Stare Decisis, Chevron, and Skidmore: Do Administrative Agencies Have the Power to Overrule Courts?

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NOTES

STARE DECISIS, CHEVRON, AND SKIDMORE: DO ADMINISTRATIVE AGENCIES HAVE THE POWER TO OVERRULE COURTS?

Because there is no Judge Subordinate, nor Soveraign, but may erre in a Judgement of Equity; if afterward in another like case he find it more consonant to Equity to give a contrary Sentence, he is obliged to doe it. No mans error becomes his own Law; nor obliges him to persist in it. Neither (for the same reason) becomes it Law to other Judges, though sworn to follow it.

- Thomas Hobbes1

Stare decisis provides some moorings so that men may trade and arrange their affairs with confidence.

- Justice William O. Douglas2

INTRODUCTION

Contrary to the hopes of Thomas Hobbes, expressed in the above quote from his landmark work Leviathan, stare decisis3 has fulfilled the role sketched by Justice Douglas and remained a bulwark of the Anglo-American legal system for centuries. In the latter half of the twentieth century, a new area of law has begun to take form alongside the time-tested pillars of our legal system, arising to deal with the development of the modern administrative state. The

3. Stare decisis is "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).
Supreme Court has responded by creating a muddled and byzantine administrative law jurisprudence that leaves many seminal questions unanswered. One of the foremost of these questions is how the venerable doctrine of stare decisis interacts with the practice of giving deference to administrative agency interpretations of the statutes Congress charges them to administer.

The uncertainty in this area of the law is strikingly illustrated by two quotes. The first is by one of the leading lights of the current Supreme Court and a renowned expert on administrative law, Justice Antonin Scalia. Dissenting in a recent case, Justice Scalia asserted:

I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency—or have allowed a lower court to render an interpretation of a statute subject to correction by an agency.4

In stark contrast is the holding of the Eleventh Circuit in Satellite Broadcasting & Communications Ass'n of America v. Oman.5 Confronted with regulations promulgated by the Copyright Office that directly conflicted with prior circuit precedent, a three judge panel unanimously concluded:

Although the new regulations conflict with our interpretation of the term “cable system” in [NBC v. Satellite Broadcasting Networks], they are neither arbitrary, capricious, nor in conflict with the clear meaning of the statute. They are therefore valid exercises of the Copyright Office’s statutory authority to interpret the provisions of the compulsory licensing scheme, and are binding on this circuit.6

This Note examines Supreme Court decisions addressing stare decisis and administrative agencies, the statutes governing such agencies, and the policy considerations underlying the actions of both the Court and Congress in order to analyze whether

6. Id. at 345.
administrative agencies are able to "overrule" courts in limited settings. More specifically, this Note will consider the effect of post-
Chevron precedents created by application of the recently re-
utilized doctrine of "Skidmore deference" in administrative law.
This analysis leads directly to the conclusion that the Eleventh Circuit's holding in Satellite Broadcasting properly recognized the
existence of an ability, albeit sharply limited, of administrative
agencies to "overrule" judicial precedent, which is particularly
applicable in the case of precedents granting deference under
Skidmore. Specifically, it will be argued that the "overruling"
procedure recognized by both the Eleventh Circuit and Justice
Scalia (in a hypothetical in his Mead dissent) does not pose a
significant threat to the values served by stare decisis and that any
negative effect in this area is far outweighed by the benefits such a
procedure will confer in terms of flexibility in administrative law.

Part I will provide the background information necessary to fully
explore the interaction of the doctrine of stare decisis and the law
governing administrative agencies. Particularly, Section IA will
examine the process of administrative rulemaking by analyzing the
provisions of the Administrative Procedure Act that define and
govern agency rulemaking and judicial review of that process. More
specifically, this section will set out the statutory definition of
rulemaking, and examine Appalachian Power Co. v. EPA,7 a recent
case that has had a significant impact on rulemaking. This section
will also summarize the academic debates surrounding these
definitions and their application. Section IB will present an
overview of the doctrine of stare decisis including judicial and
academic perspectives.

Part II will focus on the development of administrative law
jurisprudence since the Court's landmark decision in Chevron
U.S.A., Inc. v. Natural Resources Defense Council, Inc.8 First,
Section IIA will examine Chevron itself and take note of the
academic debates that surrounded (and continue to surround) the
framework for deference that the Chevron Court established.
Second, Section IIB will examine Maislin Industries, U.S., Inc. v.

7. 208 F.3d 1015 (D.C. Cir. 2000).
Primary Steel, Inc.,9 Lechmere, Inc. v. NLRB,10 and Neal v. United States,11 in which the Supreme Court made often-cited statements about the interaction of stare decisis and the Chevron doctrine. In broad terms, the Court in these cases held that stare decisis trumps the Chevron doctrine of deference to agency interpretations of statutes. Third, Section IIIC will examine the recent line of cases that have revived the pre-Administrative Procedure Act doctrine of "Skidmore deference"12 as an intermediate level of deference between Chevron deference and no deference at all. The case in which Skidmore deference made its modern debut in the High Court was Christensen v. Harris County.13 Just last term, the Court again applied Skidmore in United States v. Mead Corp.14 over the aforementioned lone dissent of Justice Scalia.

Part III will present an in-depth analysis of both the Eleventh Circuit's decision in Satellite Broadcasting and similar cases, and of Justice Scalia's dissent in Mead. Section IIIA will analyze Justice Scalia's Mead hypothetical about administrative agencies overruling courts and his arguments against letting such agencies "overrule" courts. Section IIIB will examine the arguments for allowing agencies to "overrule" precedent presented by the Eleventh Circuit and other courts.

Part IV will conclude, first, that the administrative law jurisprudence of the Supreme Court does not prohibit the procedure utilized by the Eleventh Circuit and described in Justice Scalia's hypothetical because Maislin, Lechmere, and Neal (on which Scalia relied in his Mead dissent) can be properly characterized as dealing solely with the conflict between agency action and stare decisis in the context of pre-Chevron precedents. Second, the Note will conclude that Justice Scalia's ossification argument in his dissent in Mead is only problematic when a court is confronted with a very limited set of circumstances. The public policy perspective values deference to decision making by those most qualified, and this policy underlies the modern administrative state. This policy

militates against mechanically applying a strict and wooden version of stare decisis in administrative law. Finally, this Note will analyze the conflict between this policy and the traditional Marbury v. Madison argument that courts have the final say on the proper interpretation of the laws and conclude that Marbury is of limited impact.

I. BACKGROUND

A. The Administrative Procedure Act

In 1946, Congress produced one of its landmark pieces of legislation when it passed the original Administrative Procedure Act (APA).\textsuperscript{16} It was evident to Congress in the years following the initial massive expansion of the federal administrative state under President Franklin Delano Roosevelt's New Deal that a new framework for overseeing and regulating administrative agencies was needed. By passing the APA, Congress hoped to "set[] a pattern designed to achieve relative uniformity in the administrative machinery of the Federal Government."\textsuperscript{17} A further goal was to "effectuate[] needed reforms in the administrative process and at the same time preserve[] the effectiveness of the laws which are enforced by the administrative agencies of the Government."\textsuperscript{18} For the past fifty-five years, the growing number of administrative agencies have labored to implement and fulfill the goals of the APA.

\textsuperscript{15} 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{17} UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].
\textsuperscript{18} Id. The Attorney General's manual more specifically identifies the basic goals of the APA as follows:

The Administrative Procedure Act may be said to have four basic purposes:

1. To require agencies to keep the public currently informed of their organization, procedures and rules ....
2. To provide for public participation in the rule making process ....
3. To prescribe uniform standards for the conduct of formal rule making and adjudicatory proceedings, i.e., proceedings which are required by statute to be made on the record after opportunity for an agency hearing.
4. To restate the law of judicial review.

\textit{Id.} at 9 (citations omitted).
Agencies have largely done so using the rulemaking structures set out in the APA.

