

# ***CHEVRON* VS. STARE DECISIS: SHOULD CIRCUIT COURTS FOLLOW JUDICIAL PRECEDENT OR DEFER TO AGENCIES AS MANDATED IN *CHEVRON U.S.A., INC. V. NRDC*?**

## I. INTRODUCTION

No one disputes Justice Marshall's declaration that the role of the courts is to "say what the law is."<sup>1</sup> In the 1984 case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, however, the Supreme Court announced a doctrine that shares some of that responsibility with administrative agencies.<sup>2</sup> The Supreme Court stated that courts must defer to agencies' reasonable interpretations of their enabling statutes.<sup>3</sup> Subsequently, the Supreme Court modified its own position with respect to this doctrine by holding that it is not required to defer to agencies.<sup>4</sup> In these subsequent cases, however, the Court did not address the proper resolution when circuit courts of appeals face conflicting circuit precedent and agency statutory interpretations.

The Court's silence has led to conflict among, and within, the federal circuits. Although the Court's silence might imply that the *Chevron* doctrine has not been altered with respect to lower federal courts and they should defer to agencies, not all courts have embraced this implication. Some courts follow the Supreme Court's lead and adhere to circuit precedent despite a contrary agency interpretation.<sup>5</sup> Other courts do embrace this implication and defer to agencies despite conflicting circuit precedent.<sup>6</sup> The courts' varying interpretations have the potential to defeat

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

2. 467 U.S. 837 (1984). At issue in *Chevron* was the definition of "stationary source" for purposes of the Clean Air Act. *Id.* at 840. The Environmental Protection Agency (EPA) had vacillated between definitions. *Id.* at 845-59. At one point the court of appeals adopted a particular definition that the EPA had used. *Id.* at 841. This judicial adoption made the definition static. *Id.* at 842. The Supreme Court noted that the court of appeals' "basic legal error" was to make the definition static when Congress meant for it to be flexible. *Id.* at 842, 846. The Court held that judicial courts should defer to an agency's interpretation of its enabling statute when the interpretation "centers on the wisdom of the agency's policy[.]" *Id.* at 866.

3. *Id.* at 844.

4. *See, e.g., Neal v. United States*, 516 U.S. 284, 295 (1996) (holding Supreme Court not required to defer to agency statutory interpretations); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992) (same); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (same).

5. *See, e.g., Bankers Trust New York Corp. v. United States*, 225 F.3d 1368, 1376 (Fed. Cir. 2000); *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519, 524 (8th Cir. 1991).

6. *See, e.g., Aguirre v. Immigration and Naturalization Serv.*, 79 F.3d 315, 317 (2d Cir. 1996);

the foundation of our judicial system: to treat similar cases similarly.<sup>7</sup> The most efficient resolution of this conflict is for the lower federal courts to defer consistently to agency interpretations of their enabling statutes in the absence of Supreme Court precedent.

Part II of this Note explains how the Supreme Court itself has modified the *Chevron* doctrine with respect to its own deference to agency interpretations and examines the lower courts' responses. Part III analyzes the various approaches taken by the circuits and notes a pattern in the application of one doctrine or the other. Finally, Part IV suggests a resolution to the conflict between *stare decisis* and the *Chevron* doctrine.

## II. HISTORY

Traditionally, federal courts were the authority on matters of statutory construction.<sup>8</sup> The courts were not required to defer to agency interpretations of their enabling statutes.<sup>9</sup> In *Chevron, Inc. v. Natural Resources Defense Council*, however, the Supreme Court altered this arrangement by requiring such deference from courts.<sup>10</sup>

The Court supported its decision to increase federal agencies' authority with strong policy concerns.<sup>11</sup> The Court recognized that agencies are the experts in their fields and allowing them to make decisions regarding their regulatory systems promotes efficiency within the agency.<sup>12</sup> The Court also implicitly acknowledged that federal agencies have national jurisdiction and thus their pronouncements are nationally uniform,<sup>13</sup> whereas if the lower courts followed circuit precedent, different circuits could obtain different results.<sup>14</sup>

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Schisler v. Sullivan, 3 F.3d 563, 569 (2d Cir. 1993); NLRB v. Viola Industries—Elevator Division, Inc., 979 F.2d 1384, 1394 (10th Cir. 1992) (en banc); United States v. Joshua, 976 F.2d 844, 855 (3d Cir. 1992), *rev'd on other grounds*, Stinson v. United States, 508 U.S. 36 (1993); Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers, 861 F.2d 1124, 1136 (9th Cir. 1988) (en banc).

7. See RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 8-12 (3d ed. 1997) [hereinafter LOGIC FOR LAWYERS] (describing the origins of *stare decisis* and the process of applying the same law to similar fact patterns).

8. Richard L. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2225 (1997) [hereinafter *Reconciling*].

9. *Id.*

10. 467 U.S. at 842-43.

11. *Id.* at 844, 858, 864.

12. *Id.* at 844.

13. *Id.* at 858, 864. The Court nowhere expressly articulated this concern, but its awareness of it is evident. The Court acknowledges the EPA's struggle to achieve uniformity of definition to decrease "confusion and inconsistency." *Id.* at 858. The Court is also aware that some jurisdictions will adopt the agency's definition while others will not if deference is not mandated. *Id.* at 864.

14. *Id.* at 864.

The Court developed a two-step process for resolving conflicts of statutory construction.<sup>15</sup> The first step involves determining whether Congress meant to confer authority on the agency to decide the issue; the second step is to determine whether the agency's interpretation is reasonable.<sup>16</sup> The Court broke from tradition by requiring federal courts to defer to agencies' constructions of their enabling statutes rather than follow controlling judicial precedent,<sup>17</sup> but it preserved the function of the judiciary in determining whether the statute at issue is ambiguous, and if not ambiguous, whether it is both reasonable and within the agency's congressionally defined scope of authority.<sup>18</sup> The Court's language in *Chevron* reveals a determination to empower federal agencies through judicial deference.<sup>19</sup>

#### A. Subsequent Supreme Court Actions

Several years after announcing the *Chevron* doctrine, the Court modified it with respect to its own deference requirements.<sup>20</sup> In *Lechmere, Inc. v. NLRB*, the Court held that its own prior decisions prevail over

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15. *Id.* at 842-43. The Court described the process as follows:

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

(footnotes omitted).

16. The first step in the *Chevron* analysis is to determine whether Congress has expressed its intent with regard to the specific topic at issue. *Id.* at 842. If Congress has expressed its intent either to delegate interpretive authority to the agency or not to, the agency and the court must respect that intent. *Id.* at 843. Moreover, congressional silence is to be interpreted as a grant of such power that commands deference. *Id.* at 844. See also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833-34 (2001) [hereinafter *Chevron's Domain*] (discussing express and implied delegations).

17. 467 U.S. at 843-44 (reasoning that agency decisions necessarily involve formulating policy and recognizing the long-standing tradition of according "controlling weight" to agency constructions of statutes).

18. *Id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction. . . .").

19. *Id.* at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.").

20. *Lechmere, Inc.*, 502 U.S. at 536-37. *Lechmere* clarifies the relationship between employer's property rights with employee's rights to self-organize under section 7 of the National Labor Relations Act. *Id.* at 529.

subsequent agency statutory interpretations.<sup>21</sup> Although *Lechmere* stated that the Supreme Court need not defer to agency interpretations, it neither discussed its reasoning for adhering to *stare decisis* nor addressed the appropriate level of deference from lower federal courts.<sup>22</sup> Thus, at the Supreme Court level, the doctrine of *stare decisis* takes priority over the *Chevron* doctrine.<sup>23</sup>

A few years after *Lechmere*, the Court reaffirmed its position that, at the highest level, *stare decisis* is the rule.<sup>24</sup> In *Neal v. United States*, the Court added support for its refusal to defer.<sup>25</sup> The Court acknowledged that Congress has the power to change a statute if the Court's interpretation is not what Congress intended.<sup>26</sup> The Court maintained that if it constantly changed its own statutory construction in deference to an agency, Congress would have an incentive *not* to change the statute.<sup>27</sup> Moreover, the Court noted the difference between agencies and the judiciary: agencies make policy judgments and can abandon old methods

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21. *Id.* at 536-37 (“Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning.”) (quoting *Maislin Indus.*, 497 U.S. at 131).

