statutory decisions when an agency charged with the statute's administration asks it to do so.[172] That does not mean the decisions should be without precedential effect. Nor does it mean a decision should be overruled by the Court whenever the Court is persuaded its precedent was wrongly decided.[173] Certainty, predictability, fairness, efficiency, and

---

it is at odds with the current law on judicial review of agency decisionmaking. Justice White comes close to making this argument in his dissent in *Lechmere*, stating

> The more basic legal error of the majority today, like that of the Court of Appeals in *Chevron*, is to adopt a static judicial construction of the statute when Congress has not commanded that construction. By leaving open the question of how § 7 and private property rights were to be accommodated under the NLRA, Congress delegated authority over that issue to the Board, and a court should not substitute its own judgment for a reasonable construction by the Board.
>
> Under the law that governs today, it is *Babcock* that rests on questionable legal foundations. The Board's decision in *Jean Country*, by contrast, is both rational and consistent with the governing statute. The Court should therefore defer to the Board, rather than resurrecting and extending the reach of a decision which embodies principles which the law has long since passed by.

Lechmere, 112 S. Ct. at 853 (White, J., dissenting) (citation omitted).

172. *See* Merrill, *supra* note 2, at 1023-24 (urging that *Chevron* be replaced by an "executive precedent model," under which the agency's interpretation would be given weight equivalent to the weight one circuit accords the law of another, and suggesting the courts should be more willing to reconsider their precedents when asked to do so by the agency).

But if the agency is not free to ignore the Court's precedent, how will it be able to urge the Court to reconsider its precedents? One way is for the agency to issue a decision applying the Court's precedent while explaining its disagreement with it. The aggrieved party then would be able to urge the Court for review. For example, using the *Babcock* case discussed earlier, the NLRB could issue a decision along the following lines: "We, the agency are bound by the Court's decision in *Babcock* unless and until that decision is overruled by the Court. In our expert view, however, *Babcock* is not the best reading of the NLRA. Were the question ours to decide, we would chart a different course from that charted in *Babcock*; here is the course we would chart and why." When the Union then brings the case before the Court for decision, as it presumably would try to do, the Court would then have the opportunity to decide for itself whether or not to adhere to *Babcock*. In making that decision, the Court should take the agency's view into account and should not rely on the "super strong" presumption of correctness usually afforded statutory decisions.

173. *Babcock*, for example, as Justice White notes, may well have been wrongly decided. *Lechmere*, 112 S. Ct. at 853 (White, J., dissenting). But that alone is not reason enough to overrule a decision. Even "wrong" decisions engender expectations and create reliance interests. *See* Stevens, *supra* note 130, at 9 nn.44 & 46. Moreover, public confidence in the rule of law could be undermined were decisions too easily overruled. *Id.* at 2 & n.11. Finally, "[w]hether a precedent is seen as *clearly* wrong is often a function of the judge's self-confidence more than of any objective fact." Monaghan, *supra* note 129, at 762. "If the Justices were to adopt a low level of deference to precedent (for example, overruling a precedent merely deemed erroneously reasoned), then they will have increased the chances that a subsequent Court will take the same route," with "chaos" as the "inevitable consequence." Gerhardt, *supra* note 128, at 71.

respect for the rule of law counsel in favor of the Court's continued adherence to stare decisis.[174] But instead of the "super strong" presumption of correctness, the more relaxed form of stare decisis favored by the Court in common law and constitutional cases should be employed.[175] Under that standard, the Court gives its precedents a presumption of correctness but will overrule them when they "no longer 'fit' into the evolving legal terrain and are producing anomalous policy results."[176] Precedents, however, that have generated substantial public or private reliance are unlikely to be overruled.[177]

Finally, an agency's request for reconsideration of statutory decisions should be a factor in the Court's decision of whether or not to overrule its precedent. These requests merit attention because the agencies are charged with the continued viability of the statutory scheme. However, *Chevron*, properly understood, does not demand that the agency's request be honored.[178]