It is important to thoroughly understand the APA-mandated administrative rulemaking processes before moving on because these procedures provide the framework for analyzing most agency actions. First, the APA, in § 551(4), defines a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency ....” Proposed actions by administrative agencies that fall within this definition must be promulgated according to § 553, which sets out specific rulemaking procedures.

Section 553 divides agency action within the § 551(4) definition of “rule” into three categories. The first category includes “interpretive rules, general statements of policy, ... [and] rules of agency organization, procedure or practice ...” which are exempted from the rulemaking procedures set out in the rest of § 553. The second and third categories are comprised of the wide range of agency action that may be termed “legislative rules.” Section 553 divides this broad category into two types of rules, informal and formal, distinguished by the type of procedures agencies must follow to create them. To informally promulgate a rule, the agency must “follow[] a three-step procedure: (1) issuance of public notice of the proposed rule, (2) receipt and consideration of comments from all interested persons, and (3) issuance of the rule, incorporating a

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20. It should be noted that some commentators divide rulemaking under the APA into more than three categories. See, e.g., Peter L. Strauss, The Rulemaking Continuum, 41 DUKE L.J. 1463, 1466-68 (1992). Professor Strauss sets out “four different species of activity that can produce an outcome that fits the definition of ‘rule’ given in section 551(4) ....” Id. at 1466. His taxonomy includes “formal rulemaking,” “informal rulemaking,” “publication rulemaking,” and a catch-all category that includes “the body of materials that fit the APA definition of ‘rule’ ... but that meet none of the procedural specifications of the preceding three classes.” Id. at 1466-68.


22. Legislative rules are often referred to as “substantive rules” as well. See, e.g., ATTORNEY GENERAL'S MANUAL, supra note 17, at 30 n.3 (defining the term “substantive rule” and juxtaposing this concept with “interpretive rule”); see also William Funk, When is a “Rule” a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules, 54 ADMIN. L. REV. 659 (2002) (examining how courts determine what is a legislative rule).
This procedure, commonly referred to as "notice and comment rulemaking," is the primary means of promulgating administrative rules utilized today. As such, this procedure is also the primary focus of this Note. It is, however, important to understand the entire rulemaking scheme set out in the APA.

Formal rulemaking differs from informal rulemaking in the imposition of a further step between the public notice and issuance steps of the notice and comment procedure. This step requires that the agency conduct a formal, on the record hearing before issuing the final rule. Davis and Pierce note: "Formal rulemaking has become increasingly rare. With a few exceptions, agencies [need only] use the informal rulemaking procedure to issue rules that have binding, substantive effect." The "increasingly rare" instances when agencies use formal rulemaking occur when Congress mandates compliance with the procedure in the agency's organic statute.

Despite the relative procedural ease with which rules are promulgated through informal rulemaking, some commentators in the academy have observed that, over time, a system has evolved around these simple procedural requirements that has led to

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24. See id. at 288.
25. Id. The APA specifically recognizes this procedure in § 553(c) stating: "When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection." 5 U.S.C. § 553(c) (2000).
27. Id.; see SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, AMERICAN BAR ASSOCIATION, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 4 (William F. Funk et al., eds., 3d ed. 2000) ("Because few statutes [require it], formal rulemaking is used infrequently. However, numerous agency statutes (often called 'hybrid rulemaking' statutes) do require some specific procedures beyond the basic notice-and-comment elements of informal rulemaking."). This result was largely mandated by the Supreme Court's holding in United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973), that, standing alone, the words "after hearing" did not necessarily trigger the APA's formal rulemaking requirements. See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 215 (2d ed. 2001) (noting that "in the quarter-century since FECR was decided, no statute that does not contain the magic words 'on the record' has been found to require formal rulemaking").
28. An "organic statute" is "[a] law that establishes an administrative agency or local government." BLACK'S LAW DICTIONARY, supra note 3, at 1421.
significant “ossification” of administrative law. The response of administrative agencies to this problem, as identified by a 1993 report by the Carnegie Commission, has been clear—and clearly troubling. The Commission reported that “many agencies today tend to skirt the informal rulemaking process, turning far more frequently than in the past to methods for promulgating policies that are even less formal.”

The D.C. Circuit recently addressed this very problem in Appalachian Power Co. v. EPA. The question in Appalachian Power revolved around an EPA guidance document entitled “Periodic Monitoring Guidance for Title V Operating Permit Programs.” Was the document simply an interpretive rule exempt from the procedural requirements of § 553 and not subject to judicial review, or did it represent an agency attempt to make a substantive rule without conforming with the informal rulemaking procedures mandated by the APA? The plaintiffs in the case, electric power companies and trade associations representing the chemical and petroleum industries, argued that the guidance document at issue was invalid because it imposed requirements on states regarding their operating permit programs under the Clean Air Act, making it a substantive rule promulgated without adherence to § 553. In a strongly worded opinion, the D.C. Circuit agreed, holding that the guidance document was a major substantive

29. In a recent article, Professor Mark Seidenfeld wrote: “The term ‘ossification’ refers to the inefficiencies that plague regulatory programs because of analytic hurdles that agencies must clear in order to adopt new rules.” Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking, 78 TEX. L. REV. 483, 483 (1997).


32. The importance of the United States Court of Appeals for the District of Columbia Circuit cannot be overstated in the field of administrative law. Due to the fact that most government agencies are headquartered in Washington, D.C., the D.C. Circuit has jurisdiction over, and in fact adjudicates, almost all disputes involving the actions of administrative agencies. As one distinguished scholar once noted regarding administrative law: “As a practical matter, the D.C. Circuit is something of a resident manager, and the Supreme Court an absentee landlord.” Antonin Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345, 371.

33. 208 F.3d 1015 (D.C. Cir. 2000).
addition to the prior rule and setting aside the guidance document in its entirety.\textsuperscript{34} The Court expressed significant suspicion of, and frustration with, what it perceived to be agency attempts to circumvent the informal rulemaking procedures required by § 553 of the APA.\textsuperscript{35}

Seeking to clarify the somewhat murky inquiry into what actually constitutes a "legislative rule," the D.C. Circuit stated: "Interpretive rules' and 'policy statements' may be rules within the meaning of the APA ... though neither type of 'rule' has to be promulgated through notice and comment rulemaking."\textsuperscript{36} The court recognized, however, that "[o]nly 'legislative rules' have the force and effect of law."\textsuperscript{37} The court then strictly defined a legislative rule as "one the agency has duly promulgated in compliance with the procedures laid down in the [organic] statute or the Administrative Procedure Act."\textsuperscript{38} The court also indicated its willingness to go beyond the label an agency attaches to a certain interpretation in determining whether agency action is a legislative or interpretive rule, stating, "an agency may not escape the notice and comment requirements ... by labeling a major substantive legal addition to a rule a \textit{mere interpretation}."\textsuperscript{39} This holding confirms that, although the Supreme Court has held that courts may not impose procedural requirements in excess of those set forth in § 553,\textsuperscript{40} those that are

\begin{itemize}
\item[34.] \textit{Id.} at 1028 ("In sum, we are convinced that elements of the Guidance ... significantly broadened the 1992 rule. The more expansive reading of the rule, unveiled in the Guidance cannot stand.").
\item[35.] The court stated:

\begin{quote}
The phenomenon we see in this case is familiar .... Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.... An agency operating in this way gains a large [efficiency] advantage.... The agency may also think there is another advantage—immunizing its lawmaking from judicial review.
\end{quote}