Lower federal courts do not interpret this decision uniformly. Some courts have held that if the controlling opinion deferred to the agency’s interpretation, then the judicial precedent is not final and the agency may change its interpretation with a continued expectation of judicial deference. *See, e.g., Viola Indus.*, 979 F.2d at 1393; *Mesa Verde Constr. Co.*, 861 F.2d at 1129. *See also infra* Part II.B.1.b. Other courts have adopted the Supreme Court’s practice by giving circuit court precedent higher priority than agency interpretations. *See, e.g., Bankers Trust New York Corp.*, 225 F.3d at 1376; *BPS Guard Services, Inc.*, 942 F.2d at 524. *See also infra* Part II.B.2.

22. 502 U.S. at 536-37.

23. *Id.* The dissenting opinion in *Lechmere* raised a strong argument that runs contrary to the Court’s opinion. The dissent understood the *Chevron* doctrine to prioritize judicial deference over *stare decisis*. *Id.* at 547 (White, J., dissenting). The dissent explained in *Chevron*’s own language that the Court’s failure to defer to the agency freezes the law when Congress did not mean for the law to be frozen. *Id.* (“The more basic legal error of the majority today . . . is to adopt a static judicial construction of the statute when Congress has not commanded that construction.”). The dissent supported its proposition by noting that Congress left the question open in the statute, thereby delegating authority to the agency to interpret the statute. *Id.* The dissent further stated that the Court should respect Congress’ delegation and not use its own interpretation of the statute in place of the agency’s reasonable interpretation. *Id.*

24. *Neal*, 516 U.S. at 290, 295. *Neal* addressed a discrepancy between the United States Sentencing Guidelines (Guidelines) and the minimum sentence statute. *Id.* at 286. At the time of conviction, the Guidelines and statute were uniform, but the Sentencing Commission later retroactively revised the Guidelines. *Id.* at 287. If they controlled, *Neal*’s sentence would be reduced. *Id.* The Court held, however, that because it had previously construed the minimum sentence statute, *stare decisis* commanded that the statute, rather than the Guidelines, control *Neal*’s sentence. *Id.* at 289-91.

25. *Id.* at 295-96.

26. *Id.* at 295.

27. *Id.* at 296. Implicit in the Court’s opinion is that for the Court to change judicial statutory constructions would obstruct the proper functioning of the separate branches of government. *See id.*

as more desirable methods are realized, whereas the judiciary is limited in its ability to change a prior statutory construction.<sup>28</sup> Again, the Court left lower courts' position with regard to the *Chevron* doctrine unaddressed.

The Supreme Court's exemption from deference is not the only exception to the *Chevron* doctrine; several other exceptions exist.<sup>29</sup> Although these exceptions are beyond the scope of this Note, one in particular deserves mention. The Supreme Court has limited the situations to which *Chevron* applies by requiring deference to agencies only when their pronouncements carry the force of law.<sup>30</sup> Even though the line between pronouncements with the force of law and those without is evolving,<sup>31</sup> many situations continue to arise in which *Chevron* is applicable.<sup>32</sup> It is these situations that this Note addresses.

### B. Subsequent Courts of Appeals Actions

Since *Chevron*, the Supreme Court has not expressly discussed the appropriate level of deference for circuit courts of appeals when agency statutory interpretations conflict with circuit precedent. Consequently, the circuits, and courts within circuits, have split on whether to follow the Court's *Chevron* mandate and defer to agencies or to follow the Supreme Court's own practice established in later decisions and adhere to stare decisis.<sup>33</sup> Foreseeably, two major approaches have emerged: Some courts follow *Chevron*;<sup>34</sup> other courts adhere to stare decisis.<sup>35</sup>

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28. *Id.* at 295. Ironically, *Chevron* cited this distinction as a reason for deferring to agencies. 467 U.S. at 865.

29. See generally *Chevron's Domain*, *supra* note 16.

30. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). *Mead* applies to lower courts and limits the breadth but not the depth of deference required once it has been determined that *Chevron* deference is appropriate. See *id.* at 229-30. Although the Court did not compel deference to agency pronouncements without the force of law, it articulated a lower standard of deference for courts to follow. *Id.* at 228, 234-35.

31. *Barnhart v. Walton*, 535 U.S. 212, 218-19 (2002). In *Barnhart*, the Court reaffirmed *Mead* and encouraged judicial deference to agency interpretations based on several factors. *Id.*

32. See, e.g., *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 42 (2002) (applying *Chevron* doctrine to Interstate Commerce Commission standards); *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 316 F.3d 913, 922-23 (9th Cir. 2003) (applying *Chevron* analysis to agency action).

33. This Note addresses the situations in which a circuit court of appeals faces a conflict between an agency interpretation and *circuit* precedent that interprets the same statute. Although some circuits have circumvented Supreme Court precedent under the guise of adhering to the *Chevron* doctrine, this practice is incorrect. See *Viola Indus.*, 979 F.2d at 1393-94; *Mesa Verde Constr. Co.*, 861 F.2d at 1129-31. See also *infra*, note 66. Supreme Court decisions bind the lower courts despite contrary agency interpretations. See, e.g., *Neal*, 516 U.S. at 295; *Lechmere, Inc.*, 502 U.S. at 537-37.

34. See, e.g., *In re Cybernetic Services, Inc.*, 252 F.3d 1039, 1057 (9th Cir. 2001); *NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000); *Viola Indus.*, 979 F.2d at 1393-94; *Mesa Verde Constr. Co.*, 861 F.2d at 1129.

### 1. *Following the Chevron Doctrine*

Several courts follow *Chevron* and defer to agencies despite conflicting circuit precedent. Some courts do so without discussion,<sup>36</sup> others expressly embrace one or more of the policy considerations underlying *Chevron*.<sup>37</sup> To follow *Chevron* without discussing the reason for deference might imply that, in *Chevron*, the Supreme Court abrogated circuit precedent decided without deference to the agency.<sup>38</sup> This implication leads to the conclusion that pre-*Chevron* decisions are of no legal consequence.<sup>39</sup> The Second Circuit Court of Appeals deferred to properly enacted agency regulations despite conflicting circuit precedent.<sup>40</sup> The court held that so long as the agency observed proper administrative procedures,<sup>41</sup> its regulations are within the agency's scope of authority,<sup>42</sup> and the regulations are not arbitrary or capricious,<sup>43</sup> the regulations are binding on the court.<sup>44</sup> The court stated that it had no choice but to uphold the agency's interpretation;<sup>45</sup> "[a]ny other conclusion would result in . . . chaos. . . ."<sup>46</sup>

Other courts explain their reasons for deferring to agencies. Some express sensitivity to the policy considerations that motivated *Chevron*: promoting uniformity or exploiting agency expertise.<sup>47</sup> Others acknowledge these policy concerns, but seem to defer to agencies

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35. See, e.g., *Bankers Trust New York Corp.*, 225 F.3d at 1376; *BPS Guard Services, Inc.*, 942 F.2d at 524.

36. See *Chem. Waste Mgmt., Inc. v. U.S. Envtl. Prot. Agency*, 873 F.2d 1477, 1481-82 (D.C. Cir. 1989).

37. See *Aguirre*, 79 F.3d at 317 (uniformity); *Joshua*, 976 F.2d at 855 (agency expertise); *Viola Indus.*, 979 F.2d at 1393 (deferential precedent); *Mesa Verde Constr. Co.*, 861 F.2d at 1135-36 (judicial economy and efficiency).

