Why Agency Interpretations of Ambiguous Statutes Should be Subject to Stare Decisis

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Abstract

Agencies’ interpretations of ambiguous statutes under Chevron are not subject to a rule of stare decisis. Agencies may interpret and later reinterpret ambiguous statutes without settling the statute’s meaning. This article shows that this regime permits agencies to “interpret” law in legally unprincipled and inconsistent ways and prevents administrative statutes from meaningfully constraining agency policymaking. This article concludes that a rule of stare decisis should govern agencies’ interpretations of ambiguous statutes just as it governs judicial holdings. Taking seriously Chevron’s recognition of agencies’ power to interpret law, the conventional justifications for stare decisis – separation of powers, legislative supremacy, and the consistency of regulatory schemes – apply with equal force to agencies as to courts.

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I. Introduction

The force of judicial stare decisis is at its apex in cases of statutory interpretation. But unlike judicial constructions of statutes, agencies’ interpretations of ambiguous statutes under *Chevron* are not subject to a rule of stare decisis. An agency may revise an earlier interpretation so long as the new interpretation is “permissible” under the statute. The *Chevron* Court justified this paradigm according to the imperative of administrative flexibility.

As a result, agency interpretations do not resolve ambiguities in administrative statutes. Rather, in the hands of an agency, the law remains perpetually indeterminate. Under *Chevron*, agencies may bring political views to bear on statutory meaning; agencies may reverse or abandon long-standing regulatory schemes and, with the imprimatur of congressional authorization, adopt wholly conflicting policies. Agency flexibility under *Chevron* thus implicates the well-theorized justifications for judicial statutory stare decisis: maintaining constitutional separation of powers, ensuring the continuity and consistency of legal obligations, and vesting minimal discretion in non-politically accountable actors. The Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services* rejected the application of

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2 Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation . . . ”).
5 *Id.* at 863–64.
7 *See Part III, infra*.
8 545 U.S. 967 (2005).
stare decisis to administrative interpretations due *Chevron* deference, albeit in the context of a prior judicial – rather than a prior agency – interpretation. In that decision, the Court avoided a collision between stare decisis and *Chevron* to protect the FCC’s initial interpretive primacy over the Communications Act.\(^9\) But the Court considered the application of stare decisis for agency interpretations all but foreclosed.\(^10\)

This Article argues that these conventional justifications for statutory stare decisis apply to the *Chevron* paradigm. *Chevron* doctrine shows that agency authority to choose permissible interpretations leaves statutory ambiguity perpetually unresolved. But a regime of binding judicial deference based on statutory ambiguity need not permit statutory ambiguity to survive agency interpretation. Rather, a set of countervailing constitutional, practical, and democracy values reflected in stare decisis theory furnishes good reason to require that agency interpretations settle statutory ambiguities. Part II describes how *Chevron* doctrine permits agencies to waver between permissible statutory interpretations. Part III is the heart of the piece. It engages the major justifications for statutory stare decisis and concludes that the most convincing rationales for limiting revisions of prior judicial holdings – separation of powers, and the consistency of regulatory schemes – apply with equal force to *Chevron*, in part because the courts have retained vast discretion to decide when *Chevron* applies. Part III concludes by relating founding era views of legal ambiguity to *Chevron* and showing that the settling of legal indeterminacy through judicial, executive, or legislative practice was associated with ideal notions of law from the earliest days of the Republic. Part IV addresses

\(^9\) *Id.* at 982 (“[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court’s interpretation to override an agency’s.”).

\(^10\) *See, e.g., id.* at 981 (“Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”).
counterarguments, particularly the view that legislative delegation cures the separation of powers and legislative supremacy arguments in favor of administrative stare decisis. Part V concludes.

II. The Current Regime

In *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, the Supreme Court introduced a presumption that ambiguities in agency-administered statutes vest interpretive authority in agencies rather than courts. So long as an agency’s interpretation of an ambiguous statute is “permissible,” the court must defer to that construction. *Chevron* explicitly recognized the blurry line between statutory interpretation and policymaking, at least with respect to statutes that permit multiple interpretations. Because interpreting an ambiguous statute requires the exercise of policy judgment and the balancing of competing interests, agencies rather than courts are the proper interpretive authorities. The *Chevron* Court rationalized its new presumption

12 *Id.* at 843–44.
13 *Id.* at 843. The *Chevron* two-step inquiry is as follows. At step one, the court decides whether the statute is clear. If so, then the inquiry ends. If, however, the statute is ambiguous, the court examines whether the agency has construed the statute permissibly. *Id.* at 842–43.
14 *Id.* at 843 (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” (citation omitted)); see Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 6 (1998) (describing the “substantial residual policymaking discretion retained by judges” in interpreting ambiguous statutes.”).
15 Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (“Filling these gaps, the *Chevron* Court explained, involves difficult policy choices that agencies are better equipped to make than courts.”) (citation omitted). *Chevron* justified its rule on several grounds, including agencies’ greater political accountability and expertise relative to courts. *Chevron*, 467 U.S. at 865; see Cass Sunstein, *Beyond*
of deference by pointing to agencies’ superior political accountability and expertise relative to courts and concluded that the courts were an inappropriate venue to revisit policy battles litigants lost at the agency.\textsuperscript{16}

But unlike the courts’ power “to say what the law is,”\textsuperscript{17} agencies’ interpretive authority under \textit{Chevron} is not subject to the strictures of stare decisis.\textsuperscript{18} “The fact that that the agency has from time to time changed its interpretation,” the Court stated, “does not . . . lead us to conclude that no deference should be accorded the agency’s interpretation of the statute. An initial agency interpretation,” the Court continued, “is not instantly carved in stone.”\textsuperscript{19} The Court explained that the dictates of flexible administration require – and the courts must necessarily permit – an agency to reconsider “the wisdom of its policy on a continuing basis.”\textsuperscript{20} Though the Supreme Court has since narrowed \textit{Chevron}’s application,\textsuperscript{21} the Court has never adopted a limit to agencies’

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\textsuperscript{16} \textit{Chevron}, 467 U.S. at 865.
\textsuperscript{17} \textit{Marbury} v. Madison, 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{19} \textit{Chevron}, 467 U.S. at 863–64.
\textsuperscript{20} \textit{Id.} at 864. Nonetheless, the Court has at times explained that the consistency of an agency’s interpretation merits “particular deference.” Barnhart v. Walton, 535 U.S. 212, 220 (2002) (quoting North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 522 n.12 (1982)).
\textsuperscript{21} See, e.g., United States v. Mead, 533 U.S. 218, 226–27 (2001) (holding that statutory ambiguity implies delegation of interpretive authority to agencies only where the agency
authority to reinterpret an ambiguous statute where *Chevron* applies. Nor does a prior judicial construction of an ambiguous statute restrict an agency’s interpretive latitude.\(^{22}\)

Rather, *Chevron* – applied in any posture – opens a “policy space” for the agency to explore at its discretion,\(^{23}\) which is bound only by the statute’s range of ambiguity.\(^{24}\) The Supreme Court has on occasion suggested that an agency’s interpretive inconsistency dilutes the case for deference.\(^{25}\) But the two-step *Chevron* analysis nonetheless applies,\(^{26}\)

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\(^{22}\) Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005); see Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272, 1289 (2002) (“[T]he Supreme Court has held in a number of contexts that neither an agency’s action nor its inaction extinguishes administrative discretion to construe a statute reasonably in the future.”).


\(^{25}\) See, e.g., Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994) (“[I]t is true that an agency’s interpretation of a statute or regulation that conflicts with a prior interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.”) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987)); Pauly v. Bethenergy Mines, Inc., 501 U.S. 680 (1991) (“As a general matter . . . the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.”); Watt v. Alaska, 451 U.S. 259, 273 (1981) (“The Department’s current interpretation, being in conflict with its initial position, is entitled to considerably less deference.”).

\(^{26}\) See Smiley v. Citibank (South Dakota), 517 U.S. 735, 742 (1996) (“[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguity with the implementing agency.”); Rust v. Sullivan, 500 U.S. 173, 187 (1991) (requiring “reasoned analysis” to justify agency revision); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) (“[A]n administrative agency is not disqualified from changing its mind.”) (quoting NLRB v. Iron Workers, 434 U.S. 335, 351 (1978)); Marmolejo-Campos v. Holder, 558 F.3d 903, 920 n.2 (9th Cir. 2009) (“To be clear,
and where *Chevron* applies, the court ordinarily defers to the agency’s construction. As *Chevron* and its progeny illustrate, statutory ambiguity permits agencies to interpret and then reinterpret statutes subject only to the reasonableness of the interpretations themselves, even where those revisions herald wholesale policy reversals or dramatic reinterpretation of the statute’s language. Indeed, taking the *Chevron* Court’s language seriously, an agency may derogate its legal obligations by *not* periodically reexamining its interpretations of statutes.

Agencies’ freedom to depart from earlier interpretations under *Chevron* has persisted for at least four reasons. First, *Chevron* itself examined an agency’s revised interpretation of an ambiguous term. As noted above, in upholding the Environmental Protection Agency’s revised interpretation of “stationary source” in the Clean Air Act, the Court stated explicitly that the EPA’s revision was no bar to binding deference, and the Court interpreted Congress’ failure to disapprove of the EPA’s various interpretations of the term as a sign that the definition was as flexible as the EPA claimed. Though

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28 See Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 41 (2007) (“The deference built into *Chevron*’s formal framework frees agencies not just to interpret statutes, but also to reinterpret them as political administrations change.”).


30 Id. at 863–64.

31 Id. at 864.
Chevron adopted a categorical presumption of deference, the contextual basis of EPA policy provided the rationale for the agency’s wide interpretive berth. Second, Chevron chose a static trigger for binding judicial deference. Under a contextual scheme of deference, the particulars of a statute’s language, its purpose, and its legislative history might show that an agency has authority to fill a particular statutory gap only once. But barring amendment, an ambiguous statute will be forever ambiguous, and no matter how many times an agency interprets a statute, the agency can point to Chevron’s lodestar to invoke the presumption of judicial deference. Third, the structure of Chevron’s two-step inquiry implies an agency’s power to take subsequent bites at the interpretive apple. Even if a court finds an agency’s interpretation unreasonable at step two, the agency – not the court – retains authority to revisit the statute due to the ambiguity finding at step one. Consequently, no Chevron step two holding lets courts vitiate agencies’ interpretive primacy. Fourth, agencies’ very purpose is to administer – and sometimes, even design – complex regulatory programs that Congress, for various reasons, cannot or will not. Because policy imperatives drive agency interpretive authority, Chevron suggests no principled limit to agencies’ authority to reinterpret statutes to satisfy a policy objective: the very point of agency interpretation is to foster responsiveness to

32 See Nat’l Muffler Dealers Ass’n v. United States, 440 U.S. 472, 477 (1979) (“In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose.”).
33 Kenneth A. Bamberger & Peter L. Strauss, 95 Va. L. Rev. 611, 616–17 (2009) (“If the holding entails a judicial determination that the statute cannot bear the meaning the agency has given it, such a determination limits the interpretation on which a future agency action can be based. But it does not constrain the agency’s action within any statutory discretion the court acknowledges the agency has.”).
rapidly changing circumstances.\textsuperscript{35} Barring agencies’ reconsideration of their own prior interpretations, it seems, would defeat the very flexibility \textit{Chevron} deference protects. A litany of federal cases supports these four propositions.\textsuperscript{36}

No example of agency reinterpretation is more illustrative than the Department of Health and Human Services’ (HHS) treatment of Title X of the Public Health Services Act.\textsuperscript{37} Passed in 1970, Title X provides that no funds appropriated for family planning projects “shall be used in programs where abortion is a method of family planning.”\textsuperscript{38} A 1971 HHS regulation construed “method” to mean “provide,” and thus permitted

\begin{footnotes}
\textsuperscript{35} \textit{Chevron}, 467 U.S. at 864.
\textsuperscript{36} \textit{See, e.g.}, Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (“Chevron’s premise is that it is for agencies, not courts, to fill statutory gaps.”); Smiley v. Citibank (South Dakota), 517 U.S. 735, 742 (1996); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993); Rust v. Sullivan, 500 U.S. 173, 187 (1991); \textit{Chevron}, 467 U.S. at 863–64; Nai Yuan Jiang v. Holder, 611 F.3d 1086, 1093 (9th Cir. 2010) (“Here we have no reason to hold unreasonable the agency’s current view as to the presumptive eligibility of a victim’s spouse.”); Mobile Oil Corp. v. EPA, 871 F.2d 149 (D.C. Cir. 1989) (“[A]n agency’s reinterpretation of statutory language is nevertheless entitled to deference, so long as the agency acknowledges and explains the departure from its prior views.”); Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1080 (D.C. Cir. 1987) (“[T]here may be more than one ‘right’ interpretation if Congress has painted with a broad (or at least non-specific) brush so as to permit an agency flexibility in carrying out its duties.”); \textit{see also} Natural Res. Def. Council v. U.S. E.P.A., 526 F.3d 591, 609 (9th Cir. 2008); Time Warner Telecom, Inc. v. FCC, 507 F.3d 205, 219 (3d Cir. 2007); Citizens Coal Council v. U.S. EPA, 447 F.3d 879, 902 n.23 (6th Cir. 2006); Indep. Bankers Ass’n of Am. v. Farm Credit Admin., 164 F.3d 661, 668 (D.C. Cir. 1999); Republican Nat’l Committee v. Federal Election Com’n, 76 F.3d 400, 407 (D.C. Cir. 1996); Torrington Extend-A-Care Emp. Ass’n v. NLRB, 17 F.3d 580, 589 (2d Cir. 1994); \textit{cf.} NLRB v. Local Union No. 103, 434 U.S. 335, 351 (1978). \textit{See generally}, David M. Gossett, Comment, \textit{Chevron Take Two: Deference to Revised Agencies’ Interpretation of Statutes}, 64 U. Chi. L. Rev. 681, 695–96 (1997).
\textsuperscript{38} \textit{Id.} § 300a-6.
\end{footnotes}
recipients of Title X funds to discuss abortion and refer patients to abortion clinics,\textsuperscript{39} though it did not permit recipients of funds to perform abortions. In 1988, the Reagan Administration HHS revised this interpretation and adopted what became known as the “gag rule,” which construed the law to ban recipients of federal funds from advocating abortion, referring patients to abortion providers, or discussing abortion with patients even where the patients specifically requested abortion information.\textsuperscript{40} Applying \textit{Chevron}, the Supreme Court upheld the 1988 revision in \textit{Rust v. Sullivan}.\textsuperscript{41} To the \textit{Rust} majority, the agency’s inconsistency was of no moment, even in light of the revised interpretation’s First Amendment and Due Process implications. But \textit{Rust} was not the final word on Title X. Two years later, only days after President Clinton’s inauguration, the Clinton Administration HHS suspended enforcement of the gag rule, and in 2000, on the eve of Clinton’s departure, formally restored the pre-1988 interpretation.\textsuperscript{42}