V. USING *CHEVRON* TO LIMIT PRECEDENTIAL EFFECT

Recognition that precedent generally should be given stare decisis effect, whether or not the precedent was incorrectly issued under an independent review model, forces confrontation of a difficult question. Just what is the "precedent" that binds the agency and presumptively binds the Court? It is one thing to say the NLRB cannot "overrule"

---

174. Congress, moreover, needs "a stable background of legal doctrine" against which to assess the need for change. Winter, *supra* note 28, at 67. Thus, while conferring interpretive authority on the agency promotes flexibility, viewing the Court's precedent as binding ensures a needed continuity in the overall framework of the law.

175. *See* Eskridge, *supra* note 11, at 1409. Professor Eskridge has urged the "super strong" presumption accorded statutory decisions be abandoned altogether. *Id.* He posits the Court's statutory decisions are evolutive in nature, as are its common law ones, and thus little reason exists to treat the two types of decisions differently. *Id.* at 1401-02. Also, because agencies have the freedom to shift interpretations of their enabling acts, the Court, too, should be more willing to flexibly approach its own statutory precedent. *Id.* at 1377, 1401-02. *But see* Marshall, *supra* note 11, at 208-15 (arguing for an absolute rule of stare decisis).

176. Eskridge, *supra* note 11, at 1386; *see also* Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 853 (1992) (White, J., dissenting) (putting *Babcock* into this category); Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-16 (1992) (discussing the circumstances that will support overruling constitutional precedent).

177. Eskridge, *supra* note 11, at 1386. Also unlikely candidates for overruling would be precedents that have become "building block[s]" for law developed under a particular statute. *Id.*

178. *See* Merrill, *supra* note 2, at 1024 (recognizing the agency's request is an appeal to the Court's discretion, an appeal the Court is free to deny).

Babcock[179] and that the Supreme Court should not overrule *Babcock* simply because it was decided under a review model the Court has since discarded.[180] But once one determines *Babcock* presumptively stands, the Court or the NLRB must resolve how broadly or narrowly *Babcock* should be interpreted.

Numerous commentators[181] have wrestled with defining precedent. Does precedent encompass only the "holding" of the case but not its dicta?[182] Does it embrace the "rule" of a case but not its rationale?[183] If so, what is the "rule" of the case?[184] Despite elaborate attempts to craft a workable definition,[185] no precise and satisfactory formula has

---

179. *See supra* notes 162-66 and accompanying text. Were the NLRB, for example, to refuse to recognize a distinction between employees of the employer in question and outside union organizers when resolving access questions, it would be refusing to follow *Babcock*. *See supra* text accompanying note 151. The NLRB, however, has never taken such a position, instead accepting the Court's distinction as mandatory.

Indeed, in its recent appearance before the Court in Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992), the NLRB's brief does not even cite *Chevron*. Brief for the National Labor Relations Board, Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992) (No. 90-970). The NLRB accepted *Babcock* as controlling in the case before the Court but argued its position was consistent with *Babcock*. *Id.*

180. *See supra* note 173 and accompanying text.

181. *See, e.g.*, PRECEDENT IN LAW (Laurence Goldstein, ed. 1987); Gerhardt, *supra* note 128, at 90-98; Maltz, *supra* note 22, at 372-92; Monaghan, *supra* note 129, at 756-67; Moore, *supra* note 133, at 359-66; Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1 (1941); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576-97 (1987).

182. *See* Schauer, *supra* note 181, at 578, 595-97 (urging rejection of this traditional distinction, advocating instead that the precedential effect of one case on another should depend upon rules of relevance); *see also* Maltz, *supra* note 22, at 372 ("Typically, the holding in a particular case (the 'precedent case') is said to control the result in all future cases in which the facts are similar to the precedent case in all relevant respects."); Moore, *supra* note 139, at 374-75 (stating the precedential effect of a case should depend on the "morally relevant likenesses" and the "morally relevant dissimilarities" between the cases).