\textit{Id.} at 1020 (citations omitted).
\item[36.] \textit{Id.} at 1021.
\item[37.] \textit{Id.} at 1020 (citing Chrysler Corp. v. Brown, 441 U.S. 281, 302-03 & n.31 (1979)).
\item[38.] \textit{Id.} The court continued its analysis in an accompanying footnote stating, "We have also used 'legislative rule' to refer to rules the agency should have, but did not, promulgate through notice and comment rulemaking." \textit{Id.} at 1020 n.11 (citing Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1110 (D.C. Cir. 1993)). For the purposes of this Note, however, the term "legislative rule" only applies to agency rules promulgated through the traditional notice and comment procedure.
\item[39.] \textit{Id.} at 1024 (emphasis added).
\item[40.] \textit{See} Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 545 (1978) (examining and rejecting the argument that § 553 "merely establishes lower
requirements in § 553 are vigorously policed by the courts. Informal
rulemaking is thus properly the main focus of this Note.
In addition to setting out the procedural requirements for
rulemaking, the APA also provides for judicial review of agency
actions.41 APA § 704 provides that “[a]gency action made reviewable
by statute and final agency action for which there is no other
adequate remedy in a court are subject to judicial review.”42
Building on § 704, § 706 sets out the scope of judicial review of
agency action under the APA.43 These statutory provisions,
however, provide only the starting point for this Note’s discussion
of judicial review of administrative agency action. Much more
important will be the discussion of the Supreme Court’s law in this
area, particularly the doctrine of deference announced in Chevron.44

B. The Basics of Stare Decisis

Another judge-made doctrine central to our legal system is stare
decisis. As Rafael Gely noted in a 1998 article, “Stare decisis is

41. For an interesting argument against any judicial review of agency actions (even that
mandated by the APA), see Frank B. Cross, Shattering the Fragile Case for Judicial Review
of Rulemaking, 85 VA. L. REV. 1243 (1999). Professor Cross argues that “[t]he case for judicial
review of agency rulemaking is based on assumptions that do not withstand scrutiny.” Id.
at 1333. In the end he concludes: “Defenders of judicial review should bear the burden of
proof of justification—proving that the intervention of courts can improve the process.
Experience suggests that this burden cannot be borne successfully.” Id. at 1334.
43. The statute specifically states that:
The reviewing court shall decide all relevant questions of law, interpret
constitutional and statutory provisions, and determine the meaning or
applicability of the terms of an agency action. The reviewing court shall ...
(2) hold unlawful and set aside agency action, findings, and conclusions
found to be -
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in
accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or
short of statutory right;
(D) without observance of procedure required by law....
44. See infra notes 55-66 and accompanying text.
probably the most basic principle of judicial decision-making in the Unites [sic] States.” At the outset of this discussion, therefore, it bears repeating that the term stare decisis refers to “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” The second Justice Harlan penned a more artful explanation of the doctrine and its foundational reasoning in a 1970 case:

Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.

The reasoning behind stare decisis is thus a key factor in understanding the doctrine. The values Justice Harlan identified—predictability, furthering equality and fairness, maintaining institutional prestige, and preserving scarce judicial resources—are frequently identified as the doctrinal underpinnings for stare decisis.

46. BLACK'S LAW DICTIONARY, supra note 3, at 1414. It is important to note, however, that “[s]tare decisis is not an end in itself, but a means to serve important values in the legal system.” Thomas Healy, Stare Decisis as a Constitutional Requirement, 104 W. Va. L. Rev. 43, 121 (2001).
48. Although these are the commonly recognized core values underlying stare decisis, some commentators have expanded on this list. See, e.g., Richard J. Pierce, Jr., Reconciling Chevron and Stare Decisis, 86 Geo. L.J. 2225, 2237 (1997) (listing the following six benefits of stare decisis: “(1) conserving scarce institutional resources; (2) encouraging decisionmakers to exercise foresight in announcing new rules; (3) protecting institutional reputation; (4) reducing variations among decisionmakers; (5) enhancing intertemporal equity; and (6) protecting reliance interests”).
In analyzing the basic framework of this doctrine, commentators have recognized a "three-tiered hierarchy of stare decisis ...." Professor Eskridge describes the structure as follows:

Common law precedents enjoy a strong presumption of correctness. The Court applies a relaxed, or weaker, form of that presumption when it reconsiders its constitutional precedents, because the difficulty of amending the Constitution makes the Court the only effective resort for changing obsolete constitutional doctrine. Statutory precedents, on the other hand, often enjoy a super-strong presumption of correctness.

The Supreme Court has recognized and applied this hierarchical structure, particularly with regard to the distinction between constitutional and statutory stare decisis. For example, in Payne v. Tennessee, the Court held:

[When governing decisions are unworkable or badly reasoned, "this Court has never felt constrained to follow precedent." Stare decisis is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible."]

In stark contrast to the Court's pronouncement about constitutional cases in Payne is the Court's discussion of stare decisis in Patterson v. McLean Credit Union. The Court stated:

50. Id. In the balance of the article, Eskridge lays out a critique of the super-strong presumption of correctness on behalf of statutory precedents and concludes: The super-strong presumption against overruling statutory precedents has never been thoroughly examined by the Court, and its rhetoric ought to be abandoned. In its place, the Court ought to focus on traditional stare decisis concerns—in the precedent's premises or reasoning, the practical operation of the precedent, the fit between the precedent and current statutory and constitutional policy, private and public reliance.
52. Id. at 827-28 (citations omitted).
We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.\textsuperscript{54}

On this rationale, if administrative agency action is analyzed solely as statutory interpretation, stare decisis would seem to be a formidable hurdle for agencies to overcome in implementing policy where controlling judicial precedent exists because the possible universe of agency policy choices would shrink with the announcement of each new precedent. The interaction of stare decisis and administrative law is thus of prime importance and the focus of this Note.

II. THE SUPREME COURT'S ADMINISTRATIVE LAW JURISPRUDENCE

A. The Watershed: Chevron

In 1984, the United States Supreme Court announced a unanimous decision that forever changed the lay of the land in administrative law. In \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.},\textsuperscript{55} the Court set forth the analytical structure all courts must apply when considering whether to defer to an administrative agency's interpretation of the statute Congress charged the agency with administering. In \textit{Chevron} itself, the question was whether the Court should defer to a properly promulgated Environmental Protection Agency rule\textsuperscript{56} interpreting the ambiguous provisions of the amended Clean Air Act. The rule defined a "source" of pollution in such a way that a whole industrial plant could be considered a single source. As the \textit{Chevron} Court stated: "The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices

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\textsuperscript{54} Id. at 172-73.
\textsuperscript{55} 467 U.S. 837 (1984).
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within the same industrial grouping as though they were encased within a single 'bubble' is based on a reasonable construction of the statutory term 'stationary source.'

The Court took full advantage of the opportunity to clarify the question of deference due to administrative agencies. In doing so, it set out the now classic Chevron two-step analysis distinguishing how courts should review agencies' statutory interpretations from the courts' traditional approach to statutory interpretation absent any agency interpretation. In the former situation, the Court stated: "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." The determination of whether Congressional intent has been unequivocally expressed is thus the threshold question. An affirmative answer eliminates a wide range of agency rules promulgated pursuant to the clear intent of Congress from special Chevron review. As the Court noted in a footnote following the above quote: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." The second analytical step put forth by the Court is reached only when Congress has not clearly spoken to the issue at hand.

The second Chevron step consists of a review of the agency action to determine only whether it is a reasonable interpretation of the ambiguous statutory provision. The Court expressed itself very clearly on this issue:

57. *Chevron*, 467 U.S. at 840.
58. *Id.* at 842-43. As Professors Davis and Pierce note, the Chevron Court "created a new two-step test to be applied to all attempts by agencies to give content to the statutes they administer ...." *Davis & Pierce, supra* note 23, § 3.2, at 109 (emphasis added). This conceptualization of Chevron's locus in the judicial review process is buttressed by the fact that the majority opinion in *Chevron* fails to cite or discuss APA § 706.
59. *Chevron*, 467 U.S. at 843 n.9 (emphasis added). Agency action in the face of clear congressional intent must be reviewed pursuant to the default guidelines set forth in APA § 706 to determine whether the agency in question has implemented the clearly expressed congressional intent. *See supra* notes 41-43 and accompanying text (discussing the judicial review provisions of the APA).
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.\(^6\)

The Court further held: "The [reviewing] court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding[;]"\(^6^1\) it need only defer to an agency's reasonable interpretation.\(^6^2\) The \textit{Chevron} two-step analysis thus effectively separated judicial statutory construction in the absence of administrative action from review of administrative agency action for deference.