38. E.g., *Michel v. Immigration and Naturalization Serv.*, 206 F.3d 253, 268 n.2 (2d Cir. 2000) (Cabranes, J., concurring) ("Where, as in this case, one of our previous decisions has plainly been abrogated by the Supreme Court, I do not believe we are required to seek approval of all of the active judges of the court to state as much.") (internal quotation and citation omitted). For a shortcoming in this theory, see *infra* notes 128-29 and accompanying text.

39. E.g., *Michel*, 206 F.3d at 268 n.2 (Cabranes, J., concurring).

40. *Schisler v. Sullivan*, 3 F.3d 563, 568-69 (2d Cir. 1993). *Schisler* addressed Health and Human Service regulations that enacted a version of the "treating physician rule" that differed from the circuit's traditional version of the rule. *Id.*

41. *Id.* at 568.

42. *Id.*

43. *Id.*

44. *Id.* at 568.

45. *Id.* at 569.

46. *Id.* at 568.

47. See, e.g., *Aguirre*, 79 F.3d at 317; *Joshua*, 976 F.2d at 855.

primarily because the controlling opinion was decided in deference to the agency.<sup>48</sup>

*a. Policy Considerations*

Some courts defer to agency interpretations of statutes at the expense of circuit precedent with the goal of achieving national uniformity in application of the statute.<sup>49</sup> The courts that aim to achieve uniformity recognize a foundation of our judicial system—to treat similar cases similarly.<sup>50</sup> The Court of Appeals for the Second Circuit abandoned circuit precedent in favor of creating uniform application of the immigration laws.<sup>51</sup> Caught in a conflict between its prior judicial interpretation of a section of the Immigration Nationality Act and the Immigration and Naturalization Service’s differing interpretation,<sup>52</sup> the court concluded that “nationwide uniformity outweigh[s] . . . adherence to Circuit precedent in this instance.”<sup>53</sup> The Second Circuit reasoned that it was especially important to defer to the agency when the same action would lead to different results in different jurisdictions.<sup>54</sup> Accordingly, the court felt it was particularly important to defer to the INS when considering an issue that directly affects immigrants.<sup>55</sup>

Similarly, the Third Circuit Court of Appeals has abandoned circuit precedent and deferred to agencies in the interest of uniformity.<sup>56</sup> In the

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48. See, e.g., *Viola Indus.*, 979 F.2d at 1128-29; *Mesa Verde Constr. Co.*, 861 F.2d at 1135-36.

49. See *Aguirre*, 79 F.3d at 317 (expressing the importance of uniformity in treating similarly situated immigrants similarly within the law of immigration); *Joshua*, 976 F.2d at 855 (recognizing that deference “tends to promote uniformity in the application of the statute”); *Mesa Verde Constr. Co.*, 861 F.2d at 1135-36 (explaining that stare decisis prevents agencies from “enacting consistent, nationwide policies”).

50. See LOGIC FOR LAWYERS, *supra* note 7, at 8-12 (explaining common law tradition of creating a judicial rule and then using that rule to decide future cases that have the same or similar fact patterns).

51. *Aguirre*, 79 F.3d at 317. *Aguirre* addressed a conflict between the Immigration and Naturalization’s (INS) definition of “aggravated felony” for purposes of the Immigration and Nationality Act (INA) and circuit precedent’s definition of aggravated felony. *Id.* at 316.

52. The INA is the INS’s enabling statute. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1537 (2000).

This Note addresses only the practice of deference to an agency when it interprets a section of its enabling statute. Deference to an agency that interprets sections of statutes other than one it is charged with administering is beyond the scope of this Note.

53. *Aguirre*, 79 F.3d at 317. The court felt it had a choice in whether it deferred to the agency or adhered to its own precedent. *Id.* The court cited *Chevron* and stated that although agencies are entitled to deference in some situations, the *Chevron* doctrine “cannot compel a court to forgo the principle of *stare decisis* and abandon a construction previously made.” *Id.*

54. *Id.*

55. *Id.*

56. In *United States v. Joshua*, the court considered clarifications made by the Sentencing

context of the United States Sentencing Guidelines, the court implicitly recognized that, as with immigrants, criminals convicted for similar crimes should not receive different sentences depending on the geographic location of their actions.<sup>57</sup> These courts deferred to agency statutory interpretations with the intent of creating uniform application of the laws.<sup>58</sup> The courts that recognize the importance of uniformity fulfill a fundamental objective of our legal system by treating similar cases similarly, especially when the outcome directly impacts an individual's liberty interest.<sup>59</sup>

Agency expertise is another reason courts defer to agencies at the expense of circuit precedent.<sup>60</sup> This rationale recognizes a purpose of agencies: to make a complex regulatory system function as smoothly and efficiently as possible.<sup>61</sup> The Ninth Circuit Court of Appeals, for example, has deferred to an agency statutory interpretation at the expense of circuit precedent to exploit agency expertise.<sup>62</sup> On a matter that involved pre-hire agreements between a union and an employer, the court determined that the NLRB merited deference because of its detailed knowledge of the regulatory scheme.<sup>63</sup> The court decided that the NLRB's superior knowledge enabled it to interpret individual sections of the NLRA in a manner that promotes the agency's overall purpose.<sup>64</sup> Thus, respect for agencies' statutory interpretations best effects the efficient functioning of the regulatory system and serves the purpose of establishing the agency.<sup>65</sup>

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Commission in the form of commentary on the Sentencing Guidelines. 976 F.2d at 855. The court ultimately deferred to the Commission but stated that when a prior circuit court panel's construction of a statute differs from the agency's construction of the same statute, the court is not compelled by stare decisis to adhere to the judicial construction, but neither is it "bound to close its eyes to the new source of enlightenment." *Id.*

57. *Id.*

58. *Aguirre*, 79 F.3d at 317; *Joshua*, 976 F.2d at 855.

59. LOGIC FOR LAWYERS, *supra* note 7, at 8-12; *cf. Reconciling*, *supra* note 8, at 2234 (implying necessity of the *Chevron* doctrine because courts were at risk for treating similar cases dissimilarly).

60. *Joshua*, 976 F.2d at 855 (acknowledging that judicial deference to the agency secures full use of the agency's knowledge and expertise); *Mesa Verde Constr. Co.*, 861 F.2d at 1135 (recognizing that deference is especially important when "a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge") (citing *Chevron*, 467 U.S. at 844 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961))).

61. *Barnhart*, 535 U.S. at 219 (2002) (recognizing "the importance of the question to the administration of the statute, [and] the complexity of that administration"); *Chevron*, 467 U.S. at 863-65 (noting the necessity of technical expertise).

62. *Mesa Verde Constr. Co.*, 861 F.2d at 1135.

63. *Id.* at 1128, 1135. Specifically at issue was the timing and ability of the union or employer to unilaterally repudiate a pre-hire contract. *Id.* at 1127-28.

64. *Id.* at 1135.

65. *Id.*

*b. Deferential Precedent*

Some courts defer to agency statutory interpretations when the court that issued the controlling judicial decision deferred to the agency.<sup>66</sup> In these cases, if the “original court” deferred to the agency’s interpretation,<sup>67</sup> the subsequent court respects stare decisis to the extent that it defers to the agency’s interpretation.<sup>68</sup> This method is viable when the statute at issue supports more than one reasonable interpretation.<sup>69</sup> If the original court deferred to the agency, the subsequent court need only consider whether the current agency interpretation is reasonable.<sup>70</sup>

The Courts of Appeals for the Ninth and Tenth Circuits have followed this practice.<sup>71</sup> The subsequent court has deferred to the agency’s statutory interpretation when the original court deferred to the agency.<sup>72</sup> Such deference is allowable even if the agency has changed its interpretation and deference entails overruling judicial precedent.<sup>73</sup> In announcing their

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66. *E.g., Viola Indus.*, 979 F.2d at 1393-94; *Mesa Verde Constr. Co.*, 861 F.2d at 1128-29. These circuits deferred to the agency’s interpretation despite not only conflicting circuit precedent, but also conflicting Supreme Court precedent. 979 F.2d at 1393-94; 861 F.2d at 1128-29. Once these courts dispensed with Supreme Court precedent, however, they were left with circuit precedents that conflicted with the agency interpretation. 979 F.2d at 1393-94; 861 F.2d at 1128-29. Because it is inappropriate for circuit courts not to follow Supreme Court opinions, *see supra* notes 21, 33, this Note addresses the conflict with circuit, rather than Supreme Court, precedent.