183. *See* Monaghan, *supra* note 129, at 759 (recognizing "[t]he precedential status of the Court's reasoning need not be equivalent to that of the Court's rule or standard"). Monaghan states that the rule is the "core of the precedent." *Id.* at 764. Monaghan uses Roe v. Wade, 410 U.S. 113 (1973), to discuss the precedential status of the Court's constitutional decisions. Whether *Roe*'s rule is to be preserved, he says, is a different question than whether Roe's reasoning should be extended. Monaghan, *supra* note 129, at 759. For constitutional cases, Monaghan asserts precedent should include not only the core rule but the reasoning or principles underlying it. *Id.* at 764-65. *But see* Maltz, *supra* note 22, at 381-83.

184. Determining the "rule" often requires determining "the appropriate level of generality" at which to state it. Gerhardt, *supra* note 128, at 95 n.109; *see also* Neil MacCormick, *Why Cases Have Rationales and What These Are*, *in* PRECEDENT IN LAW, *supra* note 181, at 157; Moore, *supra* note 139, at 373, 375-76.

185. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 110-15 (1977); Moore, *supra* note 139; Pound, *supra* note 181.

yet been found.[186] One must recognize, however, the amorphous quality of precedent,[187] and that determining which aspects of a prior decision are controlling can often involve significant policy choices. In the hands of a Court motivated to do so, stare decisis can be transformed into little more than "judicial politics."[188]

Certainly, there are some situations where it is clear the Court's prior decisions are controlling in the case before it. As Professor Henry Monaghan asserts, "[e]very court and every lawyer knows that there are precedents that simply cannot be distinguished; they must be either followed or overturned."[189] But every court and every lawyer also knows that more frequently precedents can be distinguished. Once a case is no longer on "all fours" with the precedent, "the Justices have significant latitude in how they view, define, and apply the inconsistencies and ambiguities in such prior decisions."[190]

The question posed here is what impact *Chevron*, with its presumption that Congress intended to confer on administrative agencies the authority to interpret their governing statutes,[191] should have on the Court's approach to viewing, defining and applying its precedent. I suggest *Chevron* commands the Court to take a narrow view of its precedent in statutory interpretation cases, when Congress has confided the administration and enforcement of the statute to an agency. In addition, when the reach of a precedent is unclear, I suggest the Court should defer to the agency's reasonable interpretation of the precedent.

---

186. *See, e.g.*, Monaghan, *supra* note 129, at 766-67 (noting the difficulties involved in determining precedent); Moore, *supra* note 139, at 358-76 (discussing differing views on the meaning of precedent); Schauer, *supra* note 181, at 587 (explaining that the notion of precedent is relative and depends upon how one categorizes ideas and objects).

187. *See* Easterbrook, *supra* note 11, at 425 (noting that a precedent's meaning changes over time by asking "Was *Plessy* [Plessy v. Ferguson, 163 U.S. 537 (1896)] a case about blacks on trains, or was it about Jim Crow? It could have been read broadly or narrowly. Which features of a case matter will be influenced by subsequent developments in the legal culture.").

188. *Leading Cases*, 105 HARV. L. REV. 177, 182 (1991). There, the student author criticizes the Rehnquist Court for playing fast and loose with the special justification standard to reject precedent with which the Court disagrees. *Id.*

189. Monaghan, *supra* note 129, at 766-67.

190. Gerhardt, *supra* note 128, at 90. As Professor Gerhardt states,

> [O]nce the Justices depart from the specific facts or rationale of a precedent, they are in a position to reshape its ambiguities and tensions beyond the original configurations of that precedent. The Justices' efforts to define the scope of the rule of law set forth in a prior opinion illustrate that precedents can often open rather than close the range of choices for subsequent Courts to make.

Id. at 95-96.

191. *See supra* notes 70-75 and accompanying text.