It is important to briefly identify the values served by the \textit{Chevron} doctrine. Professor Richard J. Pierce, Jr. clearly set out these values as follows:

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

The importance of the values identified by Professor Pierce lies in their usefulness as benchmarks in analyzing outcomes of judicial

\(^6^0\). \textit{Id.} at 843 (footnote omitted).
\(^6^1\). \textit{Id.} at 843 n.11 (citing cases).
\(^6^2\). \textit{Id.} at 843-44.
\(^6^3\). Pierce, \textit{supra} note 48, at 2229.
review and for comparison with the values furthered by stare decisis previously discussed.\textsuperscript{64}

While the importance of the Court's decision in \textit{Chevron} was immediately recognized both by courts and the legal academy,\textsuperscript{65} the last seventeen years have seen an explosion of both jurisprudence and scholarly work on the \textit{Chevron} doctrine.\textsuperscript{66} As stated above, the focus of this Note is the interplay between the doctrine of stare decisis and \textit{Chevron}. As the \textit{Chevron} Court had no occasion to discuss stare decisis, the focus now shifts to the cases following \textit{Chevron} in which the Supreme Court considered how the \textit{Chevron} framework interacts with stare decisis.

B. The Supreme Court's Stare Decisis and \textit{Chevron} Trio: Maislin, Lechmere, and Neal

It became clear in the years following the \textit{Chevron} decision in 1984 that the Supreme Court would at some point have to address the interplay between its \textit{Chevron} two-step analysis and the venerable doctrine of stare decisis. The first case in which the Supreme Court undertook this task was \textit{Maislin Industries, U.S., Inc. v. Primary Steel, Inc.}\textsuperscript{67} In \textit{Maislin}, the Court confronted a dispute concerning Interstate Commerce Commission (ICC) rulemaking proceedings interpreting the Interstate Commerce Act (ICA) to allow carriers to negotiate shipping rates lower than the tariff rates on file with the ICC, effectively circumventing the

\textsuperscript{64} See supra notes 47-48 and accompanying text.

\textsuperscript{65} The importance of \textit{Chevron} to the field of administrative law can be illustrated rather dramatically by the number of times it has been cited in other cases. "Shepardizing" \textit{Chevron} on Lexis produces 1,070 citing decisions in the five year period between 1984 and 1989 immediately following the original \textit{Chevron} decision. When the time frame is expanded to the present, that number rises to 6,575 citing decisions. Academic commentators have also recognized the importance of \textit{Chevron}. See, e.g., Cass R. Sunstein, \textit{Law and Administration After Chevron}, 90 COLUM. L. REV. 2071, 2075 (1990) ("\textit{Chevron} promises to be a pillar in administrative law for many years to come. It has become a kind of \textit{Marbury}, or counter-\textit{Marbury}, for the administrative state.").

\textsuperscript{66} See Thomas W. Merrill & Kristin E. Hickman, \textit{Chevron's Domain}, 89 GEO. L.J. 833, 834 & nn.6-8 (2001) (identifying three major areas of academic commentary on the \textit{Chevron} doctrine and collecting a large sample of major articles in each area). Even a brief review of this body of work is beyond the modest scope of this Note. For the reader interested in delving deeper, the author highly recommends the above-cited article by Merrill and Hickman as an introduction to, and a foundation for further study of the \textit{Chevron} doctrine.

\textsuperscript{67} 497 U.S. 116 (1990).
century old "filed rate doctrine." addressing the interplay of stare
decisis and the chevron doctrine in this case was almost inevitable
because of the ICA's advanced age and litigious history. Due to the
fact that the statute in question was a major piece of legislation
and over 100 years old at the time the Maislin case came before
the Court, there was much relevant Supreme Court precedent
interpreting the ICA. Indeed, the Maislin Court conducted a
thorough review of the venerable line of filed rate doctrine
precedent interpreting the rate-filing requirements of the ICA and
refused to grant Chevron deference to the ICC's Negotiated Rates
policy. Regarding the doctrine of stare decisis, the Court noted the
respect that it "must accord to longstanding and well-entrenched
decisions, especially those interpreting statutes that underlie
complex regulatory regimes." The Court then emphatically stated:
"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." This forceful statement
by the Court in support of a strong presumption of correctness of statutory precedents, even where the
agency's interpretation would be due Chevron deference if there

68. Although the Court in Maislin does not make this clear, it appears that the ICC
adopted the rule in question through the formal rulemaking procedure described above,
making it a formal rule. See supra notes 25-28 and accompanying text. In Maislin, the ICC
had adopted, and subsequently clarified, a rule proposed by the National Industrial
Transportation League (NITL) regarding a relaxation of the strict rate reporting provisions
of the ICA. See NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier
Rates, 3 I.C.C.2d 99 (1986) (announcing the ICC's original decision to adopt the proposed rule
interpreting the ICA); NITL-Petition to Institute Rulemaking on Negotiated Motor Common
Carrier Rates, 5 I.C.C.2d 923 (1989) (clarifying the policy announced in 1986 and providing
guidance on what the Commission considered unreasonable conduct within the scope of the
policy).

69. The ICA was first enacted in 1887. See Interstate Commerce Act, ch. 104, 24 Stat. 379
(Feb. 4, 1887).

70. Maislin, 497 U.S. at 126-31. The Court cited filed rate doctrine cases spanning the
twentieth century and noted in particular that the "classic statement of the 'filed rate
document'" was made in 1915. Id. at 127 (citing Louisville & Nashville R.R. Co. v. Maxwell,
237 U.S. 94 (1915)). Following the review of a century's worth of precedent, the Court
concluded: "For a century, this Court has held that the Act, as it incorporates the filed rate
document, forbids as discriminatory the secret negotiation and collection of rates lower than
the filed rate." Id. at 130.

71. Id. at 131 (quoting California v. FERC, 495 U.S. 490, 499 (1990)).

72. Id.
were no precedent, has formed the basis for the Court's jurisprudence on this issue for the last eleven years. In the next case involving the interaction of stare decisis and the *Chevron* doctrine, *Lechmere, Inc. v. NLRB*, Justice Thomas's majority opinion did not significantly extend the rule laid down in *Maislin*. After noting that "[b]efore we reach any issue of deference to the Board, however, we must first determine whether [the NLRB order at issue] ... is consistent with our past interpretation of § 7 [of the NLRA]," the majority's analysis consisted simply of a direct quote of the holding from *Maislin*. *Lechmere* thus does not represent a significant extension or clarification of the interplay between stare decisis and the *Chevron* doctrine.

The final case in the Court's trio of decisions addressing stare decisis in this context, *Neal v. United States*, does, in contrast to *Lechmere*, represent a major clarification of the relationship between *Chevron* and stare decisis. In *Neal*, the Court considered whether to defer to the United States Sentencing Commission on how to calculate the weight of LSD which conflicted with a prior Supreme Court decision, *Chapman v. United States*. It is important to note before discussing the very clear and unanimous holding in *Neal* that the Court stated in this case that "the Commission does not have the authority to amend the statute we construed in *Chapman*." The Court also stated that "Congress intended the Commission's rulemaking to respond to judicial decisions in developing a coherent sentencing regime ...."

