RETHEORIZING PRECEDENT

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ABSTRACT

Does the doctrine of stare decisis support judicial attempts to retheorize dubious precedents by putting them on firmer footing? If it does, can retheorization provide a means for Chevron *to endure as a staple of administrative law notwithstanding serious challenges to its established rationale?*

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INTRODUCTION

The future of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[1] is bound up with a legal phenomenon that is both ubiquitous and enigmatic. That phenomenon is *retheorization*, or the recasting of a prior judicial decision based on a new rationale.

Lawyers and academics retheorize cases all the time. Judges do too. Yet the practice remains disputed. The role of retheorization is part of a broader contest between stability and evolution in the path of the law. At issue is how far today's judges can, and should, go in attempting to preserve a decision they view as flawed. May a judge defer to a precedent on stare decisis grounds even while altering its foundation? Or is retheorization tantamount to reinvention, such that today's court must dispense with the presumption of deference to which precedents generally are entitled?

To isolate the problem of retheorization, this Article focuses on a court in the process of determining whether to uphold or renounce a dubious precedent. As that process is unfolding, the question is not simply how the court's decision will be received by future generations. Of more immediate interest is whether the judges who currently occupy the bench ought to defer to a precedent even if they believe it can only be sustained on a novel rationale. Stare decisis is a doctrine of close cases, and if the new rationale is plausible but debatable, retheorization could end up tipping the scales.

In modern American jurisprudence, among the most intriguing, and potentially impactful, applications of retheorization relates to the *Chevron* doctrine. Efforts to retheorize *Chevron* are legion in the academic literature, and they illustrate how and why judicial decisions are reimagined over time.[2] *Chevron*'s viability is also a topic of debate, and controversy, within the judiciary.[3] If there is a way to retheorize *Chevron* that widens its appeal—making the decision more palatable to those who do not accept its prevailing rationale, which is grounded in assumptions about congressional intent—the future of administrative law might well be altered. But that is only true if retheorization is a valid adjudicative technique.

This Article discusses retheorization both as a general concept and with particular attention to the *Chevron* doctrine. After defining the

1. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
2. *See infra* Part III.C.
3. *See infra* Part III.B.

stakes of the debate over retheorization, the Article examines the ramifications for *Chevron*. It contends that principles of stare decisis support judicial efforts to retheorize *Chevron* in order to preserve the case's rule of decision. Perhaps a given Supreme Court Justice cannot bring herself to accept *Chevron*'s intent-based rationale. Nevertheless, if she views some alternative defense of *Chevron* as plausible, she is well advised to embrace that theory and uphold *Chevron*'s rule in pursuit of a stable, impersonal legal regime.

It is worth noting two questions this Article will not discuss. The first is whether *Chevron* is correct on the merits.[4] The second is whether there is sufficient justification for overruling *Chevron*.[5] These are vital questions, but the project here is exploring the distinct issue of retheorization and what it means for the future of administrative law.

Finally, while the validity of retheorization is relevant across the federal and state judiciaries, this Article focuses on the impact of retheorization at the U.S. Supreme Court, given that tribunal's authorship of, and revisory authority over, the *Chevron* decision.

I. WHY RETHEORIZATION MATTERS

Chevron is often described as having two steps, one relating to whether a statute is clear[6] and the second relating to whether the agency's interpretation is reasonable.[7] The doctrine of stare decisis prescribes a two-step analysis of its own. First comes the question whether a decision is mistaken. Next comes the question whether the decision should be retained despite its flaws.[8] Resolving the first

4. For discussion of challenges to *Chevron*, see *infra* Part III.B.

5. On the possibility of narrowing *Chevron* rather than overruling it or reaffirming it in whole, see Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 964 (2021) (arguing that "the Court should revisit the notion of deferring to statutory interpretations announced by agencies in adjudications"). On the narrowing of precedent as a more general phenomenon, see generally Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014).

6. On the complexity of this threshold step, see, for example, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016) (reviewing ROBERT A. KATZMAN, JUDGING STATUTES (2014)).

7. On the application of *Chevron*'s second step and its implications for agency discretion, see generally Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018).