67. Throughout this Note, the author will use the phrase “original court” to refer to the circuit court that drafted the precedential decision on the issue at hand. The phrase “subsequent court” will be used to indicate the court that considered the issue in light of both the agency’s interpretation and the original court’s decision.

68. *See Michel*, 206 F.3d at 262 (implying that the subsequent court would be bound by stare decisis to follow an original court’s statutory interpretation made without deference to the agency). *See also Chevron’s Domain*, *supra* note 16, at 916 (“[T]he previous judicial decision should not be given full stare decisis effect in fixing the meaning of the statute. Instead, it should be given stare decisis effect only for the proposition that the statute admits of multiple interpretations. . .”).

69. *Mesa Verde Constr. Co.*, 861 F.2d at 1136. *See also Chevron’s Domain*, *supra* note 16, at 916-17 (“The fact that the court upheld (or invalidated) the agency’s prior construction of the statute would not, however, be determinative in deciding whether the current interpretation is permissible.”).

70. *Chevron’s Domain*, *supra* note 16, at 916. *See also Reconciling Chevron and Stare Decisis*, *supra* note 8, at 2260.

71. *Viola Indus.*, 979 F.2d at 1128-29; *Mesa Verde Constr. Co.*, 861 F.2d at 1135-36.

72. 979 F.2d at 1393-94; 861 F.2d at 1136. *But cf. TCI West, Inc., v. NLRB*, 145 F.3d 1113, 1116-17 (9th Cir. 1998) (holding that subsequent court need not defer to agency’s statutory interpretation if original court did not exercise such deference). *See also infra* note 129.

73. *Mesa Verde Constr. Co.*, 861 F.2d at 1136. In this case, the NLRB vacillated between positions with respect to unilateral repudiation of pre-hire agreements. *Id.* at 1128. Both the Ninth Circuit Court of Appeals and the United States Supreme Court enforced the NLRB’s interpretation that pre-hire contracts could be unilaterally repudiated. *Id.* The NLRB changed its interpretation prior to *Mesa Verde*. *Id.* Thus, the court faced opposing statutory interpretations, with the NLRB on one side and circuit and Supreme Court precedent on the other. *Id.* Although the circuit court’s circumvention of Supreme Court precedent is plainly unacceptable, *see supra* notes 21, 33, the court also faced circuit precedent. It is this portion of the court’s analysis that this Note considers.

decisions, the courts explained that the original courts had not judicially construed the statute, but rather had deferred to the agency's construction of the statute.<sup>74</sup> Because the original courts did not construe the statute, they did not make binding judicial constructions; therefore, they could not compel the subsequent courts to enforce the same interpretation.<sup>75</sup>

The Ninth Circuit supported its decision with several policy considerations.<sup>76</sup> In addition to achieving uniformity and exploiting agency expertise, the court reasoned that consistent deference to agencies would promote judicial economy and efficiency.<sup>77</sup> The Ninth Circuit explained that deference to the agency and an accompanying ability to overrule judicial precedent promote judicial economy by reducing superfluous appeals.<sup>78</sup> When litigants are certain that the court will defer to

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The Tenth Circuit adopted the same theory. 979 F.2d at 1393-94. Rather than analyze circuit and Supreme Court precedent separately, however, it simply relied on the fact that the circuit court opinions relied on the Supreme Court cases. *Id.* The Supreme Court apparently did not independently construe the statutes, so the circuit court determined they were not binding. *Id.* Because the circuit court precedents relied on the Supreme Court decisions and did not construe the statutes, the same analysis is applicable to circuit court precedent.

The Tenth Circuit also reached a sensitive issue related to application of the *Chevron* doctrine. After the court determined that the NLRB's current interpretation was reasonable and therefore commanded deference, it considered whether the new interpretation should be applied retroactively to an employer who repudiated the contract in reliance on the law as it was at the time of action. *Id.* at 1396. The court decided that retroactive application, in this case, was proper because there would be no "manifest injustice." *Id.* This threat is a major drawback to the *Chevron* doctrine. Retroactivity is an important consideration in resolving the stare decisis-*Chevron* conflict. Unfortunately a detailed discussion of retroactivity is beyond the scope of this Note but see *infra* note 143 for a brief discussion of retroactivity.

74. 979 F.2d at 1393; 861 F.2d at 1134.

75. 979 F.2d at 1394; 861 F.2d at 1130, 1134-35. These cases present an example of how overly strong adherence to the doctrine of stare decisis can be destructive to an agency. In this case, the NLRB changed its interpretation of § 8(f) periodically. 861 F.2d at 1128. Had the issue reached the courts of appeals either later or earlier in time, when the Board interpreted the statute not to allow unilateral repudiation, *id.*, the cases would have been different.

The point at which an agency's interpretation of its statute obtains judicial review is arbitrary and depends only on the litigants' desire (or not) to pursue their remedy. Accordingly, to hold that a court's enforcement of an agency's statutory construction at a particular point in time makes that interpretation the *only* one possible, prevents the agency's ability to function properly. *Id.* at 1135-36. The situation is further complicated when one circuit reviews and enforces a particular agency interpretation, while another circuit enforces a different interpretation. *Id.* The agency itself would have to enforce different laws, depending on the circuit. *Id.*

76. *Id.* at 1135-36.

77. *Id.* See also *supra* notes 49-65 and accompanying text for a discussion of judicial uniformity and agency expertise.

78. *Mesa Verde Constr. Co.*, 861 F.2d at 1136. If litigants are uncertain as to whether the court will ultimately defer to the agency or follow judicial precedent, they are more likely to pursue an appeal to the court of appeals, and then to the court en banc, with hopes that the court en banc will adopt the agency's interpretation. *Id.* The court stated that the panel's consistent adoption of agency interpretations increases the certainty of the law and thereby reduces appeals. *Id.* Litigants who want a change in the law applied by the court would be required to pursue an appeal all the way to the United

agency interpretations, they will not appeal with false hopes that the court will adhere to stare decisis.<sup>79</sup> Furthermore, by allowing a subsequent panel of the court of appeals to overrule a prior panel's decision—so long as both panels' decisions defer to a reasonable agency statutory interpretation—the inherent need for an en banc review is eliminated.<sup>80</sup> The court noted that requiring an en banc review of a decision every time a panel defers to an agency's statutory interpretation is infeasible and could preclude the circuit court of appeals from adopting the agency's interpretation of the statute.<sup>81</sup>

In conclusion, courts that afford *Chevron* deference to federal agencies generally do so in recognition of the policy concerns underlying *Chevron*. Some courts, however, defer to agency interpretations because the controlling judicial decision deferred. This type of analysis respects stare decisis to the extent that the subsequent court's decision is consistent with that of the original court.<sup>82</sup>

## 2. Following Stare Decisis

Stare decisis maintains a prominent position in circuit court opinions despite the Court's *Chevron* mandate. Several courts do not defer to agencies but rather follow judicial precedent regardless of the agency's statutory interpretation.<sup>83</sup> Some courts hold that the law as stated by the court is binding, and later courts do not have authority to change that law even in deference to an agency interpretation of its enabling statute.<sup>84</sup> Other courts take this understanding further.<sup>85</sup> These courts suggest that

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States Supreme Court. *Id.*

79. *Id.*

80. *Id.* If the law mandates that the court defer to a reasonable agency interpretation of its enabling statute, the litigants will not need to pursue an appeal to determine what the appropriate law is. *Id.* Rather, they will know judicial deference is proper, the panel will have the authority to defer, and the court en banc need not review the panel's decision. *Id.*

81. *Mesa Verde Constr. Co.*, 861 F.2d at 1136. This is true because the time constraints of the court do not allow for an en banc review of every panel decision. *Id.* It is possible that the panel's decision would not be reviewed en banc, thereby precluding the panel from departing from the previous interpretation and adopting the agency's current interpretation. *Id.*

82. See *Reconciling*, *supra* note 8, at 2260 (proposing that courts first examine the controlling cases to determine whether the original court deferred to the agency: if so, then the subsequent court should follow its lead and defer to the agency's current interpretation, even if it differs from the interpretation in the controlling case; if not, the court should reconsider that precedent in light of *Chevron* and in light of current circumstances in the agency and society).