After noting the Commission's limited rulemaking power, the Court held that "[t]he Commission's dose-based method [for

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73. 502 U.S. 527 (1992) (reviewing a decision of the NLRB construing the National Labor Relations Act to allow union organizers to use the parking lot of a store to approach that store's employees for the purpose of unionizing the store).
74. Id. at 536.
75. Id. at 536-37 (quoting *Maislin*, 497 U.S. at 131).
76. For an interesting argument largely based on public policy that *Lechmere* was wrongly decided, see Susan K. Goplen, Note, *Judicial Deference to Administrative Agencies' Legal Interpretations After Lechmere*, 68 WASH. L. REV. 207 (1993).
80. Id. (citation omitted).
determining the weight of LSD] cannot be squared with Chapman." Based on this determination, the Court further stated:

In these circumstances, we need not decide what, if any, deference is owed to the Commission in order to reject 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.

The importance of Neal as a clarification of the law is demonstrated by the fact that the Court then went on to spell out the reasoning behind its holding that stare decisis trumps any deference inquiry. As a general matter, the Court noted that its "reluctance to overturn precedents derives in part from institutional concerns about the relationship of the Judiciary to Congress." Justice Kennedy's opinion for the unanimous Court then laid out the specifics of the Court's rationale:

One reason that we give great weight to stare decisis in the area of statutory construction is that "Congress is free to change this Court's interpretation of its legislation." We have overruled our precedents when the intervening development of the law has "removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." Absent those changes or compelling evidence bearing on Congress' original intent, our system demands that we adhere to our prior interpretations of statutes.

As an interesting coda to a forceful opinion, Justice Kennedy noted that "there may be little in logic to defend the statute's treatment of LSD ...." He then concluded, however, with the observation that "Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case

81. Id. at 294.
82. Id. at 295 (citing Lechmere, 502 U.S. at 536-37 and Maislin, 497 U.S. at 131).
83. Id.
84. Id. (citations omitted).
85. Id.
to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."

Although the thrust of these decisions is clearly the proposition that stare decisis trumps the *Chevron* doctrine, it is important to note that these cases can be distinguished from the main focus of this Note in a number of significant ways. Prior, however, to analyzing the relevant distinguishing features and presenting the case against further application of this line of jurisprudence, the background must be complete. To this end the following discussion will document the Court's recent revival of *Skidmore* deference.

**C. The Revival of Skidmore Deference**

Prior to the passage of the APA in 1946, judge-made common law controlled the field of administrative law. In this context, the Supreme Court, in 1944, decided *Skidmore v. Swift & Co.* The question in *Skidmore* was "what, if any, deference courts should pay to the Administrator's conclusions [regarding what types of work constituted overtime within the Fair Labor Standards Act (FLSA)]." In the end, Justice Jackson concluded:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants

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86. *Id.* at 296.
87. See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 121 (1998) ("The common-law tradition in federal administrative law runs deep. For litigants in the early administrative era (roughly, the first half of this century), the 'catchall' remedy ... was an action in equity. At that time, federal equity law was judge-made.") (footnotes omitted).
88. 323 U.S. 134 (1944).
89. *Id.* at 139. The Administrator, whose conclusions the Court was reviewing, was described as follows:

> [Congress] did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments ... and a knowledge of the customs prevailing in reference to their solution.

*Id.* at 137-38.
may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.90

In Skidmore, the Supreme Court thus mandated a case-by-case review of agency action with the reviewing court's decision to give deference hinging on how persuasively the agency argued and supported its case.

The Supreme Court recently recognized a modern role for this pre-APA doctrine in Christensen v. Harris County.91 The question in Christensen was whether to give Chevron deference to a Department of Labor (DOL) opinion letter stating that an employer could not force employees to take compensatory vacation time in order to avoid paying them compensation otherwise mandated by the FLSA.92 Rejecting the DOL's arguments for unqualified Chevron deference, the Court concluded: "Interpretations such as those in opinion letters—like interpretations in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference .... Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in Skidmore ...."93 The Court through Justice Thomas's opinion, thus arguably revived a middle

90. Id. at 140.
92. Id. at 586. The Court specifically stated:

In an attempt to avoid the conclusion that the FLSA does not prohibit compelled use of compensatory time, petitioners and the United States contend that we should defer to the Department of Labor's opinion letter .... Specifically, they argue that the agency opinion letter is entitled to deference under our decision in Chevron ....

Id.

93. Id. at 587 (citations omitted). This holding aligns the Court with at least one highly respected commentator from the legal academy. In a 1990 article examining which types of agency actions should bind courts and the public, Professor Robert Anthony argued that agency action presented as interpretive rules and policies, or in manuals, guidelines, etc., should receive only Skidmore deference. See Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 YALE J. ON REG. 1, 55-60 (1990).
ground between deference under *Chevron* and no deference at all, in which courts will review agency action for persuasiveness.\(^94\)

In his concurring opinion, Justice Scalia categorically rejected the majority's explicit revival and application of *Skidmore*.\(^95\) Justice Scalia stated rather vehemently: "*Skidmore* deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations (including interpretive regulations, as opposed to 'legislative rules') authoritative effect.... That era came to an end with our watershed decision in *Chevron* ...."\(^96\) The depth of the division on the Court over the issue was further confirmed by the fact that, in dissent, Justice Breyer stated: "I do disagree with Justice Scalia's statement that what he calls 'Skidmore deference' is 'an anachronism.'"\(^97\)

Although the outcome of this deep division regarding the foundational principles of *Chevron* remains unclear,\(^98\) what is clear from *Christensen* is that the idea of *Skidmore* deference will continue to have an impact on the Court's administrative law jurisprudence.

This was proven just last term when the Court again referred to *Skidmore* deference in its holding in *United States v. Mead Corp.*\(^99\)

In *Mead*, the Court considered whether to extend deference to tariff classification rulings of the United States Customs Service that

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94. This reading of the Court's opinion in *Christensen* has been the subject of significant criticism. Compare Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1105-06 (2001) (arguing that "the [Christensen] majority did not correctly apply Skidmore, and that the Court's decision invites ad hocery by lower courts...") and Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 59 (2000) (arguing that "[t]he division of responsibility for statutory interpretation that *Chevron* formalized would be undermined if courts reviewed an agency's informal regulatory interpretation under *Skidmore*") with Merrill & Hickman, supra note 66, at 852-63 (arguing in favor of having both levels of deference).

95. Even apart from the narrow *Skidmore* issue, Professors Merrill and Hickman noted that *Christensen* "reveals deep divisions among the Justices about the basic principles that govern the scope of the *Chevron* doctrine." Merrill & Hickman, supra note 66, at 835.

96. *Christensen*, 529 U.S. at 689 (Scalia, J., concurring in part and concurring in the judgment).

97. *Id.* at 596 (Breyer, J., dissenting). Justice Breyer continued: "*Chevron* made no relevant change. It simply focused upon an additional, separate legal reason for deferring to certain agency determinations, namely that Congress has delegated to the agency the legal authority to make those determinations." *Id.*

98. *See Duffy*, supra note 87, at 189-212 (examining the conflicting views of *Chevron*).

were communicated solely in “ruling letters” issued to importers of goods.\textsuperscript{100} Writing for the eight-Justice majority, Justice Souter ultimately concluded that “classification rulings are best treated like ‘interpretations contained in policy statements, agency manuals, and enforcement guidelines.’ ... They are beyond the \textit{Chevron} pale.”\textsuperscript{101} For the Court, however, this conclusion was not the end of the deference inquiry. Justice Souter’s opinion continued:

To agree ... that Customs ruling letters do not fall within \textit{Chevron} is not, however, to place them outside the pale of any deference whatever. \textit{Chevron} did nothing to eliminate \textit{Skidmore}’s holding that an agency’s interpretation may merit some deference whatever its form, given the “specialized experience and broader investigations and information” available to the agency, ... and given the value of uniformity in its administrative and judicial understandings of what a national law requires.\textsuperscript{102}