\textit{Rust} illustrates the breadth of agency policymaking discretion under \textit{Chevron}. Due to HHS’ guardianship of Title X’s ambiguous language, the agency retains authority to decide which programs will receive federal funding. The agency need not seek a statutory amendment to change Title X funding policy.\textsuperscript{43} Nor need the agency

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\textsuperscript{40} Statutory Prohibition on Use of Appropriated Funds In Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects, 53 Fed. Reg. 2922, 2922 (“This language clearly creates a wall of separation between Title X programs and abortion as a method of family planning.”). This interpretation was known as the “gag rule.” \textit{See} Gossett, \textit{supra} note 36, at 699 n.82.
\textsuperscript{41} 500 U.S. 173 (1991).
\textsuperscript{42} \textit{See} Memorandum for the Secretary of Health and Human Services, 58 Fed. Reg. 7,455 (Jan. 22, 1993).
\textsuperscript{43} In the case of Title X, such a change in statutory language would have been impossible. Shortly after the decision in \textit{Rust}, both the Democratic-controlled House and Senate
substantiate its revised legal views with any showing of applied expertise, new data, or changed resolution about the meaning of the statute it is reinterpreting. As Rust shows, *Chevron* allows a newly elected administration to vindicate its political views without an act of Congress or fear of searching judicial scrutiny. *Chevron* requires that an agency fill a statute’s gaps, but not that the agency fill those gaps with cement. Part III evaluates this paradigm in light of several common rationales for statutory stare decisis.

III. Statutory Stare Decisis Applied to Agencies

The doctrine of stare decisis directs courts to apply a precedent without regard to whether the precedent was correctly decided. Dissenting in *Burnet v. Coronado Oil & Gas Co.*, Justice Brandies famously explained, “[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule be settled than that it be settled right.” But in the eyes of Justice Brandeis, the Supreme Court and the federal courts of appeals, not all judicial holdings are created equal. In recognition of the judiciary’s sole power to determine constitutional questions, the Court assigns

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44 Stephenson, *supra* note 3, at 1047; see, e.g., Sarah Slack, *When Is a Pesticide Not a Pollutant? Never: An Analysis of the EPA's Misguided Guidance*, 90 IOWA L. REV. 1241, 1250 (2005) (“As with many administrative agencies, the policies and statutory interpretations that the EPA has authority to enforce often change from administration to administration.”); Miles & Sunstein, *supra* note 27, at 838 n.26. Agencies’ discretion is conceivably broader in the wake of the Court’s decision in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).
46 285 U.S. 393 (1932).
47 *Id.* at 406 (Brandeis, J., dissenting).
constitutional decisions relatively weak precedential valence. In contrast, common law decisions have relatively stronger force, and statutory precedents have “a super strong presumption of correctness.”

The Court has explained the “special force” of stare decisis in cases of statutory interpretation as a function of Congress’ power to reverse the Court’s decision. Effectively, the Court is not the last word on matters of statutory law. Absent corrective legislative action, the Court will draw a negative implication of legislative acquiescence to the Court’s interpretation of a statute and regard its interpretation as authoritative. Others attribute the strength of statutory stare decisis to the related principles of legislative supremacy and separation of powers. According to this view, departing from an initial judicial interpretation of a statute is a mode of legislation or policymaking that infringes upon – or is at least better left to – the Article I lawmaking process.

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49 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) ((Brandeis, J., dissenting) (explaining that in constitutional cases, “correction through legislative action is practically impossible”).

50 William N. Eskridge, Jr., Overruling Statutory Precedents, 76 GEO. L.J. 1361, 1362 (1988) [hereinafter, Eskridge, Overruling]; see also Rasul v. Bush, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting) (noting the Court’s “almost categorical rule of stare decisis in statutory cases”). But see Einer Elhaug, Statutory Default Rules 221 (2008) (“[T]he supposedly super-strong rule of stare decisis for statutory precedent is in fact often honored in the breach. In the period 1961–1991, the Supreme Court overruled no less than ninety statutory precedents under this supposed super-strong rule.” (citation omitted)).


52 See Apex Hosiery Co. v. Leader, 310 U.S. 469, 488–89 (1940); Guido Calabresi, A Common Law for the Age of Statutes 32 (1982).


54 Id. at 207.
of functional arguments that permeate these institutional views further characterize statutory stare decisis as practically required to maintain stability and predictability in the law, to protect reliance interests,\textsuperscript{55} to cabin judicial discretion, and to uphold the institutional legitimacy of the judiciary.\textsuperscript{56}

Like judicial holdings, agencies’ interpretations of statutes have the force of law. But, as Part II shows, a parallel rule of stare decisis does not bind an agency’s law-interpreting authority under \textit{Chevron} to the agency’s initial interpretation.\textsuperscript{57} Is this special distinction justified as a matter of statutory interpretation, agencies’ role vis a vis Congress, and \textit{Chevron}’s explicit recognition that the enterprise of statutory interpretation is policy-driven? This Part argues that at least some of the rationales for statutory stare decisis apply to agencies’ interpretations of ambiguous statutes, the institutional differences between courts and agencies notwithstanding. This view finds support in early American ideas about the disposition of ambiguity in legal sources.

A. Legislative Acquiescence

Legislative acquiescence is an unconvincing rationale for judicial stare decisis.\textsuperscript{58} Because this imputed construction of post-enactment legislative intent ultimately reflects an unrealistic perception of the legislative process, it does not offer a compelling reason to apply a principle of stare decisis to agency interpretations of statutes.


\textsuperscript{57} This Article presumes that statutory stare decisis is the most relevant analogy to agencies’ interpretations of statutes under \textit{Chevron}.

\textsuperscript{58} See generally, William N. Eskridge, Jr., \textit{Interpreting Legislative Inaction}, 87 MICH. L. REV. 67 (1988) [hereinafter Eskridge, \textit{Interpreting}].
Though the Court has at times relied on this basis for following statutory precedents, commentators and jurists alike have roundly criticized the notion that congressional silence affirms a judicial construction of a statute. Judge Frank Easterbrook has argued that the inquiry itself substitutes “the decisions of a prior Congress” for “what the sitting Congress wishes” and treats the apparently rejected legislative “proposal” as a one-house veto. More fundamentally, as Professor Lawrence Marshall has detailed, pointing to legislative acquiescence to justify a judicial holding ignores explanations for congressional inaction wholly independent of Congress’ approval of the judicial holding in question. Members of Congress simply may not have known about the decision a later court purports Congress has failed to overturn, other priorities may displace overturning a judicial decision from the legislative agenda, and without bicameralism and presentment, legislative (in)action is an impossible (and possibly unconstitutional) basis from which to divine precisely what aspects of a

59 See, e.g., Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 629 n.7 (1987) (“Congress has not amended the statute to reject our construction, nor have any such amendments been proposed, and we therefore may assume that our interpretation was correct.”).
60 See, e.g. id. at 672 (Scalia, J., dissenting) (“[V] indication by congressional inaction is a canard.”).
62 Id. at 428.
64 Id. at 186–90; see Barrett, supra note 18, at 345–46 (rejecting “presumption” that Congress has an incentive to respond to lower court decisions).
65 Marshall, supra note 53, at 190–91; see Cass Sunstein & Adrian Vermeule, Interpretations and Institutions, 101 MICH. L. REV. 885, 925 (2003) (“Congress is not in the business of responding rapidly and regularly to particular cases in which interpretations . . . tend to misfire.”).
66 Barrett, supra note 18, at 339.
judicial opinion Congress has acquiesced to.\textsuperscript{67} Furthermore, the idea that a multi-member institution cannot have a locatable intent undermines the coherence of inferring actual intent from Congress’ explicit or implicit acts.\textsuperscript{68}

Because these criticisms reflect the difficulty of imputing meaningful legislative intent, they are equally applicable to agencies and courts. Though Congress cannot plausibly claim ignorance of agency interpretations of statutes, the institutional constraints on the legislative process apply no matter which institution interpreted the statute in the first instance. The fact that agencies often interpret ambiguous statutes – and always do where Chevron applies – suggests that legislative silence is an even weaker indicator of acquiescence to an agency interpretation than to a court’s. Because an ambiguous statute at least sometimes signals Congress’ intent to punt a difficult policy choice to an agency, many Members of Congress, and Congress institutionally, will on balance have less desire to reconsider statutory language following an agency interpretation than following a court’s, even if the agency interpretation did not accurately reflect the original legislative compromise.\textsuperscript{69} Admittedly, this argument also

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\textsuperscript{67} Daniel L. Rotenberg, \textit{Congressional Silence in the Supreme Court}, 47 U. MIAMI L. REV. 375, 275 (1992) (‘‘Ambiguity results because silence does not define itself.’’).
\textsuperscript{68} See Frank H. Easterbrook, \textit{Text, History, and Structure in Statutory Interpretation}, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (‘‘Intent is elusive for a natural person, fictive for a collective body.’’); Max Radin, \textit{Statutory Interpretation}, 43 HARV. L. REV. 863, 870 (1930) (‘‘That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.’’). \textit{But see} Daniel A. Farber, \textit{Statutory Interpretation, Legislative Inaction, and Civil Rights}, 87 MICH. L. REV. 2, 10 (1988) [hereinafter Farber, \textit{Statutory Interpretation}] (‘‘Because Congress will virtually never vote to overturn an interpretation it agrees with, its failure to overturn the statute increases the likelihood that Congress in fact agreed.’’).
cuts the other way: if by passing an ambiguous statute Congress intends to acquiesce to the agency’s interpretation, then legislative silence may suggest the agency interpreted the statute consistent with congressional intent and thus weighs in favor of stare decisis. 70

To be sure, the argument for stare decisis due to congressional acquiescence is marginally more convincing with respect to agencies than courts. Congress cannot be as ignorant of the limited number of agency interpretations relative to the thousands of courts of appeals cases decided each year. Furthermore, Congress maintains close relationships with agencies through oversight, if not via regular hearings than through the annual budgeting and appropriations process. 71 If statutory ambiguity reflects purposeful congressional intent to vest interpretive authority in agencies, then Members of Congress might be expected to closely observe the agency’s expertise at work and to anticipate its liquidation of the legislative compromise. Though legislative silence is not a predictable

Marshall, supra note 53, at 211 (“When there are strong competing factions on an issue, the legislature will often pass the buck to an agency, or to the courts, by enacting a vaguely worded statute. . . .”); William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479, 1532 (1987) (“Congress may delegate hard political choices to agencies . . . [and] adopt evasive strategies, such as leaving key terms ambiguous.”). Professor Mark Tushnet notes that Congress rarely reopens issues disposed in concluded legislative compromises, even after significant electoral shifts. Tushnet, supra note 18, at 1347 (“That is the puzzle of legislative stare decisis: with the proposal having gained support in the intervening election, why do its supporters refrain from reopening compromises already reached?”).

70 Cf. Farber, Statutory Interpretation, supra note 68, at 12 (“At the time of enactment, members of the winning coalition have no way of knowing whether judicial mistakes will favor them . . . . At this level of analysis, legislators are ex ante indifferent to judicial mistakes because they can expect errors to balance out.”). Notably, the Chevron Court took Congress failure to indicate “disapproval” of the EPA’s changing definitions of “stationary source” as evidence that “the definition itself is flexible.” Chevron, 467 U.S. at 864.

measure of Congress’ acquiescence, silence would seem to signal Congress’ acceptance of an agency’s interpretation more often than it would a court’s.