83. See, e.g., *Bankers Trust New York Corp.*, 225 F.3d at 1376; *BPS Guard Services, Inc.*, 942 F.2d at 524.

84. *BPS Guard Services, Inc.*, 942 F.2d at 523.

85. *Bankers Trust New York Corp.*, 225 F.3d at 1375-76.

judicial deference to an agency's statutory interpretation violates the separation of powers doctrine.<sup>86</sup>

The Eighth Circuit Court of Appeals rejected the *Chevron* doctrine in favor of stare decisis.<sup>87</sup> In *BPS Guard Services, Inc.*, the NLRB argued that because the court was bound by *Chevron*, it *must* defer to the agency's construction of the National Labor Relations Act, so long as its construction was reasonable.<sup>88</sup> Even though the court agreed with the NLRB's "statements of law,"<sup>89</sup> it found "them inapplicable to the situation before [it]."<sup>90</sup> The court suggested that the NLRB should have made its *Chevron* argument during the original court of appeals case,<sup>91</sup> before the court's decision became "binding precedent."<sup>92</sup> The court strongly stated its interpretation of the *Chevron* doctrine: "*Chevron* does not stand for the proposition that administrative agencies may reject, with impunity, the controlling precedent of a superior judicial body."<sup>93</sup> The court stated that its prior decision on the issue is binding law—binding on all courts and litigants in the circuit.<sup>94</sup> According to the court, a judicial statement is binding law and disagreement from the NLRB carries no legal consequences.<sup>95</sup>

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86. *Id.* at 1376.

87. *BPS Guard Services, Inc.*, 942 F.2d at 523.

88. *Id.* At issue was whether BPS Guard Service's firefighters qualified as "guards" within the meaning of § 9(b)(3) of the National Labor Relations Act. *Id.* at 521.

89. *Id.* at 523.

90. *Id.* The NLRB originally construed § 9(b)(3) of the NLRA not to include BPS's firefighters within the meaning of "guards." *Id.* at 521. The court, reviewing the Board's decision, disagreed with the Board and held that the firefighters were guards for purposes of § 9(b)(3). *Id.* The Board disregarded the court's holding and issued an order in accordance with its own finding that the firefighters did not qualify as guards. *Id.* at 522. Implicit in its order was a *Chevron* argument that the court's decision was invalid because it "conflicted with Board precedent." *Id.* The instant action was BPS's response to the Board's order. *Id.* at 523.

91. *Id.* at 523-24. Other courts of appeals have entertained the idea that agencies have the opportunity to challenge the court's holding before it becomes binding law and that if they do not exercise this right they lose their entitlement to deference. *See, e.g.*, *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1373 (Fed. Cir. 2001).

92. *BPS Guard Services, Inc.*, 942 F.2d at 524. *See also Nat'l Org. of Veterans' Advocates, Inc.*, 260 F.3d at 1373 (noting agency's failure to challenge the court's decision before it became binding law).

93. *BPS Guard Services, Inc.*, 942 F.2d at 523.

94. *Id.* at 524.

95. *Id.* The court of appeals emphasized its understanding of the appropriate positions of the judiciary and agencies. *Id.* In its opinion, the court stated that its decision

is the final decision of the court of last resort in this federal circuit . . . It is the law of the circuit, . . . and its holding on this issue is binding on all inferior courts and litigants in the [Eighth Circuit], including administrative agencies dealing with matters pertaining to this circuit. Furthermore, because Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court, the Board's disagreement with [our decision] is of no legal consequence in this circuit. [Our decision] sets forth the law

The Court of Appeals for the Federal Circuit also rejected the *Chevron* doctrine by holding that judicial deference to agencies violates the separation of powers doctrine.<sup>96</sup> In a case involving the Internal Revenue Service, the Court of Appeals for the Federal Circuit held that because it was bound by circuit precedent, it *could not* follow Treasury Regulations to the contrary.<sup>97</sup> The court reasoned that it would violate the separation of powers for an agency to construe a statute in a manner inconsistent with a “prior definitive court ruling” on the issue.<sup>98</sup> The court denied any conflict between the *Chevron* doctrine and stare decisis.<sup>99</sup> The court stated that *Chevron*, “properly understood,” is a “gap-filling” doctrine.<sup>100</sup> It explained that *Chevron* requires deference to reasonable agency interpretations only when there is a gap to be filled.<sup>101</sup> In the case under consideration, because the court of appeals had previously ruled on the same issue, the court found that no gap existed.<sup>102</sup> Therefore, *Chevron* was inapplicable.<sup>103</sup> The court implied that because it was bound by stare decisis, it could not defer to the Treasury Regulations even if deference was preferable.<sup>104</sup>

In further support of its decision not to defer to the agency, the court cited *Marbury v. Madison* for the “fundamental principle of Constitutional

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of this circuit, and for the Board to predicate orders on its disagreement with [our decision] is for it to operate outside the law.

*Id.* (internal citations and quotation marks omitted).

96. *Bankers Trust New York Corp.*, 225 F.3d at 1376. This case confronted conflicting agency and circuit interpretations regarding the availability of a foreign tax credit. *Id.* at 1369.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* Although the court did not express exactly what kind of “gap” it was referring to, it implied that courts are only required to defer to agency interpretations when either the circuit itself or Congress has not already decided the issue. *See id.* In *Chevron*, the Court itself did use the term “gap,” but clearly used it in reference to a gap left in the statute by Congress, not a gap left in the law by the courts. *Chevron*, 467 U.S. at 843. *See also supra* note 19.

102. *Bankers Trust New York Corp.*, 225 F.3d at 1376.

103. *Id.*

104. *Id.* Interestingly, although the court was firm in its decision not to defer to the agency and offered several reasons why it is inappropriate for a court to defer to an agency, *id.*, the court hinted that it would have readily deferred to the agency if the precedential case had been decided in deference to the agency, instead of being a direct judicial construction of the statute. *Id.* at 1374. Although dicta, this analysis resembles the analysis adopted by the Ninth and Tenth Circuits in *Mesa Verde Construction Company* and *Viola Industries*, respectively. *See supra* notes 66-81 and accompanying text. A subsequent panel in the Federal Circuit has also attached significance to this language in *Bankers Trust New York Corporation. Nat’l Org. of Veterans’ Advocates, Inc.*, 260 F.3d at 1374 n.7 (“*Bankers Trust* made clear that our obligation to follow earlier decisions of this court need not apply at all when those earlier decisions are based on deference to the agency.”) (internal quotations and citations omitted). Although not part of the holding, this statement displays potential for the Federal Circuit to change its position in the conflict between stare decisis and *Chevron* deference.

law”<sup>105</sup> that “[i]t is, emphatically, the province and duty of the judicial department, to say what the law is.”<sup>106</sup> The court reasoned that in executing its judicial duty of saying what the law is, it could not give agencies power that not even subsequent panels of the court have: the power to overrule an “established statutory construction.”<sup>107</sup> According to the court, vesting a judicial power in an agency, especially a power that the court itself does not have, violates the separation of powers.<sup>108</sup> The Federal Circuit cited the Supreme Court’s decision in *United States v. Neal* for the position that once a statute has been judicially interpreted, subsequent agency interpretations are assessed against that “settled law.”<sup>109</sup> The court construed *Neal* to hold that once a circuit court has determined the meaning of a statute, an agency cannot change that meaning in a manner that is inconsistent with the prior judicial construction.<sup>110</sup>

In light of the Supreme Court’s change in the *Chevron* doctrine with respect to itself, and its silence on how circuit courts of appeals should resolve the conflict between circuit precedent and contrary agency statutory interpretations, the federal circuits are not in agreement. Some courts follow *Chevron* while others respect stare decisis.