Although Justice Souter asserted for the majority that “we hold nothing more than we said last Term in response to the particular statutory circumstances in \textit{Christensen},”\textsuperscript{103} \textit{Mead} included much more discussion of the basic questions the \textit{Christensen} Court did not address. Particularly, \textit{Mead} confirmed that \textit{Skidmore} deference is in fact a separate level of deference and that it represents a calculated, albeit venerable, response by the Court to the complexities of the modern administrative state.\textsuperscript{104} The majority in \textit{Mead},

\begin{itemize}
  \item \textsuperscript{100} \textit{Id.} at 222.
  \item \textsuperscript{101} \textit{Id.} at 234 (citation omitted) (quoting \textit{Christensen}, 529 U.S. at 587). In so holding, the Court to some extent attempted to settle the controversy over the basic foundations of \textit{Chevron} discussed in note 95. As Justice Souter’s majority opinion stated: “We hold that administrative implementation of a particular statutory provision qualifies for \textit{Chevron} deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” \textit{Id.} at 226-27.
  \item \textsuperscript{102} \textit{Id.} at 234 (citations omitted).
  \item \textsuperscript{103} \textit{Id.} at 237-38.
  \item \textsuperscript{104} \textit{See id.} at 235-37. As the Court specifically stated:
  Underlying the position we take here ... is a choice about the best way to deal with an inescapable feature of the body of congressional legislation authorizing administrative action. That feature is the great variety of ways in which the
\end{itemize}
however, in no way addressed the stare decisis implications of Skidmore deference, most likely because any such discussion would be solely obiter dicta based on the procedural posture of the Mead case—the Customs Service action at issue implicated no prior controlling precedent.

In a characteristically forceful dissent, Justice Scalia rejected the majority's position completely. Further, he asserted that the majority's opinion “makes an avulsive change in judicial review of federal administrative action” and predicted “[w]e will be sorting out the consequences of the Mead doctrine, which has today replaced the Chevron doctrine, for years to come.”

Aside from these general observations, Justice Scalia predicted three negative effects of the majority's decision, “protracted confusion,” “an artificially induced increase in informal rulemaking,” and “the ossification of large portions of our statutory law.”

The primary practical effect of Mead, in Justice Scalia's opinion, will be a significant reduction in agencies' power to predict when they will receive deference in exercising their ability to promulgate regulations interpreting the statutes they are charged to administer. As the basis for this conclusion, Justice Scalia asserted: “The Court has largely replaced Chevron ... with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test.”

laws invest the Government’s administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress ....

Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety .... The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference ....

Id. (emphasis added).
105. Id. at 239 (Scalia, J., dissenting) (citation omitted).
106. Id. at 245 (Scalia, J., dissenting).
107. Id. at 246 (Scalia, J., dissenting).
108. Id. at 247 (Scalia, J., dissenting).
109. Id. at 239 (Scalia, J., dissenting) (“What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes ... has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary.”).
110. Id. at 241 (Scalia, J., dissenting).
Second, Justice Scalia asserted that the *Mead* decision will prompt more informal rulemaking. This concern is based on Justice Scalia's estimation that "[a]gencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities ...." Justice Scalia's consideration of the effect that future grants of *Skidmore* deference would have on administrative and statutory law is most interesting. It is to this portion of Justice Scalia's dissent, and more specifically, his concerns about ossification of administrative law and judicial abdication, that this Note now turns.

III. JUSTICE SCALIA AND THE ELEVENTH CIRCUIT: TWO POSSIBLE SOLUTIONS TO THE TENSION BETWEEN STARE DECISIS AND GRANTS OF *SKIDMORE* DEFERENCE

A. Justice Scalia: Stare Decisis Controls

In Part B of his dissent in *Mead*, Justice Scalia considered at length the practical effects of the Court's decision. Most significantly for the purposes of this Note, Justice Scalia discussed the possibility of ossification of various regulatory regimes through the application of *Skidmore* deference and its interaction with stare decisis. Justice Scalia stated the problem as follows:

For the indeterminately large number of statutes taken out of *Chevron* by today's decision ... ambiguity (and hence flexibility) will cease with the first judicial resolution. *Skidmore* deference gives the agency's current position some vague and uncertain amount of respect, but it does not, like *Chevron*, leave the matter within the control of the Executive Branch for the future. Once the court has spoken, it becomes unlawful for the agency to take a contradictory position; the statute now says what the court has prescribed.

111. *Id.* at 246 (Scalia, J., dissenting). It is interesting to note that Justice Scalia's measure of the usefulness and desirability of informal rulemaking is directly in contrast with the position of his former colleagues on the D.C. Circuit, who heavily favor the use of informal rulemaking. *See supra* notes 35-40 and accompanying text.

112. *See Mead*, 533 U.S. at 247-50 (Scalia, J., dissenting).

113. *Id.* at 247 (Scalia, J., dissenting) (citations omitted).
In support of this proposition, Justice Scalia simply cited to *Neal, Lechmere,* and *Maislin* without further explanation.\(^{114}\) Without even mentioning the term, Justice Scalia thus asserted that the stare decisis effect of a court's grant of *Skidmore* deference will create a judicial construction of a statute due, in future cases, the "strong presumption" of correctness the court employs generally when confronted with statutory construction precedents.\(^{115}\)

The most important part of this discussion, however, is the hypothetical Justice Scalia penned to explore agencies' possible procedural responses to avoid the ossification of administrative law that he feared *Mead* would promote. He wrote: "One might respond that such ossification would not result if the agency were simply to readopt its interpretation, after a court reviewing it under *Skidmore* had rejected it, by repromulgating it through one of the *Chevron*-eligible procedural formats approved by the Court today."\(^{116}\) In rejecting this option, Justice Scalia stated:

 approving this procedure would be a landmark abdication of judicial power. It is worlds apart from *Chevron* proper .... [U]nder this view, the reviewing court will not be holding the agency's authoritative interpretation within the scope of the ambiguity; but will be holding that the agency has not used the 'delegation-conferring' procedures, and that the court must therefore *interpret the statute on its own*—but subject to reversal if and when the agency uses the proper procedures.

I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency—or have allowed a lower court to render an interpretation of a statute subject to correction by an agency.\(^{117}\)

Justice Scalia thus set out, in no uncertain terms, a stinging indictment of the possible effects of the interaction of stare decisis and *Skidmore* deference. Others in the federal judiciary have been

\(^{114}\) *Id.* (Scalia, J., dissenting).

\(^{115}\) *See supra* notes 71-73 and accompanying text.

\(^{116}\) *Mead,* 533 U.S. at 247 (Scalia, J., dissenting).

\(^{117}\) *Id.* at 247-49 (Scalia, J., dissenting).
much more receptive to the idea of deferring to agency interpretations that conflict with judicial precedents.

B. The Eleventh Circuit: Limited Agency "Overruling"

In 1994, seven years before Justice Scalia wrote his Mead hypothetical, the Eleventh Circuit approved the exact procedure so roundly criticized by Justice Scalia. In *Satellite Broadcasting and Communications Ass'n v. Oman,* a three judge panel of the Eleventh Circuit considered whether United States Copyright Office regulations interpreting § 111 of the Copyright Act were valid though they conflicted with prior Circuit precedent. The court concluded:

Although the new regulations conflict with our interpretation of the term "cable system" in SBN, they are neither arbitrary, capricious, nor in conflict with the clear meaning of the statute. They are therefore valid exercises of the Copyright Office's statutory authority to interpret the provisions of the compulsory licensing scheme, and are binding on this circuit.

On its face, this holding directly contradicts Justice Scalia's assertion that no court has held that its earlier decision was open to modification by administrative action. It is important to closely examine the procedural posture that led the Eleventh Circuit to this holding in order to determine whether the court's decision can be factually distinguished from the situations that troubled Justice Scalia.