When the Court, under *Chevron*'s step one, has determined a clear statutory meaning exists or, under an independent review model, has resolved an open policy question,[192] it has given meaning to the statute. In a sense, the Court's interpretation has become a part of the statute, at least until overruled by Congress or by the Court.[193] *Chevron* determined that statutory silences or ambiguities should be resolved by the agency, not by the Court.[194] Similarly, when a silence or ambiguity exists in the Court's construction of the statute, realization of the values underlying *Chevron* is best accomplished when the Court defers to the agency's resolution of such policy choices.

Interestingly, the Court on occasion followed this approach in the pre-*Chevron* era. For example, in *NLRB v. Erie Resistor Corp.*,[195] the Court deferred to the agency's reading of a high Court precedent, specifically relying on the agency's policymaking role to support its deferential approach.[196] At issue in *Erie Resistor* was whether a grant of "super-seniority" to strike replacements was an unfair labor practice.[197] The NLRB had found that it was, but the employer argued the NLRB's ruling conflicted with the Supreme Court's earlier decision in *NLRB v. Mackay Radio & Telegraph Co.*[198] In *Mackay*, the Court had determined the hiring of permanent strike replacements to be lawful.[199] Certainly, a broad reading of *Mackay* was at odds with the

192. *Chevron* recognizes that open policy questions are for agencies, not courts, to resolve. *Chevron*, 467 U.S. at 843. Nonetheless, as the preceding section demonstrates, there is much pre-*Chevron* precedent decided under an independent review model. *See, e.g.*, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263 (1965). Moreover, the Court has been criticized, post-*Chevron*, for too often failing to defer to agencies' rational policy choices. *See, e.g.*, Merrill, *supra* note 2, at 985-90. In both situations, the Court presumably has erred under *Chevron*, yet the precedent continues to be binding on the agency and presumptively binding on the Court. *See supra* notes 162-66 and accompanying text.

193. As Professor Maltz states, "Once the initial interpretation is rendered . . . all steps necessary to effectuate the legislative scheme have been taken. Not only has the statute been passed, but the rights established by the statute have been fixed." Maltz, *supra* note 22, at 392. Professor Maltz uses this analysis to support the "super strong" presumption of correctness for the Court's statutory decisions, but he does so without distinguishing between statutes with an administering agency and those without. *See id. But see* Moore, *supra* note 139, at 364-65, 375-76.

194. *See supra* notes 48-51 and accompanying text.

195. 373 U.S. 221 (1963).

196. *Id.* at 231-32.

197. *Id.* at 222-25.

198. *Id.* at 225 (citing NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938)).

199. *Mackay*, 304 U.S. at 347.

NLRB's position in *Erie Resistor*.[200] But the Court, after determining the NLRA itself did not expressly protect or prohibit the employer's actions, chose to read *Mackay* narrowly and then deferred to the NLRB's resolution of what, consequently, was an open question under the NLRA.[201]

In deferring to the NLRB, the Court was candid about the policy choices posed in this and other labor cases. Determining whether an unfair labor practice has occurred often involves weighing employers' managerial interests against employees' interests in collective action, a balancing that must occur in the context of the NLRA and its underlying policies.[202] Recognizing that Congress confided this balancing process to the NLRB, the Court declined to allow its precedent to block the agency's rational policy choice.[203]

Chevron's rationale retrospectively explains the Court's deferential approach in *Erie Resistor* and commands its application in the post-*Chevron* era. Under *Chevron*'s step one, the Court determines whether Congress has clearly spoken to the precise question at issue.[204] Similarly, in examining its prior construction of the statute, the Court should independently determine whether its precedent directly speaks to the issue at hand.[205] If the Court concludes that it does, the prece-

---

200. *See, e.g.*, ATELSON, *supra* note 155, at 23-26; Paul Barron, *A Theory of Protected Employer Rights: A Revisionist Analysis of the Supreme Court's Interpretation of the National Labor Relations Act*, 59 TEX. L. REV. 421, 457-58 (1981).