In sum, the legislative acquiescence argument for agency stare decisis is a mixed bag. Though it provides a more plausible rationale for agency than judicial stare decisis, legislative acquiescence is not a convincing reason to apply stare decisis to the interpretations of either institution.

B. Separation of Powers

A second normative justification for stare decisis rests on constitutional separation of powers and the related principle of legislative supremacy, particularly the idea that a court’s departing from precedent usurps Congress’ legislative power. Justice Black raised this argument dissenting to the Court’s decision in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, which overruled the Court’s construction of the Norris-LaGuardia Act in *Sinclair Refining Co. v. Atkinson*, decided eight years earlier. Justice Black conceded that the judiciary’s interpreting statutes was an inevitable consequence of resolving cases, but he distinguished an initial judicial interpretation from a subsequent departure. “When the law has been settled by an earlier case,” he wrote, “then any subsequent ‘reinterpretation’ of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress

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72 See Frank E. Horack, Jr., *Congressional Silence: A Tool of Judicial Supremacy*, 25 TE J. 247, 250–51 (1947) (“But when the decision is made the statute to that extent becomes determinate, or, if you will, amended to the extent of the Court’s decision. . . . Thus, if the Court in a second case changes its former interpretation the functional consequences of the change are legislative rather than judicial.” (citations omitted)).


itself placed in the statute.” To Justice Black, the Court’s abandoning a precedent “absent extraordinary circumstances” was a legislative act that violated Article I and ignored Congress’ superior institutional competence to resolve complex policy issues.

One variant of this argument advocates stare decisis as a practical means of spurring legislative action. In *Neal v. United States*, for example, the Court invoked its prior decision in *Chapman v. United States* to hold that 21 U.S.C. § 841(b)(1) required the sentencing court to include the weight of LSD blotter paper in calculating the defendant’s total drug sales. Writing for the Court, Justice Kennedy explained, “Our reluctance to overturn precedents derives in part from institutional concerns about the

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75 Id. at 257–58 (Black, J., dissenting).
76 Id. at 258; see Neal v. United States, 516 U.S. 284, 296 (1996) (“Congress, not this Court, has the responsibility for revising its statutes.”); see also Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part) (“Gaps in the law must, of course, be filled by judicial construction. But after a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies, it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself.”); Horack, supra note 72, at 251 (“Evan assuming the prior interpretation was incorrect, if the Court now reverses the position it took in the first case it is affirmatively changing an established rule of law under which society has been operating. This is explicitly and unquestionably the exercise of a legislative function.”).
77 See, e.g., Marshall, supra note 53, at 201 (“If Congress and interested parties believe that statutory decisions can be overruled either by Congress or by the courts, the pressure on Congress to become involved is reduced.”).
80 *Neal*, 516 U.S. at 296. Notably, the *Neal* Court rejected deference to the Sentencing Commission’s conflicting Sentencing Guidelines in favor of adhering to *Sinclair*. Id. at 295 (“[W]e need not decide what, if any, deference is owed the Commission in order to rejected its alleged contrary interpretation. Once we have determined a statute’s meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency’s later interpretation of the statute against that settled law.”). It is unclear whether *Neal* survives the Court’s later decision in *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), in which the Court held that “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute. . . .” Id. at 982.
relationship of the Judiciary to Congress.”

He continued, “Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.”

Other commentators have made similar arguments based on the ex post legislative incentive effects of judicial decisions.

Critics of Justice Black’s approach attack the distinction between initial and subsequent interpretations as semantic and founded on no constitutional commitment of total lawmaking power to Congress. If the constitutional order permits courts to render interpretations of statutes at all, the counterargument goes, then why is abandoning an initial interpretation more of a legislative act than the initial interpretation itself?

Professor William Eskridge, in particular, has described several scenarios in which a stare decisis principle might undercut legislative supremacy by assigning greater value to a statutory precedent than to contrary indications of legislative intent and by encouraging the Court to find statutes unconstitutional as a workaround to its own restrictive stare

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81 Id. at 295.
82 Id. at 296.
83 See, e.g., Edward H. Levi, An Introduction to Legal Reasoning 32 (1949) (“If legislation which is disfavored can be interpreted away from time to time, then it is not to be expected, particularly if controversy is high, that the legislature will ever act. It will always be possible to say that new legislation is not needed because the court in the future will make a more appropriate interpretation.”); Marshall, supra note 53 (“Judicial overruling of statutory precedents is not only unnecessary to the adjudicative process, but it serves to lessen the level of congressional involvement in overseeing and overruling the courts’ statutory decisions. If Congress and interested parties believe that statutory decisions can be overruled either by Congress or by the courts, the pressure on Congress to become involved is reduced.”).
84 See Eskridge, Interpreting, supra note 58, at 1398–99; see also Barrett, supra note 18, at 341 (describing the failure of Justice Black’s view to describe lawmaking in the lower courts, “where different circuits can interpret the same language differently”). Professor Barrett’s criticism is inapposite to the agency context, where the possibility of conflicting interpretations across institutions is not an issue.
85 Eskridge, Interpreting, supra note 58, at 1399.
decisis doctrine. 86 Others have criticized the “democracy-forcing” rationale as requiring Congress to observe and attend to an enormous number of lower court decisions 87 and as expecting Congress to serve the role of error-correction that the Supreme Court already performs. 88

On constitutional grounds, the criticism that judicial reconstructions of statutes are no more legislative than initial constructions is at least debatable. 89 Even to the extent the Constitution does not assign all lawmaking authority to Congress, the judiciary has a weaker constitutional claim to such authority than the executive. 90 Indeed, unlike judicial review, courts’ interpreting statutes – even to the extent judicial decisions are legislative acts – is incident to deciding cases, not fulfilling a constitutional prerogative. 91 Judicial statutory interpretation is a necessary evil. As a result, reinterpretation is “gratuitous” – in Justice Black’s words – because after a statutory gap has been filled once, the court no longer needs to derive a decisional rule to resolve the case. 92

86 Id. at 1399–1400.
88 Barrett, supra note 18, at 346–47.
91 See Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 257 (1970) (Black, J., dissenting); Marshall, supra note 53, at 207 (“The judiciary’s practice of making difficult value choices in the course of interpreting statutes does not find its justification in the intrinsic value of judicial involvement in that process.”).
But even granting the criticism that initial and subsequent interpretations are alike in kind, agencies’ broad discretionary power to reinterpret statutes under *Chevron* is constitutionally suspect because agencies’ discretionary power is suspect as a matter of statutory interpretation. To be sure, the act of interpreting a statute is, in some sense, indistinguishable from execution of the law,\(^93\) for which the executive has express constitutional authority.\(^94\) The danger is that execution slips the statute’s moorings. Unlike courts, an agency interpreting an ambiguous statute has a policymaking mandate through which to vindicate political preferences independent of the purpose of the underlying statute.\(^95\)

In theory, judges merely apply Congress’ statutory prescriptions.\(^96\) In practice, judges necessarily interpret statutes, and thus make policy, to resolve cases.\(^97\) Notwithstanding the judiciary’s *actual* role, the proposition that judges exercise policymaking discretion runs counter to the ideal of separation of powers and the founding generation’s imagination of the judiciary’s function relative to the political

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\(^93\) *See* Bowsher v. Synar, 478 U.S. 714, 733 (1986) (“Interpreting a law enacted by Congress to implement a legislative mandate is the very ‘essence’ of execution of the law.”).

\(^94\) U.S. CONST, art. II, § 3.


\(^96\) *See* Marshall, *supra* note 53, at 201–02 (“In a perfect world, the legislature would be able to contemplate and provide for all contingencies in advance, settle all disputes about the effect of the statute, and overcome all ambiguity in transmitting its decisions to the judiciary and the public. If a legislature were able to accomplish all of these goals, the judicial function in statutory interpretation would be relatively passive.”).

\(^97\) *Horack, supra* note 72, at 251 (“If [deciding cases] results in the exercise of certain legislative functions by the Court it is the inescapable product of the judicial process.”).
branches. Modern confirmation battles show that the public (or at least some Senators) today believes that the judiciary’s proper place is limited to the rote application of statutes. Justice Black accepted the impossibility of the theoretical account. But he might have defended statutory stare decisis on grounds that the courts have no authority to abandon a decisional rule sufficient to solve the instant case.

In contrast, Chevron explicitly adopted the legal realist view that interpreting ambiguous statutes is a policymaking exercise. Courts defer to agency constructions precisely for the reason that agencies – due to various institutional characteristics – are better and more legitimate policymaking authorities than courts. Chevron thus assumes a functional distinction between an agency’s and a court’s interpreting a

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98 See Manning, Textualism, supra note 89, at 79–102.
99 Earl Maltz, The Nature of Precedent, 66 N.C. L. REV. 367, 371 (1988) (“The continuing influence of stare decisis reflects the fact that even in a post-Realist world, society expects judges in some significant sense to be lawfinders rather than lawmakers.”). It has become a virtual requirement for a Supreme Court nominee to extol judicial modesty before the Senate Judiciary Committee. In his confirmation hearing, Chief Justice Roberts famously characterized the judge’s role as “to call balls and strikes, and not to pitch or bat.” Todd S. Purdum & Robin Toner, Senators to Question 1st Supreme Court Nominee in 11 Years, NEW YORK TIMES (Sept. 13, 2005) available at https://www.nytimes.com/2005/09/13/politics/politicsspecial1/13confirm.html?pagewanted=all. Following Justice Sonia Sotomayor’s nomination to the Court, Republicans attacked her statement years earlier that the “Court of Appeals is where policy is made.” Jonathan Weisman & Naftali Bendavid, GOP Questions Whether Pick’s ‘Empathy’ is Desirable Trait, WSJ.COM (May 27, 2009). http://online.wsj.com/article/SB124336667607755463.html. Notably, then-Judge Sotomayor joked at the time that she should avoid making that statement on tape. Id.
100 See Horack, supra note 72, at 251.
103 See generally Schacter, supra note 14.
statute that rests on the relevance of agency policymaking mechanics to the enterprise of statutory interpretation.

But these mechanics are decidedly un-judicial and have little to do with interpreting statutes. As Professor Elizabeth Foote has explained, “Unlike courts . . . agencies do not exist to issue disinterested and authoritative interpretations of statutes based on strictly legal processes.” Indeed, agency interpretive practices more often resemble the legislative process than a judicial inquiry. Under Chevron, statutory interpretation need not be subject to the adversarial, on-the-record context of courts. An agency need not await the presentation of a concrete case or controversy to render an interpretation of a statute, nor need the agency limit its interpretive decision to the facts

\[104\] See Krzalic v. Republic Title Co., 314 F.3d 875, 878 (7th Cir. 2002) (“Small-d democrats might question Chevron’s shift of legislative power to the bureaucracy. But realists, while acknowledging the point and also that it is a fiction to suppose . . . that the exercise of power by appointed officials is democratic merely because it is authorized by elected officials, will applaud the Supreme Court’s recognition that the interpretation of an ambiguous statute is an exercise in policy formulation rather than reading.”).

\[105\] See United States v. Mead, 533 U.S. 218, 230–31 (2001). To be sure, an agency may also interpret a statute through formal adjudication (or other means that resemble lawmaking) in which case the agency is bound by the trial-type procedures of 5 U.S.C. § 554. But it need not, see id., and adjudication is itself a recognized mode of agency policymaking. See Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 Am. U. L. Rev. 443, 446 (1987) (“It is now obvious to even the casual observer of administrative decisionmaking that agencies interpret law and make policy in adjudications.”); cf. Jonathan T. Molot, The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role, 53 Stan. L. Rev. 1, 69 (2000) [hereinafter, Molot, Judicial] (“[T]he Founders valued judicial independence precisely because judges exercised independent judgment in resolving interpretive disputes.”).

\[106\] Foote, supra note 95, at 675.


developed in a rulemaking or adjudication record, though such prudential constraints, according to standing doctrine, sharpen the presentation of legal issues and improve legal decisionmaking. Rather, the meaning of the law is itself decided through the quasi-legislative gauntlet of agency rulemaking (or even more informal procedures such as an agency’s interpretation of its own regulations) in which an unlimited number of interest groups and individuals jockey for the agency’s favor. Comments filed in these agency proceedings bear little resemblance to legal briefs. Like statutes themselves, agency policy choices are intended to be purposeful, prescriptive, general applicable, and only at times the product of expertise. Agency policy choices are not incidental and undesirable byproducts of the institution’s task; they are the agencies’ very raison d’etre. Consequently, Chevron must freely admit that for the agency, divining the best legal interpretation is not the objective. Rather, the agency’s goal is to harmonize a permissible reading of the statute with a pre-ordained policy outcome. Law, in this sense, is a constraint rather than an object.