### III. ANALYSIS

In the absence of clear guidance, some circuit courts follow stare decisis while others defer to agency statutory interpretations.<sup>111</sup> Because both doctrines are useful and important, they both merit a place in the judicial system. Each doctrine has distinct advantages, and circuits have used different doctrines in different cases.<sup>112</sup> Whether they adhere to stare

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105. *Bankers Trust New York Corp.*, 225 F.3d at 1376.

106. *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 176).

107. *Id.*

108. *Id.*

109. *Id.* at 1375 (quoting *Neal*, 516 U.S. at 295).

110. *Id.* The court of appeals augmented the Supreme Court’s rationale. In *Neal*, the Supreme Court reasoned that if it misinterpreted a statute, Congress is able to change the statute. 516 U.S. at 295-96. The court of appeals argued that this rationale is even stronger for the lower courts. *Bankers Trust New York Corp.*, 225 F.3d at 1375. Only one check exists on the Supreme Court, but three checks exist on the courts of appeals: the court en banc, the Supreme Court, and Congress. *Id.*

Despite its strong reasoning, the court did recognize a shortcoming of its decision. *Id.* at 1376. The court realized that two other circuits have considered the same issue, but they deferred to the agency. *Id.* By adhering to stare decisis, the Federal Circuit created inconsistencies between the circuits. *Id.* Undaunted by this inconsistency, however, the court declared that it would “follow our precedent, and leave harmonization of the circuits to the Supreme Court and Congress.” *Id.*

111. *See supra* Part II.B.

112. *Compare Aguirre*, 79 F.3d 315, 317 (2d Cir. 1996) (deferring to reasonable agency statutory

decisis or follow *Chevron* in a specific case, courts hesitate to adopt definitively one doctrine over the other.<sup>113</sup> This hesitation may be a result of the different interests at stake in the cases.<sup>114</sup> This analysis first explores the advantages to and shortcomings of each doctrine when used to resolve the conflict between circuit precedent and agency interpretations. It then examines courts' reluctance to adopt one doctrine over the other and notes a pattern that has emerged from the judicial decisions.

Application of the *Chevron* doctrine has several advantages over stare decisis when a court faces opposing circuit precedent and agency statutory interpretations. First, it does not completely defeat stare decisis because courts tend to at least acknowledge precedential judicial decisions in their determination of whether deference to the agency is appropriate.<sup>115</sup> Second, the *Chevron* doctrine maintains authority in both the agency and the court. Agencies have the authority to regulate their systems, and adjust that regulation as knowledge increases and new developments arise, without judicial interference that can freeze prior, out-dated statutory interpretations.<sup>116</sup> At the same time, the judiciary has the authority to keep the agency within its congressionally defined bounds by determining whether the agency has exceeded the scope of its authority.<sup>117</sup> A final

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interpretation), with *United States v. Pomes-Garcia*, 171 F.3d 142, 147-48 (2d Cir. 1999) (adhering to stare decisis despite opportunity to apply *Chevron* doctrine).

113. See, e.g., *Aguirre*, 79 F.3d at 317; *Joshua*, 976 F.2d at 855; *Viola Indus.*, 979 F.2d at 1392; *Bankers Trust New York Corp.*, 225 F.3d at 1376.

114. For example, uniformity of the law has an overriding importance in a decision directly impacting a person's liberty interest; but a decision impacting the functions of an interdependent regulatory scheme is important to be left to the agency. Compare *Aguirre*, 79 F.3d at 317, and *Joshua*, 976 F.2d at 855, with *Viola Indus.*, 979 F.2d at 1392-93, and *Mesa Verde Constr. Co.*, 861 F.2d at 1135.

115. See, e.g., *Aguirre*, 79 F.3d at 317 (“[A]n agency’s interpretation of the statutes it administers, though entitled in some circumstances to deference as we decide upon the proper interpretation of such statutes . . . cannot compel a court to forgo the principle of *stare decisis* and abandon a construction previously made.”) (citations omitted); *Joshua*, 976 F.2d at 855 (acknowledging court’s responsibility both to defer to agency and to respect stare decisis). See also *Chevron’s Domain*, *supra* note 16, at 916. If the controlling decision deferred to a prior agency interpretation, the subsequent court gives it stare decisis effect to the extent that it deferred to the agency, but not to the extent of the specific agency interpretation previously upheld by the court. *Id.* This type of analysis leaves unanswered the question of what to do when the original court did not defer to the agency’s interpretation. *Reconciling*, *supra* note 8, at 2260, considers this situation. This question is also considered more fully below. See *infra* notes 128-29 and accompanying text.

116. *Chevron*, 467 U.S. at 842, 863-64. See also *Lechmere, Inc.*, 502 U.S. at 547 (White, J., dissenting).

117. *Chevron*, 467 U.S. at 843 n.9. For example, if an agency exercised interpretive powers not delegated to it by Congress or exceeded its delegated authority, the court’s responsibility is to strike the agency’s interpretation as exceeding its authority. See, e.g., *Sierra Club v. U.S. Envtl. Prot. Agency*, 314 F.3d 735, 740-41 (5th Cir. 2002) (holding EPA exceeded scope of its congressionally defined authority).

advantage to the *Chevron* doctrine is that, when courts respect it rather than circuit precedent, the agency's interpretation becomes nationally uniform at once, it need not await Supreme Court review.<sup>118</sup>

The strengths of adhering to *stare decisis* despite a conflicting agency interpretation, although fewer in number than those of *Chevron* deference, are very powerful. *Stare decisis* creates consistency in the law,<sup>119</sup> and it protects people's reliance on the law.<sup>120</sup> Statutory interpretations that are constantly subject to change, as would be true if courts definitively adopted the *Chevron* doctrine, defeat this fundamental characteristic of the judicial system.<sup>121</sup> Consistency in the law protects actors in their reliance on the law as it was at the time they acted.<sup>122</sup> This concern is especially important for individuals whose liberty is at stake, such as the immigrants and criminal defendants discussed earlier.<sup>123</sup>

Notwithstanding their advantages, both doctrines also have shortcomings. The *Chevron* doctrine has two major deficiencies when applied at the expense of circuit precedent. First, *Chevron* deference has the potential to circumvent Supreme Court authority.<sup>124</sup> The Court has made clear its position as the ultimate authority on *all* issues of statutory construction.<sup>125</sup> As shown by the Ninth and Tenth Circuits, *Chevron* deference is easily twisted and can be used to give only partial *stare decisis* effect to Supreme Court decisions and specifically not to its statutory interpretations.<sup>126</sup> Lower courts that apply the *Chevron* doctrine in this manner depart from the Supreme Court's order and intention.<sup>127</sup>

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118. See, e.g., *Mesa Verde Constr. Co.*, 861 F.2d at 1135-36.