201. *Erie Resistor*, 373 U.S. at 232. The Court stated:

> [*M*]*ackay* did not deal with super-seniority, with its effects upon all strikers, whether replaced or not, or with its powerful impact upon a strike itself. . . . We have no intention of questioning the continuing vitality of the *Mackay* rule, but we are not prepared to extend it to the situation we have here. To do so would require us to set aside the Board's considered judgment that the Act and its underlying policy require, in the present context, giving more weight to the harm wrought by super-seniority than to the interest of the employer in operating its plant during the strike by utilizing this particular means of attracting replacements.

Id.

202. *Id.* at 228-29. *Erie Resistor* is unusual, however, because it discussed this balancing in the context of section 8(a)(3) of the NLRA. *Id.* at 231-33. Balancing traditionally is understood to occur in section 8(a)(1) cases, such as *Babcock*, but not in section 8(a)(3) cases. *See* Thomas G.S. Christensen & Andrea H. Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1299-300 (1968).

203. *See Erie Resistor*, 373 U.S. at 236-37. *But see* American Ship Building Co. v. NLRB, 380 U.S. 300 (1965).

204. *See supra* notes 44-45 and accompanying text; Macey, *supra* note 45, at 681 (stating "courts will decline to defer to administrative agencies when their interpretation of a statute contradicts the plain meaning of the law, the overall structure of a statutory scheme, the relevant legislative history, or even the underlying purposes of the statute").

205. Just as the Court determines whether Congress has specifically resolved a particular issue, the Court, too, should determine whether its precedent has directly spoken to the question

dent should control unless the usual reasons for departing from stare decisis are present.[206]

However, because Congress presumptively has conferred on the agency the power to make policy choices left open by the statute, the Court should view its precedent narrowly. In this way, the Court would avoid foreclosing the agency from making the policy choices Congress intended the agency to make. When the Court determines, under *Chevron*'s step one, that Congress has resolved a particular issue, it is effectuating the policy choice of the most politically accountable branch. But when it determines its precedent speaks directly to the precise issue in question, and uses that precedent to reject the agency's view, it is deferring to a prior decision of the least politically accountable branch. This is particularly true when the precedent was issued under an independent review model. Thus, the Court should read its precedent narrowly to ensure that agency policymaking is not unduly restricted. Moreover, once the Court concludes its precedent is silent or ambiguous on the issue, the Court should defer to the agency's reasonable reading of the statute *and* its judicial gloss.[207] Any open policy question exists for the agency, not the Court, to resolve.

---

at hand. No deference is due the agency in making this determination, just as none is due the agency under *Chevron*'s step one.

206. See *supra* notes 172-78 and accompanying text for a discussion of when the Court generally will overrule a prior decision.

207. When the Court determines Congress has not resolved the particular policy question, it defers to the agency's rational resolution of the issue under *Chevron*'s step two. *See supra* note 48-51 and accompanying text. When the Court determines its own precedent does not resolve the particular issue before it, the Court should defer to the agency's reasonable reading of the statute, as interpreted by the Court. *Cf.* NLRB v. IBEW, 481 U.S. 573, 597 (1987) (Scalia, J., concurring). In *IBEW*, the Court rejected the NLRB's interpretation of section 8(b)(1)(B) of the NLRA, finding the NLRB's construction at odds with the statute and its prior interpretation by the Court. *Id.* at 585-88. Concurring in the Court's judgment, Justice Scalia stated,

> If the question before us were whether, given the deference we owe to agency determinations, the Board's construction of this Court's opinion in *ABC* is a reasonable one, I would agree with the Government that it is. We defer to agencies, however (and thus apply a mere "reasonableness" standard of review) in their construction of their statutes, not of our opinions. The question before us is not whether *ABC* can reasonably be read to support the Board's decision but whether § 8(b)(1)(B) can reasonably be read to support it.

Id. at 597.