111 Barnhart, 535 U.S. at 221–22.
114 See 5 U.S.C. § 553 (requiring that agencies publish the “purpose” of a rule in the Federal Register).
115 Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (describing need for agency expertise as one explanation for statutory ambiguity); Foote, supra note 95, at 691 (“Unlike the judiciary, agencies implement their enabling acts with a combination of expertise, practicality, interest-group input, and political will – not with a strictly legal, neutral, judicial-style methodology that would be principally attentive to the text and structure of the legislation as well as the views of the enacting Congress.”).
But even the law’s constraints may be weak. Because interpreting ambiguous statutes is a policymaking act, *Chevron* condones agencies interpreting the law in ways that appear – and are – political rather than legal: “In contrast [to courts],” *Chevron* explained, “an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”¹¹⁶ Political preference is not an acceptable interpretive rubric for judicial statutory interpretation, even where the courts must resolve ambiguous statutory language.¹¹⁷ Courts must resolve ambiguities in non-administrative statutes according to the “traditional tools of statutory interpretation.”¹¹⁸ The doctrine of stare decisis might be understood as a requirement that courts justify departures from precedent in strict legal terms.¹¹⁹ Some “special justification” of legal superiority should underlie the court’s abandonment of an earlier interpretation; in overruling a precedent the court discards its earlier legal reasoning as

¹¹⁶ *Chevron*, 467 U.S. at 865; see ELHAUGE, supra note 50, at 90 (explaining the “real ground” of *Chevron* deference as “the likelihood that they reflect current political preferences”). The constitutional basis of the president’s authority to direct agency rulemaking is controversial. Compare Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 979–80 (1997) [hereinafter Strauss, *Presidential*] with McGarity, supra note 105, at 480.

¹¹⁷ See Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 258 (1970) (Black, J., dissenting) (“When the Court changes its mind years later, simply because the judges have changed, in my judgment, it takes upon itself the function of the legislature.”).

¹¹⁸ *Chevron*, 467 U.S. at 843 n.9.

flawed. Indeed, the theory of judicial statutory interpretation denies that the act of judicial interpretation changes the statute’s meaning.

Agencies often present legal reasons in rulemaking proceedings, but as far as *Chevron* is concerned, political reasons are one acceptable interpretive rationale. As

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120 *Patterson*, 491 U.S. at 173; see also Eskridge, *Overruling*, supra note 50, at 1369–85 (describing the Court’s various “exceptions” to the rule of statutory stare decisis).

121 Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 n.12 (1994) (explaining that when a court interprets a statute “it is explaining its understanding of what the statute has meant continuously since the date when it became law”); United States v. City of Tacoma, 332 F.3d 574, 580 (9th Cir. 2003) (“The theory of a judicial interpretation of a statute is that the interpretation gives the meaning of the statute from its inception, and does not merely give an interpretation to be used from the date of a decision.”).

122 See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (“[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better . . . .”); Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (Rehnquist, J., concurring) (“It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”). See generally Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

123 Agencies invocation of legal criteria in *Chevron* cases may reflect the courts discomfort with purely political rationales for statutory interpretation. The Court’s recent decision in *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800 (2009), suggests that the same may now be true of judicial scrutiny under the Administrative Procedure Act [APA]. “But [the agency] need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.” Id. at 1811.

124 See *FDA v. Brown & Williamson Corp.*, 529 U.S. 120, 190 (2000) (Breyer, J., dissenting) (“Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for that administration, and those politically elected officials who support it, must (and will) take responsibility.”). Though *Chevron* deference relies in part on the chief executive’s political accountability, agency interpretations may or may not respond to top-down presidential directives. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2377 (2001); Cynthia Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN L. REV. 179, 185 (1997). Notably, the line of APA cases applying “arbitrary or capricious” review counsels agencies to avoid highlighting the political motives underlying their
a result, agency understandings of statutes may be naked expressions of political preferences rather than principled “interpretations” in the judicial sense.\textsuperscript{125} The bubble concept at issue in \textit{Chevron} itself was a product of the Reagan Administration’s deregulatory approach to industry.\textsuperscript{126} Some scholars have explained the Court’s recent decision in \textit{Massachusetts v. EPA}\textsuperscript{127} as a response to the George W. Bush Administration’s disregard for the broad scientific consensus that manmade greenhouse gases cause climate change and the EPA’s refusal to make a consequent endangerment finding under the Clean Air Act.\textsuperscript{128}

Legal reasoning does little work in these examples; rather it becomes an ex post justification for a policy preference. Though the Reagan HHS completed a lengthy rulemaking in advance of reinterpreting Title X, it is difficult to imagine what public comments might have persuaded the agency to refrain from adopting its preferred interpretation. In this sense, \textit{Chevron} permits agencies to discard more plain indications of legislative intent in favor of the agencies’ political preferences and does not ensure that interpretive decisions. \textit{See generally} Watts, supra note 122. Other scholars have provided examples of the Court’s suspicion of presidential involvement in cases revolving on agency expertise. \textit{See generally} Lisa Shultz Bressman, \textit{Deference and Democracy}, 75 GEO. WASH. L. REV. 761 (2007).

\textsuperscript{125} Bruh v. Bessemer Venture Partners III L.P., 464 F.3d 202, 207 (2d Cir. 2006) (“As the Court explained in \textit{Chevron}, the resolution of ambiguities in legal texts will more often turn on policy preferences than parsing. . . .”); Jeffrey A. Pojanowski, \textit{Reason and Reasonableness in Review of Agency Decisions}, 104 NW. U. L. REV. 799, 836 (2010) (“The political accountability and policy expertise that \textit{Chevron} applauds raise concerns that an agency is more likely to adopt the interpretation that best suits its own purposes, rather than the best reading on the legal merits.”); \textit{see} Stephenson, supra note 3, at 1048 (“[J]udges are (usually) less partisan and outcome-driven in their interpretations of statutes than politically accountable agency heads.”).

\textsuperscript{126} Thomas W. Merrill, \textit{Judicial Deference to Executive Precedent}, 101 YALE L.J. 969, 975 (1992) ([hereinafter, Merrill, \textit{Judicial}].

\textsuperscript{127} 549 U.S. 497 (2007).

\textsuperscript{128} Jody Freeman & Adrian Vermeule, \textit{Massachusetts v. EPA: From Politics to Expertise}, 2007 SUP. CT. REV. 51, 65.
agencies act as faithful agents of Congress in either the initial or revised cases.\footnote{See Henry P. Monoghan, \textit{The Protective Power of the Presidency}, 93 \textit{COLUM. L. REV.} 1, 61 (1993) (doubting the legitimacy of agency authority where agencies do not act as agents of Congress); McGarity, \textit{supra} note 105, at 454 (describing how presidential control may “steer an agency away from its congressional mandate”); \textit{cf.} Rust v. Sullivan, 500 U.S. 173, 221 (1991) (Stevens, J., dissenting) (“Read in the context of the entire statute, this prohibition is plainly directed at conduct, rather than the dissemination of information or advice, by potential grant recipients.”).} As Professor Jonathan Molot has explained, the agency “will tend to choose among reasonable interpretive options based on political considerations and policy concerns rather than anything in Congress’ statute.”\footnote{Molot, \textit{Judicial}, \textit{supra} note 105, at 78.} If so, then the agency acts ultra vires by exercising freestanding legislative authority. This uneasy tension between law and politics may explain why the Court sometimes dismisses claims that an agency interpretation conflicts with an earlier one before concluding that the \textit{Chevron} framework applies.\footnote{See, \textit{e.g.}, Smiley v. Citibank (South Dakota), 517 U.S. 735, 742 (1996); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 516 (1994); \textit{Good Samaritan Hosp. v. Shalala}, 508 U.S. 402, 416–17 (1993); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 698–99 (1991). Some evidence suggests that the courts of appeals do the same. Gossett, \textit{supra} note 36, at 697 n.72.} The very practice of agencies’ switching between interpretations evinces a legally unprincipled approach to a statute.\footnote{Thomas W. Merrill, \textit{Preemption and Institutional Choice}, 102 \textit{Nw. U. L. REV.} 727, 751–52 (2010). Merrill defines “principled interpretation” as “that which accounts for the text and other material conventionally regarded as bearing on questions of interpretation, responds to objections from others grounded in these materials, and offers a reasoned justification for the conclusion it adopts.” \textit{Id.} at 751. \textit{Cf.} Caleb Nelson, \textit{Stare Decisis and Demonstrably Erroneous Precedents}, 87 \textit{VA. L. REV.} 1, 4 (2001) [hereinafter, Nelson, \textit{Stare Decisis}] (arguing that unless a legal source is “wholly indeterminate,” interpretation of that source will “tend to produce some degree of consistency in judicial decisions”).}
The political character of agency policymaking challenges the presumption that agencies’ interpretations of statutes are characterized by legal discipline. But how does politics distinguish between initial and subsequent interpretations in favor of stare decisis? The answer reflects the relationship of conflicting interpretations to the underlying statute itself. Unlike courts, the agency need not demonstrate the legal superiority of its revised view when it abandons an earlier interpretation. The revision need only be “permissible” and, in theory, may be defended without reference to the abandoned interpretation. More specifically, because political motivations may displace traditional, judicial statutory interpretation methods, and because an agency need not show that its interpretation is better than an earlier one, the expansive range of “permissible” interpretations may rob a statute of any discernable purposive limit. Consider again, the example from Rust. The language of Title X may permit either the pre or post-1988 HHS interpretations. But if either interpretation is permissible, can both possibly be? The statute suggests no: the term “where abortion is a method of family

133 See Strauss, Presidential, supra note 116, at 968 (“This tension [between law and politics] is one on the maintenance of which our political society depends – and one in which a strongly political, presidentially centered view of rulemaking threatens to erode.”).
134 See Fox Television Stations, Inc., 129 S.Ct. at 1811.
136 See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 164 (1994) (“Legal process theory should not be sympathetic to Chevron deference when the agency’s interpretation gets the statutory purpose wrong.”); HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1156 (tent. Ed. 1958) (“The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible.”); cf. Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417–18 (1993) (“We should be especially reluctant to reject the agency’s current view, which, as we see it, so closely fits “the design of the statute as a whole and . . . its object and policy.” (quoting Crandon v. United States, 494 U.S. 152, 158 (1990)). Professor Thomas McGarity has argued that political interpretation may run afoul of the “take care” clause of Article II. McGarity, supra note 105, at 454.
planning” cannot intelligibly mean both to limit funding only to abortion providers and to limit funding to abortion providers and anyone who speaks of abortion. But under Chevron, either interpretation is permissible and neither interpretation is foreclosed by the agency’s adoption of the other. The choice is a matter of arbitrary policymaking rather than any indication of legislative intent or purpose.\footnote{42 U.S.C. § 300a-6.}

The Court’s 2005 decision in Brand X illustrates the same effect. In Brand X, the Court considered the FCC’s deregulatory classification of cable broadband Internet service as a relatively unregulated “information service” rather than a highly regulated “telecommunications service” under the Communications Act.\footnote{Cf. Whitman v. American Trucking Associations, 531 U.S. 457, 472–73 (2001) (describing “intelligible principle” nondelegation standard).} The case turned on the FCC’s interpretation of the ambiguous term “offering” in the statute’s definition of “telecommunications service.”\footnote{See 47 U.S.C. § 153 (2006).} The Republican-controlled FCC, over the dissent of the lone Democratic Commissioner, had interpreted “offering” to mean providing stand-alone telecommunications, defined loosely as the transmission of data.\footnote{Id. 153(46) (“The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public. . . .”); Nat’l Cable and Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 989 (2005).} Because cable companies only offered telecommunications services in conjunction with Internet service, the FCC’s interpretation freed those companies from burdensome common carriage, rate regulation, and network interconnection requirements.\footnote{In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798, 4823, 4870 (2002). The FCC’s other Democratic Commissioner had resigned months earlier and her replacement had not yet been confirmed.} This regulatory classification emphasized growing competition in the broadband market and reflected the general

\footnote{See generally 47 U.S.C. § 251 (2006).}
deregulatory posture of the FCC’s Republican leadership.\textsuperscript{143} Reviewing the FCC’s interpretation, the Court concluded at \textit{Chevron} step one that the term “offering” was ambiguous “[b]ecause the term ‘offer’ can sometimes refer to a single, finished product and sometimes to the individual components being offered . . . .”\textsuperscript{144} The Court then deferred to the FCC’s construction at step two.\textsuperscript{145}

The permissibility of the FCC’s construction bears significant implications for the FCC’s power. In the wake of \textit{Brand X}, the Communications Act no longer constrains FCC authority to make regulatory classifications. Given the Court’s application of \textit{Chevron}, the Court is unlikely in the future to demand legalistic explanations for regulatory reclassifications. As a result, the FCC may vacillate between forceful regulation and whole deregulation of the broadband industry subject only to the toothless standard of \textit{Chevron} step two. But as a matter of statutory interpretation, such regulatory switching is unjustifiable. If the statute were meant to give the FCC authority to regulate various services at will, then why did Congress even bother to define classes of service in the statute?\textsuperscript{146} Like the language of Title X, the ambiguous term in the Communications

\textsuperscript{144} \textit{Brand X}, 545 U.S. at 991 (internal quotation marks omitted).
\textsuperscript{145} Id. at 1000.
\textsuperscript{146} Cf. id. at 1008 (Scalia, J., dissenting) (arguing that “the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being an offer.”). Admittedly, this view assumes that at least some ambiguous regulatory statutes nonetheless have a discernable meaning. \textit{But see} Lisa Schultz Bressman, \textit{Chevron’s Mistake}, 58 DUKE L.J. 549 (2009) [hereinafter, \textit{Chevron’s Mistake}] (“The search for meaning, common to the dominant theories of statutory interpretation, does not square with what a good deal of positive political theory and legal scholarship has stated about regulatory statutes. Congress often designs these statutes with the aim of delegating authority, including interpretive authority, to agencies.”) (citation omitted)).
Act permits multiple meanings. “[O]ffering” may mean either “a single, finished product” or “the individual components being offered,” but it cannot mean both, for then the meaning of the statute becomes subservient to the shifting regulatory proclivities of the FCC.