In 1991, the Eleventh Circuit addressed the meaning of § 111 in the context of a copyright infringement action by NBC against a satellite carrier in *NBC v. Satellite Broadcasting Networks (NBC).* The court interpreted the statutory definition of "cable system" under § 111(f) to include satellite carriers, which were thus covered by the compulsory licensing scheme put in place by

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120. *Satellite Broadcasting,* 17 F.3d at 345.
121. 940 F.2d 1467 (11th Cir. 1991).
On this question, the Copyright office had issued a policy statement stating that satellite carriers do not fall within the statutory definition of "cable systems" under § 111(f). In the NBC opinion, the court specifically rejected the Copyright Office's rationale, stating, "we have considered the views of the Copyright Office on the language and legislative history of § 111, but we find those views unpersuasive." After NBC, the Copyright Office reasserted the position it had taken in the policy decision, this time by promulgating a legislative rule through proper notice and comment procedures. Reviewing the meaning of "cable system" again in Satellite Broadcasting, the court was thus faced with the question of whether to grant Chevron deference to an agency interpretation it had earlier declined to follow simply because this time around the agency had used a Chevron-eligible format.

The issue raised in Justice Scalia's Mead dissent thus squarely faced the Eleventh Circuit. In response, the court conducted a careful analysis of the existing law on the subject. The court first analyzed the Copyright Office's authority and then examined whether Chevron or Lechmere was the Supreme Court precedent more directly on point. The court distinguished the situation in Lechmere from the problem in Satellite Broadcasting because the former dealt with a statutory scheme that was explicit on the definition of the term at issue. In contrast, in NBC the Eleventh Circuit had rested its decision "not upon the statute's 'clear meaning,' but rather upon inferences drawn from the statutory

122. Id. at 1470.
123. See Cable Compulsory License: Definition of Cable Systems, 56 Fed. Reg. 31,580 (July 11, 1991). It is important to recognize that this policy decision was an agency action not due Chevron deference because it was merely a statement of policy accompanying a notice of proposed rulemaking that indicated the Copyright Office's intent to issue a future legislative rule interpreting the term "cable system." As such, the policy decision is agency action of the type that the Court in Christensen and Mead held should be analyzed for deference under Skidmore.
124. NBC, 940 F.2d at 1470 n.4. While the Eleventh Circuit did not specify here that it was using a Skidmore analysis, the use of the term "persuasive" points strongly to reliance on an analysis based on the traditional standards identified by Justice Jackson in Skidmore. Id.
125. See 57 Fed. Reg. 3,284 (Jan. 29, 1992) (codified at 37 C.F.R. § 201.17(k)). The Eleventh Circuit also noted that "[t]he Copyright Office is a federal agency with authority to promulgate rules concerning the meaning and application of§ 111." Satellite Broadcasting, 17 F.3d at 347.
scheme and upon our policy determination ...."\textsuperscript{127} The court granted \textit{Chevron} deference to the Copyright Office rule for two other reasons. First, "[a] contrary result would illogically wed [this] circuit to the \textit{SBN} decision, while all other circuits and the Supreme Court would be bound under \textit{Chevron} to defer to the Copyright Office rule."\textsuperscript{128} Second, such a limited deference policy as \textit{Lechmere} dictates would have "create[d] a rush to the courthouse among parties wishing to litigate a statute's meaning before an agency has exercised its broad 'knowledge respecting the matters subjected to agency regulations.'"\textsuperscript{129} The Eleventh Circuit thus refused to use stare decisis as a figleaf to usurp the congressionally delegated authority of the Copyright Office to interpret the statute it administers. By rejecting the heavy reliance on stare decisis of the strictly limited deference doctrine expressed in \textit{Lechmere}, the Eleventh Circuit fulfilled its proper judicial role in the modern administrative state.

In \textit{Satellite Broadcasting}, the Eleventh Circuit thus approved the exact procedure dismissed by Justice Scalia in his \textit{Mead} dissent minus an explicit reference to \textit{Skidmore}. The Supreme Court's specific resurrection of the doctrine in \textit{Christensen} and \textit{Mead} had yet to happen, but \textit{Skidmore} remained viable law in 1994 when the Eleventh Circuit decided \textit{Satellite Broadcasting} because, despite benign neglect by the Supreme Court, the case had never been significantly undercut or specifically overruled.

\textbf{IV. ANALYSIS AND ARGUMENT}

The foregoing discussion set forth the legal landscape now confronting the courts, individuals, and agencies who participate in the creation and application of administrative law. This discussion illustrated the considerable tension and uncertainty regarding the interaction of stare decisis and deference to administrative agencies, particularly in light of the Supreme Court's recent revitalization of \textit{Skidmore} deference. Using the Court's jurisprudence regarding the interaction of stare decisis and the well-
established *Chevron* doctrine as a guide, this section analyzes the unresolved question of how stare decisis and *Skidmore* deference should interact.

Specifically, this section considers possible agency reactions to judicial decisions to withhold *Skidmore* deference, in particular the substantive propriety of agency attempts to "overrule" such judicial decisions. Two possible circumstances exist in which such a situation could arise. First, a court could strike down the agency's rule as "unpersuasive" under *Skidmore* and the agency could then promulgate the rule through a *Chevron*-eligible format.\(^\text{130}\) Second, applying *Skidmore*’s deference framework, a court could uphold the agency's original action and subsequently the agency could attempt to promulgate a rule contrary to its interpretation previously given deference under *Skidmore*. In either case, the agency might be confronted with a reviewing court asserting that its prior decision applying *Skidmore* also was a statutory construction deserving the full presumption of correctness and stare decisis effect applicable to such decisions.\(^\text{131}\)

A reviewing court that chose to eschew the Eleventh Circuit's reasoning in *Satellite Broadcasting* and strike down the new agency interpretation would likely rely on the Supreme Court's decisions stating that stare decisis trumps *Chevron* deference, and the concern with ossification Justice Scalia addressed in his *Mead* dissent.\(^\text{132}\) Many courts and commentators would also likely rely on classic understandings of the role of the federal courts, memorably put forth in *Marbury v. Madison*,\(^\text{133}\) which held that the Constitution vests the courts with the power to interpret the laws. The following section examines each of these arguments and analyzes them in light of the values furthered by both stare decisis and *Chevron*.

\(^{130}\) It is important to note here that the agency is "promulgating" the rule for the first time through the *Chevron*-eligible procedures. In some cases, the rule will *never* have been "promulgated" at all, merely announced or published. *See, e.g., Mead*, 533 U.S. at 223 (examining a Customs Service "ruling letter" that was never "promulgated" but was merely sent to the affected party).

\(^{131}\) *See supra* notes 49-54 and accompanying text for a discussion of this presumption.

\(^{132}\) *See supra* note 108 and accompanying text.

\(^{133}\) 5 U.S. (1 Cranch) 137 (1803). The Supreme Court's oft-quoted *Marbury* holding is: "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177.
A. Stare Decisis and Skidmore

The Supreme Court’s stare decisis precedents, Maislin, Lechmere, and Neal, can be significantly distinguished as addressing a discrete and well-defined subset of cases. Specifically, these cases dealt with conflicts between pre-Chevron judicial statutory interpretations and post-Chevron interpretations of the same statutory provisions by administrative agencies.134 They are therefore not on point to determine the interaction between stare decisis and Skidmore in cases such as Satellite Broadcasting where judicially settled statutory construction is not at issue. These cases do not undercut the limited ability of administrative agencies to overrule attempts by the courts to create a statutory construction in the course of analyzing agency action with Skidmore deference. Maislin, Lechmere, and Neal do not undercut the limited ability of administrative agencies to “overrule” judicial decisions creating statutory meaning in the absence of controlling judicial precedent or Chevron-eligible administrative action.

As the Eleventh Circuit noted in Satellite Broadcasting, the precedential effect of a ruling is minimal when the ruling court did not attempt to address the “clear meaning” of a statute or statutory scheme.135 In cases where a reviewing court is analyzing agency action under Skidmore, the court should evaluate the persuasiveness of the agency action and apply its decision to the facts of the case. The court should, however, resist the temptation to infringe on the expressed intent of the agency to give binding content to the statutory provision at issue. This conception of Skidmore is supported by the Mead Court’s explanation that Skidmore represents a distinct level of deference that is a response to “the great variety of ways in which the laws invest the Government’s administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of

134. See Lechmere, 502 U.S. at 531-39 (discussing conflict); Neal, 516 U.S. at 289-96 (same); Maislin, 497 U.S. at 126-33 (same).
135. See supra notes 118-29 and accompanying text (analyzing the Eleventh Circuit’s opinion in Satellite Broadcasting).
Congress. This, in turn, reflects a very conscious choice by the Court "to tailor deference to variety."