As set forth above, the Court should independently determine whether the statute or its precedent disposes of the precise question before it. But once it finds both a silent or ambiguous statute, *and* a silent or ambiguous precedent, it should defer to the agency's reasonable interpretation of not only the statute but also the precedent. In *IBEW*, however, Justice Scalia relied on particular statutory language to foreclose the agency's interpretation. *Id.* at 596 (Scalia, J., concurring).

The Court's recent opinion in *Lechmere v. NLRB*[208] illustrates the Court's improper use of stare decisis to usurp an agency's legitimate exercise of policymaking authority. *Lechmere*, like *Babcock*, posed the question of union access to private property.[209] In *Lechmere*, unlike in *Babcock*, the employer's private property was open to the public.[210] In such cases, the NLRB had developed what became known as the *Jean Country* balancing test.[211] The *Jean Country* test weighed the impairment of the employer's property rights against the impairment of section 7 rights, taking into account whether the union had reasonable alternative means for reaching employees.[212] In performing this balancing test, the NLRB found the employer's property interest to be less weighty in *Lechmere* than in *Babcock* because the property was open to the public.[213] Accordingly, the NLRB ordered access.[214]

---

208. 112 S. Ct. 841 (1992).

209. *Lechmere*, 112 S. Ct. at 844. In *Lechmere*, the United Food and Commercial Workers Union, the AFL-CIO, was attempting to organize Lechmere's 200 nonunion employees. *Id.*

210. Lechmere is a retail store that sells "'hard goods,' including appliances, audio/video equipment, housewares, and sporting paraphernalia." Lechmere, Inc. v. NLRB, 914 F.2d 313, 315 (1st Cir. 1990), *rev'd*, 112 S. Ct. 841 (1992). The Lechmere store was located in the Lechmere Shopping Plaza, a shopping strip owned by Lechmere and the owner of the 13 smaller specialty shops located in the shopping center. *Id.* The union attempted to leaflet cars parked in the portion of the parking lot where most Lechmere employees were believed to park. *Id.* The employer threatened the leafletters with arrest for trespass, enforcing its nondiscriminatory policy against distribution of literature on its property, including its parking lots. *Id.* at 316.

As noted by Professor Gorman, union organizing, in recent years, has shifted from the manufacturing plants at issue in *Babcock* to service and retail establishments, where the property, while privately owned, is "infused with an open-ended invitation to the public to park, visit, stroll and shop," making the union access question "more complex." Gorman, *supra* note 30, at 4.

211. *See Jean Country*, 291 N.L.R.B. 11 (1988).

212. The *Jean Country* balancing test provides a three-factor analysis for determining whether to grant union access to private property. *See id.* The *Jean Country* balancing test stated:

> [I]n all access cases our essential concern will be [1] the degree of impairment of the Section 7 right if access should be denied, as it balances against [2] the degree of impairment of the private property right if access should be granted. We view the consideration of [3] the availability of reasonably effective alternative means as especially significant in this balancing process.

Lechmere, 112 S. Ct. 841, 847 (1992) (quoting *Jean Country*, 291 N.L.R.B. at 14).

213. *Lechmere*, 914 F.2d at 320. The lower *Lechmere* court stated: "[I]f a particular property right is diluted, as 'when property is open to the general public' and some more private character has [not] been maintained,' it becomes more likely that other alternatives will be found unsatisfactory and a denial of access found unlawful." *Id.* (quoting *Jean Country*, 291 N.L.R.B. at 14).

It has been estimated that following *Jean Country*, the NLRB ordered access almost 85% of the time. Ford, *supra* note 158, at 701.

214. *Lechmere*, 914 F.2d at 317.