Though the Constitution may not vest all lawmaking authority in Congress, the Brand X scenario illustrates how Chevron may nonetheless infringe upon Congress’ legislative power by letting agencies loose the statutory strictures on their lawmaking authority. As sections III.C–D argue, ambiguity is more rightly an indication that agencies must settle statutory meaning and not of broad authority.

C. Building Blocks, Ambiguity, and Agency Discretion

A third justification for statutory stare decisis reflects Congress’ and private parties’ reliance interests in judicial decisions through the corollary values of legal stability and predictability. Dean (and later Attorney General) Edward Levi famously

\footnote{Id. at 991 (majority opinion) (internal quotation marks omitted).}

\footnote{See id. at 1013 (Scalia, J., dissenting) (“In other words, what the Commission hath given, the Commission may well take away – unless it doesn't. This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions.”).}

\footnote{Cf. MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225–26 (1994) (refusing to apply Chevron where ambiguity delegated substantial regulatory authority to the FCC). But see Note, supra note 24, at 1028–33 (arguing that Brand X’s focus on consumers’ perception of the service may constrain the FCC’s reclassification of broadband services).}

\footnote{Payne v. Tennessee, 501 U.S. 808, 827 (1991) (“Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”); Eskridge, Overruling, supra note 50, at 1382 (“Where private parties have over time shaped their relations around a precedent’s rule, it is considered presumptively unfair to change the precedent retroactively, and courts will not do so without strong reason.”).}

\footnote{See sources cited note 55.}
developed this basis for adhering to the interpretation of a statute “fixed” by a court.\textsuperscript{152} As Levi explained, courts’ interpretations of statutes “do more than decide the case.”\textsuperscript{153} “They give broad direction to the statute,”\textsuperscript{154} the full meaning of which is not apparent but through judicial exegesis.\textsuperscript{155} Professor Eskridge has described this view as the “building blocks argument.”\textsuperscript{156} After a court interprets a statute, Eskridge explains, “the Court, private parties, and even Congress will build upon that direction as they apply and develop the statute further.”\textsuperscript{157} By preserving the “direction” of the statute absent compelling reason to depart, stare decisis protects and encourages these efforts.\textsuperscript{158} Other commentators have suggested that without a rule of stare decisis, the Court’s judicial decisions would devolve into a chaotic cycle of overruling and restoring precedents, which would render the persistence of particular legal rights and obligations highly uncertain.\textsuperscript{159}

\textsuperscript{152} Levi, supra note 83, at 32.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 33 (“Where legislative interpretation is concerned, therefore, it appears that legal reasoning does attempt to fix the meaning of the word. . . . Its meaning is made clear as examples are seen, but the reference is fixed.”).
\textsuperscript{156} Eskridge, Overruling, supra note 50, at 1400. Legal philosopher Ronald Dworkin described this effect in terms of a “chain novel,” in which individual authors each contribute a chapter in sequence with the goal of creating “a single unified novel that is the best it can be.” Ronald Dworkin, Law’s Empire 229 (1986). “Because the chapters are sequentially written, each author is to some degree bound by what has gone before. Nevertheless, each author also possesses some discretion about how to advance the story, choices that will serve to bind future chapter writers.” Stefanie A. Lindquist & Frank B. Cross, Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent, 80 N.Y.U. L. Rev. 1156, 1168 (2005).
\textsuperscript{157} Id.
\textsuperscript{158} Eskridge, Overruling, supra note 50, at 1401 (“Obviously, if the Court overrules an early decision, then much of the law is unhinged, and the stability sought by stare decisis is deeply compromised.”).
\textsuperscript{159} Payne v. Tennessee, 501 U.S. 808, 828 (1991) (“Considerations in favor of \textit{stare decisis} are at their acme in cases involving property and contract rights, where reliance
This section argues that the building blocks theory of stare decisis applies to the post-
_Chevron_ legal landscape. It will first describe why the goal of stability favors stare
decisis even more strongly, as in _Chevron_ cases, where the underlying statute is
ambiguous; it will then relate the building blocks concern about judicial discretion to the
administrative context.

1. Ambiguity and Agency Discretion. Reliance interests may suggest the practical
imperative of legal stability and predictability.\(^{160}\) But the “building blocks” rationale is
really an argument about the relationship of statutory ambiguity to judicial discretion.
Levi could not have been so concerned with legal change per se.\(^{161}\) After all, Congress
may change the law at any time, without notice, and for arbitrary reasons, so long as the
law does not violate the Constitution. Levi’s view – like Justice Black’s – reflected the
ideal of legislative supremacy.\(^{162}\) But unlike Justice Black, Levi believed that

\(^{160}\) See _Maltz, supra_ note 99, at 368 (“Admittedly, any change in the law will generate
some social costs as affected parties adjust their behavior. These costs are often
overstated, however; many certainty-related problems relate not to the _fact_ that a
precedent is overruled, but rather to the technique used by the overruling court.”).

\(^{161}\) But cf. _Schauer, supra_ note 55, at 598 (“The other side, of course, is that sometimes it is more important that things be settled
correctly than that they be settled for the sake of settlement.”).

decisis as a “cycle-prevention vehicle”). This latter view may best approximate the thrust
of Justice Brandeis’ much-cited dissent in _Burnet v. Coronado Oil & Gas Co.,_ 285 U.S.
393, 406 (1932) ((Brandeis, J., dissenting). _But cf._ Schauer, _supra_ note 55, at 598 (“The
other side, of course, is that sometimes it is more important that things be settled
correctly than that they be settled for the sake of settlement.”)).
“[l]egislatures and courts are cooperative law-making bodies.”\textsuperscript{163} A court’s interpretation of an ambiguous text should fix the direction of the statute not, as Justice Black believed, because reinterpretation would violate the separation of powers, but because Congress is better suited institutionally to make “controversial changes” to statutory schemes.\textsuperscript{164} For Levi, it was important that only the most competent, legitimate institution hold the pen.\textsuperscript{165}

As Levi’s discussion suggests, where reliance interests are concerned, stare decisis is needed most where the underlying statute permits multiple interpretations.\textsuperscript{166} As Professor Caleb Nelson has demonstrated, unless a source of law is totally indeterminate, it “will still tend to produce some degree of consistency in judicial decisions.”\textsuperscript{167} Where a statute has one clear meaning, few would claim that a judge exercises permissible judicial discretion, however defined, by departing from an authoritative interpretation.\textsuperscript{168} In these cases, the building blocks imperative of stare decisis is relatively weak because the underlying legal constraint is relatively strong.\textsuperscript{169}

\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.} at 32–33 (“In many controversial situations, legislative revision cannot be expected. It often appears that the only hope lies with the courts. Yet the democratic process seems to require that controversial changes should be made by the legislative body.”).
\textsuperscript{165} \textit{Id.} (“The word [in a statute] will not change verbally. It could change in meaning, however, and if frequent appeals as to what the legislature really intended are permitted, it may shift radically from time to time. When this is done, a court in interpreting legislation has really more discretion than it has with case law. . . . There is great danger in this.”).
\textsuperscript{166} Levi’s discussion focuses on judicial interpretations of ambiguous statutes. \textit{See} Levi, \textit{supra} note 83, at 30–33.
\textsuperscript{167} Nelson, \textit{Stare Decisis, supra} note 132, at 4.
\textsuperscript{168} \textit{See} KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 85 (1960) (arguing that this practice would be “[f]latly illegitimate.”).
\textsuperscript{169} \textit{Id.} (“[T]he more determinate one considers the external sources of the law that judicial decisions seek to apply, the less frequently one might deem precedents binding.”); \textit{see} Molot, \textit{Judicial, supra} note 105, at 20 (“Absent ambiguity, politically motivated and politically insulated interpreters would reach identical conclusions.”).
But as a statute’s indeterminacy grows, so does the likelihood of inconsistent interpretations. Where a source permits multiple interpretations, a judge (or group of Justices) may substitute his own discretion for that of an earlier court without interpreting the statute erroneously. Because a later judge’s interpretation is equally valid as the former’s, the underlying source of law provides no check to judicial “cycling.”

Settling statutory ambiguities thus protects reliance interests against the interpretive discretion that the statute otherwise permits. The connection between reliance and judicial discretion extends beyond the substance of the law. To the extent law even appears to be the product of individual preferences, stability, predictability, and ultimately reliance interests suffer. As the Court has explained, stare decisis “ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion” by reflecting “bedrock legal principles” rather than the “proclivities of individuals.” Even where a statute may not have a single best meaning, the credibility of law depends on settling a meaning. In Levi’s terms, the fact that an alternative interpretation of a statute may be legally justifiable is irrelevant because “the

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172 Nelson, *Stare Decisis*, *supra* note 132, at 7 (“Letting judges overrule past decisions of this type simply because they would have made a different discretionary choice might indeed generate an endless series of reversals.”).
173 See RONALD A. CASS, THE RULE OF LAW IN AMERICA 7–12 (2001); Benjamin P. Friedman, *Fishkin and Precedent: Liberal Political Theory and the Normative Uses of History*, 42 EMORY L.J. 647, 693 (1993) (“It is an important goal of stare decisis to show that courts are not actively participating in the legislative role and that a handful of unelected, unimpeachable judges are not making law for the country.” (citation omitted)).
175 *Id.*; Friedman, *supra* note 173, at 693 (describing one advantage of “the perception of judicial impartiality” as allowing “businesses to make educated guesses on the legality of their practices and to know what they can and cannot do”).
legislation needs judicial consistency.”

Judicial decisions should resolve ambiguities in the law, even if alternate interpretations are no less “correct” than the prevailing one.

To what extent do the problems of judicial discretion translate to agencies? Under *Chevron*, agencies may cycle between interpretations; and the underlying statute may not provide an obvious interpretive constraint. Ultimately, whether *Chevron* harms reliance interests is an empirical question. But if the judicial discretion Levi feared reflects the predictability of legal obligations, then at least some agency interpretations would seem to be good candidates for stare decisis, especially given that *Chevron*’s endorsement of political preferences in lieu of acceptable judicial interpretive rubrics leaves the statute’s text and apparent purpose with relatively little predictive power.

As a practical matter, the capital-intensive industries subject to agency regulatory schemes would seem to value legal certainty more than the subjects of legislative enactments as a whole. The business case for long-term investment in telecommunications infrastructure, for example, may hinge entirely upon the statutory classification of broadband service. Similarly, were the EPA permitted to shift its view of whether carbon dioxide is a “pollutant” that may be regulated from mobile sources under the Clean Air Act, automakers would have little certainty that long-term

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176 *Id.* at 32.
177 See *supra* TAN 133–148.
178 See *supra* TAN 106–132.
179 See *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4802 (2002) (“[W]e seek to remove regulatory uncertainty that in itself may discourage investment and innovation.”).
180 See Freeman & Vermeule, *supra* note 128, at 77 (“[T]he EPA had always said it possessed the authority to regulate greenhouse gases until changing its mind in the George W. Bush administration.”).
investments in vehicle fleets could survive later regulatory changes.\textsuperscript{181} To be sure, Congress too can change the regulatory landscape at any time, and, like an agency, is most likely to following an election.\textsuperscript{182} However, as Levi explained, legislative supremacy itself serves private reliance values,\textsuperscript{183} if only because leaving Congress alone to change the law shows that the law is not a creature of concentrated political power.\textsuperscript{184} Agencies may be politically accountable via the chief executive, but they are akin to judges in the sense that their lawmaking power derives from the authority of a single individual.\textsuperscript{185} This view suggests that agencies’ political accountability relative to judges does not fully address the reliance concern.

But the obvious benefits of stability do not dispose the issue.\textsuperscript{186} Recognizing the different institutional functions courts and agencies, the larger question is whether the benefits of greater legal stability outweigh the countervailing value of agency

\textsuperscript{181} See Dennis D. Hirsch, \textit{Lean and Green?: Environmental Law and Policy and the Flexible Production Economy}, 79 Ind. L.J. 611, 658 (2004) (“The EPA could plausibly argue that facilities will only invest in pollution prevention opportunities where they have confidence that the investment will secure their regulatory compliance for some time to come.”); cf. Jad Mouawad, \textit{Businesses in U.S. Brace for New Rules on Emissions}, N.Y. Times (Nov. 26, 2009) at B1 (“Much of corporate America has already been thinking about how to comply [with expected mandatory emissions limits]. Many businesses concluded years ago that such limits were inevitable, and they have been calling on Congress to define the exact rules they will need to follow.”).

\textsuperscript{182} But cf. Tushnet, \textit{supra} note 18, at 1347 (nothing that Congress rarely reopens previous legislative compromises following elections).

\textsuperscript{183} Levi, \textit{supra} note 83, at 33 (“[T]he democratic process seems to require that controversial changes should be made by the legislative body.”).


\textsuperscript{185} Cf. Stephenson, \textit{supra} note 3, at 1043 (“Agencies are also susceptible to influence by the President, and the President’s influence over agency decisionmaking is almost certainly greater than Congress’s.”). “[T]he President has at his disposal an array of mechanisms to assert centralized ideological control over the bureaucracy, including appointment and dismissal powers, regulatory review, and directive authority.” \textit{Id.} at 1048.