Any judicial statutory interpretation that takes place in such a context should serve only as persuasive dicta for a future court pending further administrative action interpreting the statute. Procedurally, a court initially confronted with such a case should only review the agency action for persuasiveness and defer to, or strike down the agency action. In striking down the agency action, the court may be noting its disapproval of the procedure the agency used, or may be expressing its disagreement with the agency's proffered support for its decision. In either case, by refusing to defer to the agency under Skidmore, the court should merely be seen as flagging the problematic facets of the agency action for further agency review. As such, the only precedential value of the court's decision should be as a guidepost to the agency for tailoring its procedural and substantive choices in formulating policy. After a reviewing court makes a decision to uphold or strike down an agency action under Skidmore, the agency should remain free to revisit the issue and, in effect, overrule the court's decision by creating a binding, procedurally sound legislative rule implementing the agency's choice. The interaction of courts and agencies in this manner would have the added benefits of creating more reliance on the expertise of administrative agencies and increasing public participation in the administrative process.

136. Mead, 533 U.S. at 236.
137. Id.
138. This is permissible under Vermont Yankee as long as the reviewing court confines itself to evaluating whether the agency has followed the basic requirements of the APA. See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 548 (1978) (noting that "nothing ... permitted the court to review and overturn the rulemaking proceeding ... so long as the Commission employed at least the statutory minima ... ").
139. It is important to note here that this approach assists the agency in making the procedural decisions that are firmly within its discretion under Chenery II. See SEC v. Chenery Corp., 332 U.S. 194 (1947). This situation differs somewhat from the Chenery II situation, however, in that under Skidmore the review inquiry is not only into procedure but also the substance and support for the agency action. Chenery II and Skidmore are nonetheless closely related in terms of the philosophy of administrative expertise that animates their deferential treatment of agency decision making. See Ronald J. Krotoszynski, Jr., Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore, 54 ADMIN. L. REV. 735, 739-43 (2002) (discussing the expertise rationale in Skidmore and Chenery II).
B. Analyzing the Force of the Ossification Argument

In either case sketched above giving rise to the interaction of stare decisis and Skidmore deference, Justice Scalia's ossification argument only becomes a problem if the reviewing court overestimates its proper role and attempts to craft a controlling interpretation of the statute. It would be judicial overreaching of the worst kind for a court to assert that it was putting a controlling interpretation on a statute in either case, but particularly after rejecting Skidmore deference. This is because by interpreting or applying the statute it administers, the agency has manifested its clear intent to fulfill the role that Congress assigned to the agency.

For a court to reject the agency’s application or interpretation as “unpersuasive” and to then create a judicial construction on second review of the same policy that can only be overruled by legislative action would usurp the role of the administrative agency. By failing to remand the action to the agency in such situations, the court would effectively remove the agency’s interpretive function and leave it solely with the task of implementing the statute as interpreted by the court. Similarly, holding, on second review, that a prior instance of the court deferring to agency action under Skidmore was controlling or binding precedent would significantly undercut the flexibility sheltered by Chevron and identified by commentators as a virtue of the modern administrative state.140

C. Countering the Marbury Argument

Finally, the Marbury argument regarding the peculiar and exclusive duty of the federal courts to expound the laws of the United States is of limited critical impact in this inquiry. Although it is the duty of the courts to “say what the law is,” it is undoubtedly the duty of Congress to make the laws to be interpreted. In its administrative law jurisprudence, the Court has recognized that the modern administrative state is a result of Congress' realization that it cannot possibly create laws that are

140. See supra note 63 and accompanying text (discussing the values and virtues of the Chevron decision).
141. Marbury, 5 U.S. (1 Cranch) at 177.
particularized enough to be independently effective. Congress thus mandates that administrative agencies fill gaps in the statutory schemes, the administration of which Congress delegated to the agencies.\textsuperscript{142} Thus, as Professor Henry Monaghan forcefully argued in 1983 on the cusp of the \textit{Chevron} revolution, although \textit{Marbury} is important as an administrative law case, it fails to preclude judicial deference to agency action.\textsuperscript{143} Indeed, Professor Monaghan specifically noted that "there has never been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply all of the relevant meaning of statutes. Rather the judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act."\textsuperscript{144} Within this framework, the judiciary fulfills its duty to shape the law when it interprets the outer boundaries of the zones of discretion set by Congress for each administrative agency.

This conception of the modern administrative state led first to the Court's creation of the \textit{Chevron} framework which Professor Cass Sunstein has memorably described as the "counter-\textit{Marbury}[] for the administrative state."\textsuperscript{145} Building on this framework, the current Court has recognized the need for another level of deference to preserve the flexibility and responsiveness of the modern administrative state.\textsuperscript{146} The revival of \textit{Skidmore} deference thus may be viewed as a part of the continuing reappraisal by the Supreme

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\textsuperscript{142} See \textit{Mead}, 533 U.S. at 227-31 (discussing congressional delegation of gap-filling authority to agencies).


\textsuperscript{144} Id. at 33.

\textsuperscript{145} See Sunstein, supra note 65 (stating in full that "\textit{Chevron} promises to be a pillar in administrative law for many years to come. It has become a kind of \textit{Marbury}, or counter-\textit{Marbury}, for the administrative state.").

\textsuperscript{146} See \textit{Mead}, 533 U.S. at 235-39 (discussing the Court's conception of deference as a non-binary inquiry). \textit{Skidmore} deference is especially important in light of the continuing delineation of the contours of the \textit{Chevron} doctrine in cases like \textit{Mead}. Although some critics, notably Justice Scalia and Professor Krotoszynski, maintain that the \textit{Mead} implied delegation test is too broad and easily manipulated, even a mildly principled application of the test based on traditional principles of statutory construction would seem to mark the outer limit of \textit{Chevron} deference. See id. at 241 (Scalia, J., dissenting) ("The Court has largely replaced \textit{Chevron} ... with that test most beloved by a court unwilling to be held to rules ...: th'o'l 'totality of the circumstances' test."); Krotoszynski, supra note 139, at 751 ("The implied delegation prong of the \textit{Mead} test represents a naked power grab by the federal courts.").
Court of the traditional role of the federal courts in light of the complexity of modern government and the expertise of administrative agencies. Allowing administrative agencies a limited opportunity to "overrule" a court's Skidmore reading would work no cataclysmic upset of the American system of government that was not already worked by the Chevron court in 1984.147

CONCLUSION

The tension between the doctrines of stare decisis and judicial deference to administrative agency actions, particularly at the Skidmore deference level, need not be a zero sum game. Instead, courts should pay close attention to the facts of each individual case as signals that indicate what level of deference is needed and how to best serve the values of stare decisis and administrative flexibility. In cases where there is a strong factual basis for applying stare decisis, such as an existing Supreme Court opinion or circuit precedent that interprets the plain meaning of the statute in question, stare decisis should apply and the inconsistent agency interpretation should be struck down. In cases, however, where there is no strong need to follow precedent based on the facts, to do so would make stare decisis an end in itself rather than a tool used to further the values of our legal system. This would be a great impediment to the flexibility of the modern administrative state and a misapplication of the venerable doctrine of stare decisis.

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147. At least one commentator has stated that some of the courts of appeals are reaching the same result by overruling their own precedents. See Ronald M. Levin, Mead and the Prospective Exercise of Discretion, 54 ADMIN. L. REV. 771, 791 n.86 (2002) (citing Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996) and Office of Communication of United Church of Christ v. FCC, 911 F.2d 813 (D.C. Cir. 1990)).