The Court in *Lechmere* rejected the NLRB's test as inconsistent with *Babcock*.[215] Refusing to defer to the NLRB under *Chevron*, the Court stated, "before we reach any issue of deference to the Board, however, we must first determine whether *Jean Country* — at least as applied to nonemployee organizational trespassing — is consistent with our past interpretation of § 7."[216]

This statement is correct, as far as it goes. As set forth in the preceding section, *Chevron* does not require or permit the NLRB to overrule Supreme Court precedent.[217] Moreover, when faced with a question of whether the Court's precedent is controlling, the Court should independently examine its precedent to determine whether it speaks directly to the precise question at issue.[218] But if the precedent does not, the Court should defer to the NLRB's reasonable interpretation.[219]

Where the Court failed in *Lechmere* was in not properly performing this analysis. The Court read *Babcock* as establishing a hard and fast rule on all questions of union access to private property for organizational purposes.[220] Only if no reasonable alternative means of communication exist could the NLRB balance the employer's property rights against the section 7 rights at issue.[221] Moreover, the Court read *Babcock* to establish that reasonable alternative means would exist unless "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them."[222]

This may well be *one* reasonable reading of *Babcock*.[223] It might even be *one* reasonable reading of the NLRA.[224] But, as the Court's

---

215. *Lechmere*, 112 S. Ct. at 848.

216. *Id.* at 847.

217. *See supra* notes 162-66 and accompanying text.

218. *See supra* notes 205-06 and accompanying text.

219. *See supra* note 207 and accompanying text.

220. *Lechmere*, 112 S. Ct. at 848. The Court stated that "*Babcock*'s teaching is straightforward: § 7 simply does not protect nonemployee union organizers *except* in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'" *Id.* (quoting *Babcock*, 351 U.S. at 112).

221. *Id.* at 848.

222. *Id.* at 849 (quoting *Babcock*, 351 U.S. at 113).

223. *See Lechmere*, 914 F.2d at 326 (Torruella, J., dissenting); *Recent Developments*, 104 HARV. L. REV. 1407 (1991). *But see* Gorman, *supra* note 30, at 10 (describing the Court's reading of *Babcock* as "untenable").

224. *But see supra* note 155 and accompanying text.

precedents demonstrate, and as the dissent points out,[225] the majority's reading of *Babcock* and the NLRA was not the *only* permissible reading of either.[226] Accordingly, because neither the language of the statute nor of *Babcock* precluded the NLRB's *Jean Country* test, the Court should have deferred to the NLRB on this critical policy question, a question on which the NLRA is silent.[227]

Lechmere presents a "true" conflict between *Chevron* and stare decisis,[228] and its flawed resolution demonstrates the need for careful analysis of this issue. When the Court uses its precedent to block an agency's policy choice, it undermines *Chevron*. This is particularly so when the precedent was issued under an independent review model,

---

225. *Lechmere*, 112 S. Ct. at 851 (White, J., dissenting). In his dissent Justice White argues:

> We have consistently declined to define the principle of *Babcock* as a general rule subject to narrow exceptions, and have instead repeatedly reaffirmed that the standard is a neutral and flexible rule of accommodation. . . . Our cases . . . are more consistent with the *Jean Country* view that reasonable alternatives are an important factor in finding the least destructive accommodation between § 7 and property rights. The majority's assertion to this effect notwithstanding, our cases do not require a prior showing [of] reasonable alternatives as a precondition to any inquiry balancing the two rights.

Id. (White, J., dissenting).

For his reading of *Babcock*, Justice White relied on two cases, Central Hardware Co. v. NLRB, 407 U.S. 539, 544 (1972) (stating the "guiding principle" for resolving conflicts between § 7 rights and property rights is contained in *Babcock*'s neutral accommodation language) and Hudgens v. NLRB, 424 U.S. 507, 522 (1976) ("The locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance.").

226. *See Lechmere*, 112 S. Ct. at 851 (White, J., dissenting). Every circuit to consider the NLRB's *Jean Country* test, moreover, had accepted it as consistent with both *Babcock* and the NLRA. *See, e.g., Lechmere*, 914 F.2d at 313; Labours' Local Union No. 204 v. NLRB, 904 F.2d 715 (D.C. Cir. 1990). *See also* Gorman, *supra* note 30, at 10-12 (critizing the *Lechmere* Court's analysis); Gresham, *supra* note 152, at 119-20, 157-65 (criticising *Babcock*'s analytical flaws).