119. See LOGIC FOR LAWYERS, *supra* note 7, at 12.

120. See *Reconciling*, *supra* note 8, at 2258.

121. *But see* LOGIC FOR LAWYERS, *supra* note 7, at 8-17 (describing changing nature of law); ESKRIDGE, WILLIAM N., JR., DYNAMIC STATUTORY INTERPRETATION 48-80 (1994) (arguing that statutory interpretation involves change and policy choices).

122. See *Reconciling*, *supra* note 8, at 2244-45 (explaining that agency decisionmaking protects reliance interests).

123. See *supra* notes 51-59 and accompanying text. Although the alternate route, deference to the agency, does not necessarily work to the individual's detriment, see, e.g., *Aguirre*, 79 F.3d 315, consistency is of paramount importance in this context because an actor may have acted differently under a different, or even uncertain, set of consequences.

124. See, e.g., *Viola Indus.*, 979 F.2d at 1394; *Mesa Verde Constr. Co.*, 861 F.2d at 1129-30. See also *supra* note 73.

125. *Neal*, 516 U.S. at 295; *Lechmere, Inc.*, 502 U.S. at 537; *Maislin Indus.*, 497 U.S. at 131.

126. See, e.g., *Viola Indus.*, 979 F.2d at 1393-94; *Mesa Verde Constr. Co.*, 861 F.2d at 1128-29.

127. See, e.g., *Neal*, 516 U.S. at 295; *Lechmere, Inc.*, 502 U.S. at 537; *Maislin Indus.*, 497 U.S. at 131. This rationale not only distorts Supreme Court precedent, it also demands line-drawing depending on how definitively the Supreme Court has spoken. *E.g.*, 979 F.2d at 1394. This approach is overly formalistic in the emphasis it places on the specific language the Court uses in its opinions. Further, this type of quasi-deference invites post-hoc determinations of precedent: If subsequent courts agree with the precedential decision, they can affirm it as binding precedent; if they do not agree with it, they

The second deficiency is that, as it is developing in the circuit courts, the *Chevron* doctrine does not address the situation in which the original court did *not* defer to the agency.<sup>128</sup> The failure to address this situation leaves open the opportunity for a court to refuse to defer on the basis that the original court did not defer to the agency.<sup>129</sup>

The major shortcoming of stare decisis, when circuit and agency interpretations conflict, is the very problem recognized by the *Chevron* Court: It locks the law into place when the law is meant to be dynamic.<sup>130</sup> Agencies are left at the courts' mercy as to their ability to fine-tune statutory interpretations as their knowledge increases.<sup>131</sup> Once a court affirms or re-interprets an agency's construction of its statute, the agency cannot alter that interpretation.<sup>132</sup> The court's decision prevents the agency from fine-tuning its regulatory scheme by freezing the agency's interpretation.<sup>133</sup> The illogic of this type of analysis is emphasized by the arbitrariness of the point in time at which a court reviews the agency's statutory interpretation.<sup>134</sup>

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can circumvent it by saying it was made in deference to an agency. This loose standard allows courts to bypass precedent without directly overruling it.

128. *Mesa Verde Constr. Co.*, 861 F.2d at 1136; *cf. TCI West, Inc.*, 145 F.3d at 1116-17 (holding that a prior, non-deferential judicial opinion construing a section of the NLRA does not require deference from the subsequent court). *See also supra* notes 66-81 and accompanying text.

129. *See TCI West, Inc.*, 145 F.3d at 1116-17. As the result of a disputed vote in a decertification election, TCI West refused to bargain with the union. *Id.* at 1114. When TCI West appealed the Board's decision, the court of appeals faced conflicting circuit and agency interpretations of a section of the NLRA. *Id.* at 1115-17. The NLRB argued that the court of appeals was free to reject judicial precedent and follow the agency's interpretation. *Id.* at 1117. The court disagreed. *Id.* It noted that the original court had not deferred to the agency's interpretation, but rather had construed the statute itself. *Id.* Accordingly, the court of appeals held that it was bound by stare decisis to follow the judicial precedent. *Id.*

Other courts have noted this situation. *See, e.g., Bankers Trust New York Corp.*, 225 F.3d at 1376 (recognizing that a court is not required to defer if the original court did not defer and following judicial precedent at the expense of deference to a reasonable agency interpretation); *Nat'l Org. of Veterans' Advocates, Inc.*, 260 F.3d at 1374 n.9 (same).

130. *Chevron*, 467 U.S. at 842, 863-64.

131. *See, e.g., Mesa Verde Constr. Co.*, 861 F.2d at 1135-36.

132. *See, e.g., Bankers Trust New York Corp.*, 225 F.3d at 1376.

133. *See Mesa Verde Constr. Co.*, 861 F.2d at 1135. *See also Lechmere, Inc.*, 502 U.S. at 547 (White, J., dissenting). This practice has a potential chilling effect on agencies. Due to the intricacy of complex regulatory systems, a change in one area of the system may require accommodating changes in other areas. Accordingly, the experts in the agency must have control over the entire system for it to work properly. *See Chevron*, 467 U.S. at 863 (noting agency's control allows it flexibility). Contrary to this necessity, when a court interprets or confirms an agency's statutory interpretation, the interpretation becomes static. *Id.* at 842. If an adjustment is necessary in the area where the court ruled, the agency cannot make that adjustment. *See Lechmere, Inc.*, 502 U.S. at 536-37. Consequently, a judicial statement on one section of an enabling statute potentially disrupts the functioning of the entire system.

134. *Mesa Verde Constr. Co.*, 861 F.2d 1135-36. A court will review the agency's statutory

Because both *Chevron* and stare decisis are valid and useful, courts are unwilling to adopt firmly one doctrine at the expense of the other. Even courts that establish a doctrine in a specific case tend to leave open the option for future cases.<sup>135</sup> These courts either expressly or implicitly acknowledge that they have a choice in which doctrine they apply.<sup>136</sup>

Despite their apparent choice between the two doctrines, the courts of appeals decisions have generally followed a single path in deciding which doctrine to apply. Courts facing a decision that impacts the internal workings of a regulatory scheme or an individual's liberty interest generally apply the *Chevron* doctrine with the goals of affording the agency flexibility and treating similar cases similarly, respectively.<sup>137</sup> Courts facing a decision that does not affect an individual's liberty interest or that impacts merely a procedural aspect of the agency's system, not an issue affecting the inner workings of the regulatory system, generally adhere to stare decisis.<sup>138</sup>

Because both *Chevron* and stare decisis are useful doctrines, both continue in the judicial system. Courts adopt one doctrine over the other in specific cases, but are reluctant to do so on a broader scale. This practice eliminates all consistency from the law. Despite the emerging pattern of application, litigants are unable to know whether a circuit court of appeals will defer to the agency or follow its judicial precedent.

#### IV. PROPOSAL

When the Supreme Court has announced or confirmed a statutory construction, lower federal courts should adhere to stare decisis and follow that interpretation. In the absence of a Supreme Court interpretation, courts should defer to agencies' reasonable interpretations of their enabling statutes. This resolution to the conflict between stare decisis and *Chevron*

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interpretation if and when a litigant decides to file suit or pursue an appeal. *See supra* note 75.

135. *See, e.g., Aguirre*, 79 F.3d at 317 (holding *Chevron* outweighs stare decisis "in this instance") (emphasis added); *Joshua*, 976 F.2d at 855 (considering both judicial precedent and agency amendments).

136. *Supra* note 135.

137. *See, e.g., Aguirre*, 79 F.3d at 317; *Joshua*, 976 F.2d at 855; *Michel*, 206 F.3d at 262-63; *Schisler*, 3 F.3d at 568. *But cf. Pornes-Garcia*, 171 F.3d at 147 (refusing to defer to agency in construing sentencing guidelines despite direct impact on defendant's liberty). Although the Supreme Court expressly followed stare decisis in *Neal*, 516 U.S. at 295, a case directly impacting the defendant's liberty, this result is appropriate under this standard because Supreme Court decisions necessarily achieve uniformity among the circuits. *See infra* note 144 and accompanying text.