\textsuperscript{186} Cf. Schauer, \textit{supra} note 55, at 597 (“[P]redictability plainly is, \textit{ceteris paribus}, desirable.”).
flexibility. 187 Chevron answers with an emphatic “no”: agencies “must consider varying interpretations . . . on a continuing basis.” 188 Freezing agency interpretations, the Court reaffirmed in Brand X, “would lead to the ossification of large portions of our statutory law.” 189 At least some of Chevron’s core justifications suggest the same. Because agencies have technical expertise, they should be able to derive optimal legal rules from rapidly changing circumstances; 190 and Congress might intend, or have delegated to the agency, authority to modify interpretations. 191

Applying the building blocks theory to agencies need not deny Chevron’s imperative of agency flexibility. Stare decisis need not be absolute. Indeed, Brand X recognized that the doctrine of stare decisis need not “preclude agencies from revising unwise” constructions of statutes. 192 Rather, the doctrine of stare decisis might better align Chevron deference with its underlying purposes by permitting an agency to depart from its initial interpretation only upon the agency’s showing some “special

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187 See id. (“We attain predictability, however, only by diminishing our ability to adapt to a changing future.”).
190 See David Epstein & Sharyn O’Halloran, The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach, 20 CARDOZO L. REV. 947, 967 (1999) (“[T]he executive branch is filled (or can be filled) with policy experts who can run tests and experiments, gather data, and otherwise determine the wisest course of policy, much more so than can 535 members of Congress and their staff.”).
191 Id. at 844 (“Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, the court may not substitute its construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”). Section IV.A of this Article argues that the delegation rationale is nonetheless faulty.
192 Brand X, 545 U.S. at 983.
justification” that reflects the comparative institutional competencies *Chevron* identified. Such justifications might include a change in facts or newly available empirical data. This doctrinal change would inject some predictability into the likelihood of agency revisions. To be sure, this change would draw the *Chevron* inquiry closer to courts’ scrutiny under the “arbitrary” or “capricious” standard under the APA, and, admittedly, to courts’ pre-*Chevron* deference inquiry. But it would not flatly preclude reinterpretation, nor need it restrict agencies’ interpretations to particular criteria in the first instance. It would merely ensure that the law develops in a “principled and intelligible fashion.”

2. Judicial Discretion Under *Chevron*. Because courts’ application of the *Chevron* framework is so unpredictable, the applicability of the building blocks theory to *Chevron* need not depend entirely on the institutional differences between agencies and courts. In 1989, Justice Scalia explained that “Congress now knows the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of

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195 Some commentators have already suggested consistency, or even overlap, between *Chevron* step two and the APA. Bamberger & Strauss, *supra* note 33, at 623–24. (“Step Two analysis considers whether agencies have permissibly exercised the interpretive authority delegated to them by reasonably employing appropriate methods for elaborating statutory meaning.”); Matthew C. Stepheson & Adrian Vermeule, *Chevron* Only Has Only One Step, 95 Va. L. Rev. 597, 599 (2009) (suggesting redundancy between *Chevron* step two and the APA § 706 standard).
196 See Merrill, Judicial, *supra* note 126, at 972–75 (describing the contextual pre-*Chevron* inquiry).
198 See William N. Eskridge, Jr., & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to Hamdan, 96 Geo. L.J. 1083, 1122–23 (2008) (“The clearest effect of *Chevron* at the Supreme Court level is that it has created an increasingly complicated set of doctrinal debates about when this deference regime is applicable . . . and the relationship of *Chevron* to other deference regimes.”).
permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.”

The Court’s invocation of *Chevron* even in the few years following that decision proved far more unpredictable than Justice Scalia anticipated. In recent years too, the Court’s application of *Chevron* has been highly inconsistent and subject to puzzling new constraints. From the nondelegation, or “major” cases doctrine, to the *United States v. Mead* issue of whether an agency has acted with sufficient legal force, to the preclusive effect of a prior judicial holding under *Brand X*, the threshold question of *Chevron*’s applicability remains highly unpredictable nearly two decades after the doctrine’s invention. Ambiguity alone, however defined, is no guarantee that the court will defer; apparent clarity is no guarantee that the court will interpret the statute *de novo*; and in light of the numerous

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200 Merrill, *Judicial, supra* note 126, at 982 (finding that “the two-step framework has been used in only about one-third of the total post-*Chevron* cases in which one or more Justices recognized that a deference question was presented”).
202 *Id.* at 245 (“[T]he distinction between major questions and non-major ones lacks a metric.”).
205 For a somewhat dated, pre-*Mead* and pre-*Brand X* account, see Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001) (identifying fourteen outstanding questions about *Chevron*’s applicability).
207 See, e.g. *Brand X*, 545 U.S. at 1007–08 (Scalia, J., dissenting).
extant regimes of judicial deference to agencies, ambiguity is no guarantee that the court, even if it does defer, will defer under *Chevron*.208

Recent doctrinal modifications are not wholly to blame for the judicial discretion *Chevron* permits. Ambiguity, *Chevron*’s lodestar, is itself an ambiguous criterion.209 The Court’s 2002 decision in *Department of Housing and Urban Development v. Rucker*210 illustrates the critical uncertainty of this threshold determination. In *Rucker*, the Supreme Court held eight to zero at *Chevron* step one that “the plain language”211 of 42 U.S.C. § 1437d(/)(6) “unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity.”212 The *Rucker* Court reversed the en banc Ninth Circuit, which had also found the statute clear at *Chevron* step one, but, unlike the Supreme Court, found that “if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(/)(6) does not

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208 Eskridge & Baer, *supra* note 198, at 1121 (“[T]he Court in a majority of its agency-interpretation cases (53.6% of them) applied no deference regime at all. The old ‘independent judgment of judges’ approach that predated the modern administrative state remains the overwhelmingly dominant approach taken by the Justices in cases involving agency inputs.”).
209 Slocum, *supra* note 206, at 795 (“The *Chevron* doctrine’s reliance on explicit ambiguity conclusions to determine whether an agency’s interpretation will receive deference has elevated the importance of a concept that is subjective, discretionary, typically addressed through conclusory statements, and, not surprisingly, a source of considerable disagreement among members of the Court.”); Molot, Judicial, *supra* note 105, at 1245.
210 535 U.S. 125 (2002),
211 *Id*. at 130
212 *Id*.
authorize the eviction.” The en banc Ninth Circuit had reversed the Ninth Circuit panel decision, which, like the Supreme Court, held that the statute unambiguously permitted eviction. Altogether, 12 Justices and judges found the statute clear in favor of the agency and ten judges found the statute clear in favor of the tenants. None favored deferring at *Chevron* step two.

As *Rucker* shows, *Chevron*’s uncertain application leaves courts with substantial discretion to decide both the substantive meaning of a statute and whether an interpretation will either cement the statute’s meaning per stare decisis or subject that meaning to agency revision. Considered in this light, no analogy to Levi’s concern about judicial discretion is necessary to justify stare decisis for agency interpretations under the building blocks theory because courts’ ac hoc application of the doctrine itself renders the statute’s likely meaning unpredictable. Where a party cannot predict whether *Chevron* applies, it may be difficult to predict the prevailing interpretation because courts and agencies interpret statutes using different criteria. Nor can parties anticipating the challenges of regulatory compliance know whether the statute’s legal effect will reflect the statute’s “best” meaning or merely a “permissible” reading, or whether that meaning will be subject to change without legislative intervention. As suggested in section III.B, these differentials may play a significant part in deciding a statute’s legal effect and

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213 *Rucker v. Davis*, 237 F.3d 1113, 1126 (9th Cir. 2001).
214 *Rucker v. Davis*, 203 F.3d 627, 646 (9th Cir. 2000).
215 PETER L. STRAUSS ET AL., GELLOHM AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS 1096 (10th ed. 2003) (“Both sides say the statute is unambiguous. How can that be?”).
216 See Colburn, *supra* note 113, at 669 (“[I]f the Court instead means to allocate interpretive authority by its own shifting fictions on how legislation empowers agencies to act, then the force of law is almost certainly becoming a matter of judicial will and caprice.”).
217 See *supra*, TAN 106–132.
whether that effect may change.\textsuperscript{218} They also bear important implications for the integrity of the legislative process.

In sum, even if the coexistence of the \textit{Chevron} and \textit{Marbury} conventions is not by itself problematic, the judiciary’s inability to signal which convention applies is.\textsuperscript{219} Nor is excessive judicial discretion problematic only under the latter paradigm. Applying a principle of stare decisis to agency interpretations cannot address the doctrinal vagaries of \textit{Chevron}. But it can partially mitigate the uncertainty the doctrine has created by establishing parity between the legal effect of agencies’ and courts’ interpretations of statutes.

D. Founding Era Views of Fixing

Founding era views of legal ambiguity illustrate a final rationale for applying stare decisis to agency interpretations of ambiguous statutes. Whereas \textit{Chevron} presumes a clear-cut distinction between statutory ambiguity and clarity, the founding generation understood the impossibility of exorcising all ambiguity from legal language.\textsuperscript{220}

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\textsuperscript{218} \textit{See supra}, TAN 106–149.
\textsuperscript{219} \textit{See} Finley v. United States, 490 U.S. 545, 556 (1989) (“What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”); cf. William N. Eskridge, Jr., & Philip P. Frickey, \textit{Foreword: Law as Equilibrium}, 108 HARV. L. REV. 26, 66 (1993) (“An interpretive regime tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to statutes’s scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities.”).
Nonetheless, both supporters and opponents of the Constitution assumed that ambiguity was, *ceteris parabus*, undesired. As a result, both Federalist and Anti-Federalist framers drew the opposite conclusion from *Chevron*: ambiguity would not and should not confer broad authority to waver between permissible constructions of the Constitution. Rather, subsequent enactments and adjudications would “fix” or “liquidate” the meaning of ambiguous language. Under the Framers’ view, ambiguity was not meant to survive the law’s implementation. Despite the apparent differences between constitutional and statutory interpretation and between courts and agencies, this view of law is broadly applicable to modern agencies.

James Madison most clearly articulated this view in Federalist No. 37.

Responding to Anti-Federalist charges that the Constitution was too ambiguous and risked curtailing state power at the hands of federal judges, Madison responded that ambiguity was inevitable given the complex ideas the document represented, the “imperfection of the human faculties” to express these ideas, and the expressive limitations of human language. Madison explained, “it must happen that however

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221 Hamburger, *supra* note 220, at 307 (“In both the framing and ratification debates, everyone who spoke or wrote about a lack of clarity argued on the assumption that it was undesirable.”). Federalists did, however, support some ambiguous language in the interest of preserving flexibility. Nelson, *Originalism, supra* note 220, at 25 (citing the example of the Necessary and Proper clause).

222 Molot, *Judicial, supra* note 105, at 27.

223 The Federalist No. 78 (Alexander Hamilton), *supra* note 220, at 415.


225 The Federalist No. 37 (James Madison), *supra* note 220, at 183; see Hamburger, *supra* note 220, at 304 (pointing out that Madison was paraphrasing Locke’s Essay on Human Understanding).
accurately objects may be discriminated in themselves, and however accurately the
discrimination may be considered, the definition of them may be rendered inaccurate by
the inaccuracy of the terms in which it is delivered.”

Consequently, “[a]ll new laws,
though penned with the greatest technical skill, and passed on the fullest and most mature
deliberation, are considered as more or less obscure and equivocal.”

To be sure, Madison did not believe that legal language was hopelessly open-
ended. Conscientious draftsmanship, evidenced by the extensive Philadelphia
convention debates, could forestall radical judicial reconstructions of the framers’ intent
in the guise of interpretation. Madison addressed Anti-Federalist fears of tyrannical
federal judges by explaining that subsequent interpretive authorities confronting
ambiguous language would, “by a series of particular discussions and adjudications,”
“liquidate and settle” the Constitution’s meaning. In a later letter to Samuel Johnston,
Madison reiterated his expectation that constitutional “meaning on all great points”

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226 Federalist No. 37 (James Madison), supra note 220, at 183.
227 Id. at 182; see Monaghan, Supremacy, supra note 220, at 785 (“[C]irca 1788, many
Founders in fact believed that they had not yet established a fixed meaning for many
parts of the Constitution.”).
228 Molot, Judicial, supra note 105, at 22 (“Madison and his contemporaries generally
believed that careful drafting could narrow interpretive options and guide interpreters in
exercising their leeway.”); id. at 23 (“[T]he Federalists countered with a moderate vision
of meaning and ambiguity.”); Powell, supra note 220, at 904 (“Madison’s argument . . .
was of course a restatement in somewhat abstract terms of the old common law
assumption, shared by the Philadelphia framers, that the ‘intent’ of any legal document is
the product of the interpretive process and not some fixed meaning that the author locks
into the document’s text at the outset.”).
229 See Smith, supra note 220, at 627–28; Molot, Judicial, supra note 105, at 23.
230 See Powell, supra note 220, at 910.
231 Federalist No. 37 (James Madison), supra note 220, at 182.
232 Nelson, Originalism, supra note 220, at 527 (quoting Letter from James Madison to
Spencer Roane (Sept 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON
143, 145 (J.B. Lippincott 1865)); see also Letter from James Madison to N.P. Trist (Dec.
1831), in 9 Writings of James Madison 477 (Gaillard Hunt ed., 1910).
would be “settled by precedents.” In effect, ambiguity would not sanction broad judicial power because post-ratification interpretations, like serial additions to Dworkin’s chain novel, would squelch ambiguity from the Constitution’s meaning, if not its text. As Professor Nelson explains, “[f]or the founding generation’s men of letters, the concept of ‘fixing’ connoted permanence and immutability.”