227. *See supra* note 152 and accompanying text; Gorman, *supra* note 30, at 14-16.

228. *See also* NLRB v. International Longshoremen's Ass'n, 473 U.S. 61, 73-84 (1985) (refusing to uphold the NLRB's interpretation of prior Supreme Court case law); *cf.* Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) (rejecting the Interstate Commerce Commission's statutory interpretation where the Court previously had established the Interstate Commerce Act's clear meaning).

Lechmere will not be the last such case. Already, at least one circuit has been urged, post-*Lechmere*, to refuse to defer to the NLRB under *Chevron* because the NLRB's decision was allegedly at odds with Supreme Court precedent. The lower court rejected the invitation, finding the NLRB's position consistent with both the statute and controlling Supreme Court authority. United States Postal Serv. v. NLRB, 969 F.2d 1064 (D.C. Cir. 1992).

because no deference to the agency has ever occurred, even in cases where the statute is silent or ambiguous.[229] Instead, the Court should construe its precedent narrowly when determining if the precedent speaks directly to the precise issue in question. Moreover, the Court should defer to the agency's rational construction of ambiguous precedent. Doing so would reconcile *Chevron*'s concern for best effectuating congressional intent and maintaining political accountability with the concern for stability and judicial legitimacy that justifies stare decisis.

Whatever may be the appropriate guideposts for interpreting precedents when no administrative agency is in the picture,[230] *Chevron* counsels a restrained judicial role when an agency has been confided interpretive authority over a statute.[231] In order for the values underlying both *Chevron* and stare decisis to be realized, the Court must be willing to recognize ambiguities in its own precedents, as well as ambiguities in statutes. Furthermore, the Court must defer to agency interpretations of those ambiguous decisions, as well as to agency interpretations of ambiguities created by Congress.

VI. CONCLUSION

The interpretive principles of *Chevron* and stare decisis work at cross purposes. *Chevron* finds an implied congressional intent to delegate interpretive power to agencies because the interpretation of silent or ambiguous statutes is an exercise in policymaking. Congress, *Chevron* tells us, generally prefers to have policy made by politically accountable agencies that can respond to shifts in political power by flexibly interpreting statutes. Stare decisis, in contrast, promotes not only stability in the law, but the law's legitimacy. By ensuring the law does *not* change in response to shifts in the political winds, stare decisis fosters respect for the courts and for the legal process.

When it is unlikely Congress intended to confer authority on the agency, *Chevron* deference does not apply. The question thus becomes whether Congress intended to delegate to agencies the power to overrule Supreme Court decisions. The values underlying stare decisis counsel against a finding that Congress intended to confer any such authority on administrative agencies. Accordingly, *Chevron* is an in-

229. *See Babcock*, 351 U.S. at 105; *supra* notes 152-58 and accompanying text.

230. For example, when there is no agency in the picture, application of the "super strong" presumption of correctness becomes more arguable, as does how broadly or narrowly the Court should construe those precedents. *See* Marshall, *supra* note 11; Maltz, *supra* note 22; Eskridge, *supra* note 11.

231. *See supra* notes 70-84 and accompanying text.

adequate basis for deferring to an agency's interpretation that conflicts with high Court precedent.

However, *Chevron* does suggest a more limited judicial role in the construction and application of those precedents. Just as the Court recognizes the interpretation of silent or ambiguous statutes is an exercise in policymaking, it similarly must recognize the interpretation of its own precedent frequently involves policy choices. Therefore, congressional creation of an administrative agency to enforce and administer the statute should lead the Court to construe its statutory precedents narrowly and to defer to the agency's rational interpretation of relevant, though not dispositive, high Court decisions.