138. *See, e.g., Bankers Trust New York Corp.*, 225 F.3d at 1376; *BPS Guard Services, Inc.*, 942 F.2d at 524. *But cf. MLQ Investors, L.P. v. Pac. Quadracasting, Inc.*, 146 F.3d 746, 748 (9th Cir. 1998) (deferring to agency although only a financial interest at stake, not a liberty interest).

avoids the deceptive circumvention of clearly controlling judicial precedent that occurs in some circuits,<sup>139</sup> and it allows the flexibility necessary to efficiently control regulatory systems.<sup>140</sup> Moreover, although stare decisis promotes consistency in the law,<sup>141</sup> habitual deference to agencies will also promote considerable consistency.<sup>142</sup> When courts regularly defer to agencies, potential litigants will know that the agency's statutory interpretation, not the court's, is binding.<sup>143</sup>

The practical distinctions between the Supreme Court and the lower federal courts support this resolution to the conflict. Because of their different roles in the judicial system, it is not inconsistent for the Supreme Court to follow judicial precedent while lower federal courts defer to agencies. Supreme Court decisions have uniformity, publicity, and finality that are lacking in the lower courts.

The Supreme Court is the ultimate authority in the judicial system. Its interpretations are binding on all circuits and so provide uniformity in the law.<sup>144</sup> The Supreme Court has discretion as to which cases it hears and can give full consideration to each case.<sup>145</sup> The Court is most likely to hear issues that are especially important to the public or on which the circuits are split.<sup>146</sup> Accordingly, cases before the Court are necessarily pressing

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139. See *supra* notes 66, 73.

140. *Chevron*, 467 U.S. at 863. This approach keeps the agencies free to run their systems so long as they do not overstep their congressionally defined boundaries. *Id.* at 843 n.9.

141. LOGIC FOR LAWYERS, *supra* note 7, at 8-17 (discussing changing nature of the common law).

142. See *Reconciling*, *supra* note 8, at 2244-45. Agency pronouncements that command deference involve rather public processes that give potential litigants notice and an opportunity to be heard. See generally RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 7.3, 8.2 (4th ed. 2002). If the agency interpretation changed through regular notice and comment rulemaking procedures, the individuals have notice of the new interpretation prior to their actions and therefore cannot argue that they did not know of the change. See *id.* § 7.3. Similarly, in agency adjudication, individuals have an opportunity to explain why they should not be bound by the new interpretation if it was not enacted prior to their actions. See *id.* § 8.2. Accordingly, through either avenue, individuals either have notice of the rule or have an opportunity to explain why the rule should not apply to them.

143. The public nature of agency lawmaking helps protect individuals' reliance interest and resolve the problem of retroactivity noted in *Viola Industries*. See *Reconciling*, *supra* note 8, at 2244-45. A "retroactive" decision is one that is applied to all cases pending at the time the decision is rendered. RICHARD H. FALLON, JR. ET AL, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 84 (4th ed. 1996). Supreme Court decisions are generally "non-retroactive," applying to the case in which the decision is rendered and all future cases.

144. See *Bankers Trust New York Corp.*, 225 F.3d at 1376 (noting that it is the Supreme Court's responsibility to "harmoniz[e]" the circuits).

145. See Caldeira, Gregory A. & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1114-15, 1122 (Dec. 1988) [hereinafter *Agenda Setting*]. Moreover, the publicity accorded to Supreme Court cases and the briefs submitted by interested organizations contribute to the completeness of the Court's consideration. See *infra* notes 149-50 and accompanying text.

146. *Agenda Setting*, *supra* note 145, at 1114 (finding that conflicts between circuits and between

questions of law that must be settled.<sup>147</sup> These “high conflict” cases allow the Court to settle the law uniformly throughout the United States.<sup>148</sup> Circuit courts of appeals cannot settle an area of law or promote uniformity because their interpretations are not binding outside of their respective circuits.

Moreover, because of the nature of its cases, Supreme Court decisions attract a lot of attention.<sup>149</sup> Interested attorneys and organizations have an opportunity to participate in the litigation.<sup>150</sup> This participation ensures the Supreme Court’s interpretations are fully informed. Circuit courts of appeals cases do not have the publicity and participation of Supreme Court cases and thus are likely not as fully informed.

Finally, the Supreme Court’s ability to settle the law lends its decisions a finality that lower court judgments do not have. Once the Court has interpreted a statute, only Congress or the Court itself can modify that interpretation.<sup>151</sup> The finality of Supreme Court interpretations provides consistency in the law. This consistency safeguards potential litigants’ reliance on the law.<sup>152</sup>

The publicity, full consideration, discretion and ability to settle an area of law found within the Supreme Court lend a finality to its statutory interpretations that is lacking in the lower courts. Because these protections exist only for the Supreme Court, the lower courts have less reason to adhere to *stare decisis* and more reason to defer to agency statutory interpretations than the Supreme Court. Importantly, these characteristics of Supreme Court interpretations also exist for agency statutory interpretations.<sup>153</sup> Agencies, in the process of interpreting

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lower federal courts and the Supreme Court increase the likelihood that the Court will grant certiorari).

147. *Id.* at 1111, 1122.

148. *See, e.g., Neal*, 516 U.S. at 768-69 (describing Supreme Court decisions as producing “settled law”). Interestingly, the *Mesa Verde* court’s approach, by skirting Supreme Court authority, actually inhibits uniformity, despite that court’s purported goal of achieving uniformity. 861 F.2d at 1135. *See also supra* note 49.

149. *See Agenda Setting, supra* note 145, at 1110-11. The Supreme Court hears high-conflict cases or cases of public importance. *Id.*

150. *See id.* at 1110 (explaining traditional opportunities for public participation in Supreme Court litigation).

151. *Neal*, 516 U.S. at 295-96. Moreover, if Congress or the Court changes the interpretation, it nevertheless remains uniform because both the Court and Congress have national jurisdiction. *But cf. ESKRIDGE, supra* note 121, at 58-68 (noting impact of interpreter’s frame of reference on statutory interpretations); Lee Epstein et al., *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395, 396-99 (arguing that a goal of courts is to implement their policy preferences as law). Under these theories, Supreme Court interpretations may be less final than generally believed.

152. *See Reconciling, supra* note 8, at 2244-45 (noting *stare decisis* protects reliance interests).

153. *See Chevron*, 467 U.S. at 865.

statutes, face conflicting policies and therefore must fully consider the issue.<sup>154</sup> Furthermore, their decisionmaking processes necessitate public involvement.<sup>155</sup> Thus, because agency interpretations have the same beneficial characteristics as Supreme Court interpretations,<sup>156</sup> it is appropriate for circuit courts to give them deference despite conflicting circuit precedent.

In summary, deference first to Supreme Court statutory interpretations, and in their absence to agency interpretations, protects the role of the judiciary, allows agencies necessary flexibility, and promotes certainty in the law for potential litigants.

#### V. CONCLUSION

It is desirable and appropriate for federal courts, other than the United States Supreme Court, to defer to reasonable agency statutory interpretations despite conflicting circuit precedent. Deference to agencies promotes uniformity throughout the circuits, allows agencies to control efficiently their regulatory systems, and, when followed consistently, protects litigants' reliance on the law at the time of action.<sup>157</sup> Moreover, regular deference to agencies in the absence of Supreme Court precedent effects an efficient resolution to the current, inconsistent applications of stare decisis and the *Chevron* doctrine.

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154. *Id.*

155. *See generally* PIERCE, *supra* note 142, at §§ 7.3, 8.2 (describing publicity requirements of agency rulemaking and opportunities to be heard in agency adjudication processes, respectively).

156. *Id.*

157. *Reconciling*, *supra* note 8, at 2258.

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