Alexander Hamilton echoed this point in Federalist No. 78. In response to ambiguous legal prescriptions, Hamilton wrote, the courts were to “liquidate and fix their meaning and operation.” Hamilton connected this idea to the broader concept of appropriate judicial discretion. Indeed, he seems to have assumed that law, by definition, required such resolution and that fixing was itself a feature of legal exegesis. Hamilton illustrated this point by reference to judicial resolution of conflicting statutes. Where courts confront “two contradictory laws,” he wrote, the courts apply the later-in-time rule. Hamilton explained this practice as an act of fixing and liquidation. The interpretive canon, he continued, “is a mere rule of construction, not derived from any positive law.” Despite the opacity of legislative intent in this circumstance, Hamilton viewed principled resolution of a single meaning as “a matter of necessity,” and as quintessential to the “truth and propriety” of courts’ “conduct as interpreters of the

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234 See infra TAN 156.

235 Molot, Judicial, supra note 105, at 22.

236 Nelson, Originalism, supra note 220, at 521.

237 Federalist No. 78 (Alexander Hamilton), supra note 220, at 394.

238 See id.

239 Id. (“[The courts] thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference.”).

240 Id.
law.” Like Chevron, Hamilton accepted that a permissible interpretation of ambiguity – such as that produced by a canon of construction – was within the province of judicial judgment. But unlike Chevron, Hamilton seems to have viewed eliminating ambiguity as the very object of legal interpretation. Hamilton, Madison, and others of the founding generation observed no place for continuing ambiguity in the American legal order.

One need not subscribe to originalism to appreciate the application of these views to concerns about agency discretion pursuant to ambiguous statutes. Implicit in Madison and Hamilton’s arguments is the idea that without fixing meaning “by a series of particular discussions and adjudications,” ambiguity in law – and with it, undesirable post-enactment interpretive discretion – would persist. The prominent Anti-Federalist Brutus seemed to agree. Though the ratification debates provided the backdrop for these early discussions of ambiguity, Madison and Hamilton’s arguments (as illustrated by Hamilton’s conflicting statutes example) apply with equal force to statutory interpretation. Indeed, both Federalists and Anti-Federalists, Professor H. Jefferson

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241 Id.
242 Nelson, Originalism, supra note 220, at 529 n.40; Hamburger, supra note 220, at 301.
243 Federalist No. 37 (James Madison), supra note 220, at 182.
244 See Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 VAND. L. REV. 647, 663 (1999) (“The Framers’ expectation that federal courts would be subject to some notion of binding precedent is evident in Alexander Hamilton’s argument in Federalist No. 78 in favor of strong job security for federal judges.”).
245 See Essays of Brutus, XII, N.Y.J. (Feb. 7, 1788), in 2 The Complete Anti-Federalist 422–23 (Herbert J. Storing, ed., 1981); Molot, Judicial, supra note 105, at 34.
246 Smith, supra note 220, at 628 (“Madison and Hamilton believed that courts would – and ought to – construe the Constitution according to the same principles of interpretation on which they relied to construe statutes.”); see Powell, supra note 220, at 912 (“The public debate over the adoption of the Constitution thus revealed that Americans of all political opinions accepted the applicability to constitutional interpretation of hermeneutical views developed in relation to quite different documents – the Bible, parliamentary statutes, and private contracts.”).
Powell writes, believed that “the Constitution was to be viewed as a quasi-statute, a command from a legal superior to those under its authority.” Judges would interpret both constitutional and statutory text using similar means, and Hamilton countered Anti-Federalist concerns about constitutional ambiguity by showing that judges, in interpreting statutes, deployed “JUDGMENT” rather than “WILL.” To Hamilton, judges’ personal or political views were an impermissible rubric for resolving either constitutional or statutory ambiguity because in either case, judges bowed to a higher legal authority. Hamilton thus connected hierarchies of legal authority and desirable limits on judicial discretion with judges’ locating a single meaning from a legal source. In this sense, judges would be agnostic to whether the text at issue was the Constitution or a statute; in no case could they “substitute their own pleasure” for that of the underlying legal authority.

Arguments critical of excessive agency authority under *Chevron* echo the same Anti-Federalist concerns that prompted Hamilton’s response in *The Federalist Papers*. Just as the Constitution is superior to Congress as a legal source, Congress is superior to the agencies. Indeed, in terms of ambiguity, generality, and the need to “liquidate” broad

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247 Id. at 911.
248 Federalist No. 78 (Alexander Hamilton), *supra* note 220, at 395 (“The courts must declare the sense of the law . . . and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure for that of the legislative body.”).
250 Federalist No. 78 (Alexander Hamilton), *supra* note 220, at 395 (“It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law.”).
251 Id.
252 Though the Anti-Federalists feared the erosion of states’ authority, modern concerns about *Chevron* rest on separation of powers grounds.
language into concrete prescriptive mandates, modern administrative statutes might be regarded as constitutions.° To the extent *Chevron* considers agency interpretations of statutes to be “legal,” Hamilton’s notion of discretion bound by superior authority suggests that agencies’ resort to a merely permissible interpretation should nonetheless fix statutory meaning.

To be sure, the concept of fixing flies in the face of *Chevron’s* core value of agency flexibility.°°° Consequently, to the extent *Chevron* is a “counter-*Marbury* for the administrative state,”°°°°° the framers’ views of legal ambiguity may seem anachronistic and inapposite. But nothing about the concept of fixing is inextricable from the *Marbury* paradigm. Though Hamilton clearly anticipated the institution of judicial review,°°°°° *Marbury* was not inevitable from the structure of the Constitution.°°°°°° Indeed, in contrast to Hamilton, Madison endorsed a broader view of which institutions might permissibly

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° See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 165 (2000) (Breyer, J., dissenting) (“After studying the FDCA’s history, experts have written that the statute is a purposefully broad delegation of discretionary power to Congress, and that, in a sense, the FDCA must be regarded as a constitution that establishes general principles . . . .”) (citations and internal quotation marks omitted)); cf. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 *Colum. L. Rev.* 369, 381 (1989) (“A statute whose application is intransitive does not state any rule that the agency is expected to apply directly to the target; it merely instructs the agency to develop rules.”).


°°°°° See Federalist No. 78 (Alexander Hamilton), *supra* note 220, at 395.

°°°°°° Smith, *supra* note 220, at 631 (“[M]any during the framing era believed that adjudication was not the only way to resolve constitutional ambiguities.”); Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 *Colum. L. Rev.* 215, 237 (2000) (“Americans at the Founding also believed that such questions could, and should, be settled by popular and political means, even though this might entail periods during which some questions of constitutional meaning could remain unsettled and subject to ongoing controversy.”).
fix post-ratification constitutional meaning. So long as adequate deliberation informed a legislative or executive interpretation, Madison would not rule out those modes of resolving the Constitution’s ambiguities. As a Member of the First Congress, Madison “reminded his colleagues that the policy reflected in their statute would have lasting impact as a ‘permanent exposition of the constitution.’”

Nor is Madison’s interpretive ideal necessarily contradictory to *Marbury*. Since *Marbury*, the Supreme Court has deferred to the constitutional constructions of the political branches through both interpretive rationales and doctrines of deference. One week after deciding *Marbury*, the Court upheld Congress’s provision for circuit riding in *Stuart v. Laird*. Writing for the Court, Justice Paterson explained that the “practice and acquiescence under [circuit riding] for a period of several years, commencing with the organization of the judicial system . . . has indeed fixed the construction.” Here, the very persistence of the custom under the Judiciary Act of 1789 was sufficient to fill the constitutional gap. The Court has also resolved debates about the President’s power to remove executive officials and Congress’ power to charter the Bank of the United States with reference to early congressional decisions on the subject.

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258 Nelson, *Originalism*, supra note 220, at 527 (“For Madison, the relevant ‘discussions and adjudications’ were not confined to interpretations adopted by the judiciary; other sufficiently deliberate constructions of the Constitution could also help ‘settle()’ the document’s meaning.” (citation omitted)).

259 Id. at 527–29.

260 Id. at 527 (quoting The Congressional Register (June 17, 1789), reprinted in Bickford, Bowling, and Veit, eds, 11 Documentary History of the First Congress 904, 921 (Johns Hopkins 1992)).

261 1 Cranch 299 (1803).

262 Id. at 309.

proved reluctant to decide constitutional questions, such as in cases of executive war powers or political questions, courts implicitly leave resolution of constitutional ambiguity to executive or congressional liquidation. Indeed, much like *Chevron*, the political question doctrine explicitly disclaims the courts’ power to resolve particular textual ambiguities by recognizing their “commitment” to the interpretive authority of Congress or the executive.\(^{264}\) The Court has observed a similar rubric in deciding Article II cases. In *Dames & Moore v. Regan*,\(^{265}\) for example, the Court upheld the President’s power to suspend pending private American claims against Iran.\(^{266}\) Quoting Justice Frankfurter in *Youngstown Sheet & Tube Co. v. Sawyer*,\(^{267}\) Justice Rehnquist explained the outcome as an act of fixing constitutional meaning. “[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.”\(^{268}\) “Past practice,” Justice Rehnquist continued, “does not, by itself, create power.”\(^{269}\) Rather, consistent practice absent congressional opposition was evidence that Article II permitted the President’s action.

These examples show that fixing constitutional meaning is a creature of all branches of government. The rich history of nonjudicial, constitutional interpretive authority is, at least in some areas, closely associated with fixing meaning from

\(^{264}\) See *Nixon v. United States*, 506 U.S. 224, 228 (1993) (“[T]he courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed.”); *Baker v. Carr*, 369 U.S 186, 217 (1962) (explaining that a nonjusticiable political question involves “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”).


\(^{266}\) *Id.* at 686.

\(^{267}\) 343 U.S. 579 (1952).

\(^{268}\) *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. at 610–11).

\(^{269}\) *Id.*
ambiguous text rather than permitting floating authority. Historical practice and founding-era beliefs demonstrate a definitional view of law that prizes resolution of ambiguity by judicial, legislative, and executive authorities.

III. Addressing Counterarguments

A. Chevron as Delegation

The obvious objection to the legislative supremacy rationales discussed above as applied to agencies is that unlike courts, agencies under *Chevron* act pursuant to delegated legislative authority.\(^{270}\) According to this view, Congress explicitly contemplates agency authority to make policy with the force of law within the constraints of an ambiguous statute.\(^{271}\) But the delegation rationale does not cure *Chevron’s* legislative supremacy problem vis a vis interpretive revisions for at least two reasons. Indeed, the fallacy of delegation provides further evidence that *Chevron*, in its current form, cedes excessive legislative power to agencies.

\(^{270}\) *See* United States v. Mead, 533 U.S. 218, 226–27 (2001) (holding that statutory ambiguity implies delegation of interpretive authority to agencies where the agency has “authority . . . generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority.”); *Chevron*, 467 U.S. at 865.

\(^{271}\) *Cf.* *Eskridge, Overruling*, supra note 50, at 1399. Some scholars have argued that the President’s Article II “completion power” explains agencies’ discretion to fill statutory gaps. Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2298–2302 (2006). This view corrects for *Chevron’s* shaky presumption that congressional intent links statutory ambiguity to agency interpretive authority. *Id.* at 2298–99. But the vague completion power, which rests on “defeasible” executive authority “to prescribe incidental details needed to carry into execution a legislative scheme,” *id.* at 2282, seems an unlikely source of agency interpretive authority (especially for independent agencies) because it cannot distinguish which statutory ambiguities are to be resolved by agencies and which are to be resolved by the executive.
First, *Chevron* deference already rests on the unlikely presumption that ambiguity—rather than some contextual trigger—signals Congress’ delegation of interpretive authority to agencies. Consequently, extending deference to agency revisions compounds the possibility of erroneous deference. As Justice Scalia has written, *Chevron’s* assumption “represents merely a fictional, presumed intent.” Indeed, when courts interpret ambiguous, non-administrative statutes, judges do not assume “delegated” legislative authority, even though they exercise policymaking discretion in construing the statute. Rather, the judicial tradition of statutory interpretation, and its attendant “traditional tools of statutory interpretation” presume that the interpretive-judicial and the creative-legislative powers are separate species. Ambiguity may as commonly reflect Congress’ failure to address an issue as it reflects a legislative compromise or lawmaking delegation.

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272 See Slocum, *supra* note 206, at 798 (“*Chevron* . . . represents a shift from a focus on factors related to agency deliberation and expertise to a primary initial focus on ambiguous determinations.”). For an example of the pre-*Chevron* approach, see Nat’l Muffler Dealers Ass’n v. United States, 440 U.S. 472, 477 (1979) (“In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose.”).

273 Bressman, *Chevron’s Mistake, supra* note 146, at 553 (“*Chevron* recognizes such ‘delegating’ factors; its mistake is failing to make those factors central to its doctrinal inquiry. The factors operate only as justifications for agency delegation, not as guides for determining the existence of that delegation.”); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989) (“An ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two.”).

274 Scalia, *supra* note 199, at 517.


278 See *supra* TAN 232–251.

In this sense, the rule of judicial deference per *Chevron* is overbroad. And like any overbroad rule, *Chevron* concedes false positives.\(^{280}\) Courts will defer – and likely have deferred – in cases where none of *Chevron*’s justifications holds and Congress “intended” the court to fill statutory gaps. As a result, extending the presumption of delegation to all, rather than only to initial, interpretations compounds the effect of the court’s initial interpretive error. If the broad brush of statutory ambiguity led a court to erroneously defer in the first instance, *Chevron* provides no doctrinal safeguard to restore the court’s interpretive primacy and vindicate Congress’ intent. The court will again find the statute ambiguous, either through an independent inquiry or due to the precedential effect of the earlier court’s holding. The later court’s only corrective recourse is a step two holding of unreasonableness, a tool that courts are loath to deploy.\(^{281}\) In sum, deference to revised agency interpretations tests the limits of *Chevron*’s presumption that ambiguity implies delegation. Because Congress is not nimble enough to overrule wayward agency interpretations,\(^{282}\) the default rule that best guards against an agency’s unlawfully usurping legislative power is stare decisis.

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\(^{280}\) Cf. Derek E. Bambauer, *Cybersieves*, 59 Duke L.J. 377, 397 (2009) (“Overbreadth may also represent a considered policy choice to tolerate false positive results to minimize false negative ones.”).

\(^{281}\) See Miles & Sunstein, *supra* note 27, at 838 n.26. But see Marmolejo-Campos v. Holder, 558 F.3d 903, 920 n.2 (9th Cir. 2009).

Second, even where ambiguity correctly signals Congress’ delegation of lawmaking authority to agencies, that authority is not necessarily as wide-ranging as *Chevron* presumes. The doctrine recognizes no distinction between delegation of interpretive authority and delegation of reinterpretive authority; once *Chevron* applies, only step two cabins an agency’s power. But Congress may have every reason to grant, and delegation may indeed imply, an agency’s authority to resolve statutory interstices rather than to continually interpret and reinterpret a statute. As a matter of statutory interpretation, then, *Chevron* defaults to the most expansive possible range of agency authority. Judging by the *Chevron* Court’s reasoning, the exigencies of administrative law compel deference precisely because it vests agencies with flexible discretion.

But this conclusion does not inevitably follow from a presumption of legislative delegation. Outside of the *Chevron* context, the Court has on numerous occasions construed statutes to limit Congress’ delegation of substantial lawmaking authority to agencies.

This point highlights the larger doctrinal problem that this Article addresses – that *Chevron* confuses delegation of interpretive authority for delegation of legislative power.

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284 See Stephenson, *supra* note 3, at 1039–45 (describing various criteria informing congressional choice between agencies and courts as interpreters of statutes); cf. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281, 283 (1989) (“I argue that legislators generally do not want to condition the continued effectiveness of a statute on the state of public opinion. Consequently even radical changes in public opinion do not, in themselves, justify deviations from statutory directives.”). This point is related to the larger discussion of ambiguity in Part III.


As the framers’ discussion of fixing and liquidation suggests, an agency merely implementing a legislative command, that interpretation would necessarily resolve a statute’s meaning. But because agencies may change their interpretations based only on the pliability of the underlying statute, agency reinterpretations seem like acts of legislation.

The law of interpretive rulemaking endorses this very distinction. Agencies’ interpretations of their own legislative rules are subject to few procedural constraints; because an agency is merely excavating the meaning of a regulation, the agency need not adhere to the notice and comment procedures of informal rulemaking. But the D.C. Circuit held as recently as 1999 that an agency must follow notice and comment procedures when it modifies an interpretive rule. In Alaska Professional Hunters Association, Inc. v. FAA, the D.C. Circuit held that “[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule.” Because a modification of even an interpretive rule is an act of law-making rather than law-interpreting, the D.C. Circuit has rejected Chevron’s formalist distinction between these concepts. An agency may not escape the APA’s notice and comment requirements merely by couching its creating new law as

\[\text{\textsuperscript{287}} \text{See supra TAN 232–251.}\]
\[\text{\textsuperscript{288}} \text{See 5 U.S.C. § 553(c) (2006).}\]
\[\text{\textsuperscript{289}} \text{Alaska Professional Hunters Ass’n Inc. v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999).}\]
\[\text{\textsuperscript{290}} \text{177 F.3d. 1030.}\]
\[\text{\textsuperscript{291}} \text{Id. at 1034.}\]
\[\text{\textsuperscript{292}} \text{See, e.g., Paralyzed Veterans of Am. v. D.C. Arena, 117 F.3d 579, 586 (D.C. Cir. 1997).}\]
a revised interpretation of an earlier rule. Agencies’ revised constructions of statutes are susceptible to the same reasoning. As the Rust and Brand X examples show, because agency interpretations may reflect unlikely and unfaithful interpretations of statutes, these “interpretations” are analogous to the modifications of interpretive rules that the D.C. Circuit has required heightened justification for in the form of notice and comment procedures. Considered in this light, the inconsistency of Chevron and Alaska Hunters may reflect no more than differing views about what an agency is doing – and what kind of power it deploys – when it departs from an earlier interpretation of a text. Contrary to the status quo, it would seem courts should be more probing in the Chevron than in the Alaska Hunters context, because agencies lack any authority to modify the text of a statute. The legislative delegation rationale has attempted – with little success – to resolve this contradiction.

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294 Justice Scalia has recently criticized the doctrine of Auer deference on these grounds. In Talk America, Inc. v. Michigan Bell Tel. Co., No. 10-313 (U.S. June 9, 2011), the Court deferred to the FCC’s interpretation of regulations requiring incumbent telephone companies to allow their competitors to interconnect with the incumbents’ networks. Justice Scalia concurred and explained that, because he thought the regulation’s meaning was unambiguous, he would have reached the same conclusion as the Court without deferring to the FCC’s interpretation per Auer, a doctrine the validity of which he had “become increasingly doubtful.” Talk America, No. 10-313, slip op. at 2 (Scalia, J., concurring). His newfound skepticism, he continued, reflected the legislative character of administrative rulemaking. “When Congress enacts an imprecise statute that it commits to the implementation of an executive agency,” Justice Scalia wrote, “it has no control over that implementation . . . . But when an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule’s meaning.” Id. This combination of legislative and executive power, Justice Scalia concluded, is “contrary to the fundamental principles of separation of powers.” Id. Justice Scalia carefully distinguished Chevron from his criticism of Auer; in Chevron cases, he explained, an agency is merely “implementing” an imprecise statute over which Congress no longer exercises control. As a result, “[t]he legislative and executive
Admittedly, the “nondelegation canons”\footnote{Sunstein, Zero, supra note 201, at 245. See generally John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 SUP. CT. REV. 223.} have put \textit{Chevron’s} legislative delegation premise on firmer ground.\footnote{In United States v. Mead, 533 U.S. 218 (2007), the Court further tied \textit{Chevron} further to the theory of legislative delegation. See id. at 226–27.} The Court will not defer where the breadth of the agency’s purported statutory authority renders implied delegation unlikely.\footnote{See, e.g., Brown & Williamson, 529 U.S. at 190; MCI Telecomms. Corp, 512 U.S. at 225–26; see also Solid Waste Agency v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 172–73 (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”).} But, as subsection III.C.2 suggests,\footnote{See supra TAN 198–218.} this line of cases highlights a third reason why delegation fails to justify \textit{Chevron} deference to agency revisions: the unpredictability of the doctrine’s application.\footnote{See supra note 124, at 2279 (explaining that a “doctrine of variable deference” cannot “provide Congress with a background rule of deference against which to legislate.”).} In the hands of the courts, \textit{Chevron} has evolved adopt the worst features of both a categorical rule – overbreadth – and a standard – judicial discretion.\footnote{Cf. Molot, Judicial, supra note 105, at 78 (“[L]egislators wishing to guide administrative decisions under \textit{Chevron} must resort to . . . tactics that differ significantly from the careful deliberation and drafting the might use to guide judges.”).} Against a legislative background of ad hoc deference, Congress cannot control the direction or scope of implied legislative delegation\footnote{See Eskridge & Baer, supra note 198, at 1122–23.} because Congress cannot reliably signal to the court that ambiguities are meant for agency, rather than judicial, interpretation.\footnote{See Louis Kaplow, Rules Versus Standards, 42 DUKE L. J. 557, 609 (1992) (“Rules may be preferred to standards in order to limit discretion, thereby minimizing abuses of power.”).}
This dynamic is important in two respects. First, it provides strong evidence that *Chevron*’s theory of delegation is not only fictive, but constitutionally flawed. Surely Article I does not subject Congress’s power to delegate legislative power to judicial caprice, especially in light of the effectively moribund nondelegation doctrine. Second, because courts are bound by stare decisis and agencies are not, Congress’ powerlessness to direct interpretive authority leaves Congress powerless to control the extent of policymaking discretion granted by imprecise statutory language. *Chevron*’s unpredictability deals a blow to Congress’ exercise and cession of its legislative power, both of which depend on some predictable connection between legislative choices and the resulting statutes’ legal effects.

**B. Agency Flexibility**

Subjecting agencies’ interpretations of ambiguous statutes to a rule of stare decisis necessarily limits agencies’ policymaking flexibility, a value that figured prominently in *Chevron* and one that the Court invoked more recently in *Brand X*.

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304 The Court has not struck down a statute on nondelegation grounds since 1936. See Panama Refining Co. v. Ryan, 293 U.S. 388, 419 (1935) (holding that delegating to the President authority to choose whether or not to impose a prohibition on transport of oil products was unconstitutional).


306 See Eskridge & Frickey *supra* note 219, at 67 (“Knowing the interpretive regime into which statutes will be developed over time, the players in the legislative bargaining process will be better able to predict what effects the statute will have.”).


308 Nat’l Cable & Telecommrs. Ass’n v. *Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (explaining that holding agencies to a prior court’s interpretation of an ambiguous
But as Section III.C explains, stare decisis theory provides ready escape hatches from prior interpretations. Initial interpretations need not be “carved in stone.” They need only be subject to revision for reasons more stringent than the mere permissibility of an alternate interpretation. Adequate justifications for revision might include changed factual circumstances or discovery of new facts that cast doubt on the agency’s initial view of the statute.

A more fundamental criticism of the flexibility counterargument is that it does not explain why the lawmaking discretion agencies have under *Chevron* is preferable to their limited discretion under a regime of stare decisis. This counterargument establishes *Chevron* as an optimal baseline. But that baseline is disjoined from any normative account of how much agency flexibility is ideal. The *Brand X* Court, for example, feared that subjecting agencies’ interpretations of statutes to those of prior courts would lead to the “ossification” of administrative law. But *Brand X* could not explain why administrative law was not already too ossified. Indeed, a rule of stare decisis may prove administratively inconvenient relative to the current regime, but no one would argue that agencies should have unbounded discretion to make or interpret law. Democratic and constitutional values must provide a counterweight. In sum, barring some convincing

statute would “lead to the ossification of large portions of our statutory law” (quoting United States v. Mead, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting)).

309 See supra TAN 189–94.

310 *Chevron*, 467 U.S. at 863–64.

311 In the years leading up to *Chevron*, “hard look” review prompted concerns that administrative law had become too rigid. Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 Wake Forest L. Rev. 745, 760 (1996). Many of the same arguments against close judicial oversight of agency rulemaking may apply here, but the analogy is imperfect because relatively few agency rules are interpretations of ambiguous statutes.

312 *Brand X*, 545 U.S. at 983.
account of the practical imperative of agencies’ power to reinterpret ambiguous statutes, the safeguards of stare decisis ought to prevail.\footnote{See generally Mark Seidenfeld, Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review, 70 OHIO ST. L.J. 251 (2009) (arguing that judicial review is only one factor that encourages or discourages agency regulatory action).}

IV. Conclusions

An agency’s changing its interpretation of an ambiguous statute should raise concerns that policy preferences or political motives have replaced a principled approach to statutory interpretation and that pure legislative delegation has replaced meaningful limits on agency authority at \textit{Chevron} step two. Stare decisis guards against these dangers, and \textit{Chevron’s} justifications provide scant reason why the doctrine should not apply with equal force to the agency as to the judicial context. Indeed, maintaining agency flexibility seems to be the only coherent rationale for granting agencies open-ended reinterpretive authority. But even \textit{Chevron’s} own arguments on this point fail to explain why the vast flexibility \textit{Chevron’s} provides is necessary or optimal.

To be sure, agency flexibility will suffer under a regime of stare decisis. As a result, responsibility for policy changes will more often fall to Congress. The extent of Congress’s increased workload may determine the practical wisdom of importing stare decisis to \textit{Chevron}. But from the perspective of democratic governance and the integrity of the political process, the argument for stare decisis is strong. Presidential elections alone will determine fewer policy changes pursuant to broadly worded statutes, and Congress will no longer be able to rely on changes in administrations to vindicate policy preferences.
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