8. Some judicial opinions describe a different sequence: the Court looks first to norms of stare decisis and finds them sufficiently compelling to obviate the need for resolving whether the precedent under review is correct or incorrect. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were

question only "poses" the second,[9] which brings into play considerations of stability, reliance, humility, and the impersonality that results when Justices view themselves not simply as individuals, but as part of a continuous institution that endures over time.[10]

Within a system of stare decisis, a decision's flaws and its claim to survival present independent questions calling for independent analyses. Sometimes Justices apply the doctrine of stare decisis and conclude that the decision under review must be overruled. Other times, they defer to a decision on stare decisis grounds notwithstanding its shortcomings.

Alongside the questions whether a precedent is correct on the merits and whether it ought to survive despite its flaws, I wish to raise a third question to inform the stare decisis analysis: whether today's Court should entertain the possibility of retheorizing a precedent as a method of preserving it. To that end, this Part explains how the retheorization of precedent can affect the path of the law. The Part begins by discussing retheorization as a general matter before turning specifically to the *Chevron* doctrine.

A. Retheorization as Adjudicative Technique

A commitment to stare decisis "means sticking to some wrong decisions."[11] By design, the doctrine guarantees that some incorrect decisions will remain on the books.[12] At the U.S. Supreme Court, stare decisis requires a "special justification" for overruling precedent, above and beyond the sitting Justices' disagreement with that

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we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.").

9. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 144 (2005) [hereinafter *Confirmation Hearing*] (statement of Hon. John G. Roberts, Jr.) ("It is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question. It just poses the question.").

10. *Cf.* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1711 (2013) ("Sometimes [stare decisis] functions less to handle doctrinal missteps than to mediate intense disagreements between justices about the fundamental nature of the Constitution.").

11. Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015).

12. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) ("[T]o overrule a constitutional precedent, the Court requires something 'over and above the belief that the precedent was wrongly decided.'" (quoting Allen v. Cooper, 140 S. Ct. 994, 1003 (2020))); Kisor v. Wilkie, 139 S. Ct. 2400, 2423 (2019) ("Of course, it is good—and important—for our opinions to be right and well-reasoned. But that is not the test for overturning precedent.").

precedent's reasoning.[13] The special justification might be that the precedent rests on a factual mistake or an assumption that has eroded over time.[14] Or the precedent might have yielded a rule that does not function effectively as a procedural matter.[15]

Importantly, if more controversially, Justices have indicated that a precedent is subject to overruling if it is not just incorrect, but obviously and severely so.[16] This exceptional wrongness might arise from reasoning that today's Justices view as "demonstrably erroneous."[17] Or it might be the product of a precedent's disastrous consequences.[18] Either way, the precedent moves beyond the realm of plausibility into the category of manifest or inordinately prejudicial error. The precedent accordingly is subject to overruling.

Rather than reaffirming or overruling a decision, Justices occasionally recognize a third option: retheorizing the decision to give it a stronger legal and conceptual foundation.[19] A Justice might contemplate retheorization because, while she believes that a decision's rationale is problematic, she sees good reasons for retaining the decision on a different, more persuasive rationale. Alternatively, the Justice might conclude that the decision's rationale is sound, but she might surmise that another rationale would carry more weight with her colleagues.

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13. *See, e.g.*, *Kisor*, 139 S. Ct. at 2422 ("[A]ny departure from the doctrine demands 'special justification'—something more than 'an argument that the precedent was wrongly decided.'" (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014))). *See generally* Randy J. Kozel, *Special Justifications*, 97 TEX. L. REV. 1125 (2019) (examining various ways of understanding the concept of a special justification for overruling precedent).

14. *See, e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2095 (2018) (noting the dramatic changes in the world of online retailing since the relevant precedent issued).

15. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 234 (2008) (noting the relevance of whether a decisional rule has worked properly).

16. *See, e.g.*, *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part) (including among the stare decisis factors "the quality of the precedent's reasoning," and noting that "[a] garden-variety error or disagreement does not suffice to overrule"); Payne v. Tennessee, 501 U.S. 808, 827 (1991) (including among the stare decisis factors whether a prior decision was "badly reasoned"). For an argument that the inquiry into demonstrable or clear error is problematic, see RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 118–21 (2017).

17. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring).

18. *See Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part) (recognizing that the stare decisis analysis includes the question whether "the prior decision caused significant negative jurisprudential or real-world consequences"); *cf.* Citizens United v. FEC, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (noting that if stare decisis were absolute, "segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants").

19. *See infra* notes 33–39 and accompanying text.

In either scenario, the jurisprudential question is how to think about the role of stare decisis during the process of retheorization. Should today's Justices defer to a prior decision even while revising its rationale? Or does the act of updating the original rationale essentially extinguish the precedent, leaving stare decisis with no role to play and requiring the Justices to proceed as if they were resolving a case of first impression?

Retheorization is most salient when the special justification for overruling is the belief that a precedent's rationale is too flawed to accept. When the problem is the glaring inadequacy (as perceived by today's Justices) of a decision's *rationale*, it is worth considering whether the decision's *rule* might still be salvaged on an alternative basis.

An example should clarify the inquiry. In 2018, the Supreme Court addressed the First Amendment implications of compulsory agency fees paid to public sector labor unions.[20] Four decades earlier, the Court had ruled in *Abood v. Detroit Board of Education*[21] that laws requiring public employees to subsidize certain union activities, such as collective bargaining, do not violate the First Amendment.[22] Those laws, the Court explained, were supported by the government's interest in promoting "labor peace"[23] and ensuring that employees who benefit from a union's activities pay their fair share.[24] So long as compulsory fees were used to support activities like collective bargaining, as opposed to "ideological activities" like "the expression of political views," those fees did not violate the First Amendment.[25]

Abood sparked considerable debate over the years, and the Supreme Court called the decision's reasoning into doubt on several occasions.[26] By 2018, it appeared increasingly likely that the Court would take the final step of overruling *Abood* and invalidating laws requiring the payment of agency fees to public sector unions.

Imagine that you are a Justice in 2018 contemplating what to do with *Abood*. You conclude that the decision's stated rationale is

20. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2459–60 (2018).

21. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

22. *Id.* at 232.

23. *Id.* at 224; *see also Janus*, 138 S. Ct. at 2465 (discussing the concept of labor peace).

24. *Abood*, 431 U.S. at 224.

25. *Id.* at 235–36.

26. *See, e.g.*, Harris v. Quinn, 573 U.S. 616, 635 (2014) ("The *Abood* Court's analysis is questionable on several grounds.").

"manifestly erroneous"[27] and utterly untenable. You find the arguments about promoting labor peace entirely unconvincing, and you believe the government's interest in avoiding free riders is plainly inadequate to warrant restricting expressive liberty by compelling financial support of public sector unions. At the same time, you think it is a much closer call whether the *Abood* approach is supported by a different argument—namely, that compulsory fee laws represent a reasonable regulation of speech within public workplaces.[28] You see some merit in the contention that the government has discretion to regulate interactions among its employees, even in ways that diminish expressive liberty, when it acts in a managerial capacity by pursuing operational objectives unrelated to the suppression of speech.[29] Then again, you also see merit in the counterargument that the government's prerogative to manage its workplace does not authorize mandatory fees paid to labor unions.[30]

You are leaning toward accepting the latter argument and concluding that the government's added discretion to manage public workplaces does not encompass compulsory agency fees. But you view the question as close and subject to reasonable disagreement. Moreover, you note that *Abood* has been a feature of American constitutional law for nearly half a century, shaping the expectations of lawmakers, employees, and unions.[31]

The time arrives for you to cast your vote. If the case were one of first impression—if, in other words, *Abood* were not on the books—you would vote to invalidate compulsory fee laws, despite your recognition that there is a plausible argument for upholding them as an extension of the government's authority to oversee public workplaces. But you are not writing on a clean slate. *Abood* is the law of the land and has been for some time. Even though you cannot accept *Abood*'s stated rationale, you would be comfortable voting to retain *Abood* as an application of the Court's public employee speech doctrine.

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27. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (deeming it relevant whether a prior decision is "not just wrong, but grievously or egregiously wrong").

28. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 146–47 (1983) (recognizing the unique rules that determine the constitutionality of restrictions on the speech of public employees).

29. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2492 (2018) (Kagan, J., dissenting).

30. *See id.* at 2472 (majority opinion).

31. *Cf. id.* at 2499 (Kagan, J., dissenting) (contending that the majority's decision to overrule *Abood* "wreaks havoc on entrenched legislative and contractual arrangements").

Although you think the employee speech argument in support of *Abood*'s rule is, on balance, incorrect, you view it as plausible.

The plausibility of this alternative rationale, combined with *Abood*'s status as a longstanding precedent that has engendered significant reliance,[32] leads you to consider voting to retheorize and reaffirm *Abood* as a case involving the regulation of government workplaces. You accordingly must determine whether retheorization is a legitimate judicial technique, or whether the only two options are overruling *Abood* or reaffirming it on its original rationale.

Abood is just one illustration of the implications of retheorization. Other examples abound, and they arise in a variety of contexts and postures. A court might retheorize a line of cases involving the Sixth Amendment's Confrontation Clause to ground them in the Constitution's original meaning.[33] Or a case involving the lawfulness of abortion regulations as driven not by the trimester of pregnancy, but rather by whether the right to abortion has been unduly burdened.[34] Or a case construing Article I's Commerce Clause to depend on whether the law at issue was a standalone provision as opposed to part of a comprehensive statutory scheme.[35] Or a case involving deference to administrative agencies' interpretations of their own regulations as flowing from notions of institutional competence rather than determinations about the best way to discern intended meanings.[36]

Or the Court might receive a request to retheorize decisions asserting various constitutional liberties against the states as drawing on the Fourteenth Amendment's Privileges or Immunities Clause, not its Due Process Clause.[37] Or a request to retheorize decisions

32. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (noting the importance of reliance interests to the stare decisis analysis); *cf.* Dickerson v. United States, 530 U.S. 428, 443 (2000) (observing that the relevant precedent, *Miranda v. Arizona*, 384 U.S. 436 (1966), had "become embedded in routine police practice to the point where [its prescribed warnings] have become part of our national culture").

33. *See* Crawford v. Washington, 541 U.S. 36, 60 (2004) ("Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales.").

34. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 875–77 (1992) (plurality opinion).

35. *See* Gonzales v. Raich, 545 U.S. 1, 23 (2005).

36. *See* Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 GEO. J.L. & PUB. POL'Y 87, 88–91 (2018) (noting this type of argument with respect to *Bowles v. Seminole Rock*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997)).

37. *See* McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) ("In petitioners' view, the Privileges or Immunities Clause protects all of the rights set out in the Bill of Rights, as well as some others . . . .").

permitting the restriction of corporate political advocacy based on concerns about corruption, instead of worries about misuse of the corporate form.[38] Or to retheorize the rules for certain takings claims based on specific features of litigation under 42 U.S.C. § 1983.[39]

In each of these examples, retheorization is part of the conversation about precedent. As the *Abood* episode demonstrates, the impact of retheorization is greatest when three features are present. First, a Justice views the precedent's rationale as deeply and irredeemably flawed. Second, the Justice believes there are one or more alternative rationales for the precedent—that is, rationales the deciding Court did not rely upon—that are plausible, even if ultimately incorrect. And third, the Justice thinks the doctrine of stare decisis counsels retention of the decision if it can be placed on firmer footing. Putting these considerations together yields the following framework:

TABLE 1: OVERRULING VERSUS RETHEORIZING

Source of Rationale	**Perception of Rationale by Sitting Justice**	**Judicial Response**
Actual Rationale Supporting the Decision Under Review	Manifestly Erroneous and Untenable	Overrule the Decision
Alternative Rationale That Could Support the Decision Under Review	Plausible, Even if Incorrect	Retheorize the Decision

When a Justice views a precedent's articulated rationale(s) as so clearly flawed as to foreclose reaffirmance, but when she nevertheless believes there is a plausible, alternative rationale that could support the decision's retention, the validity of retheorization moves to the forefront. The Justice must determine whether stare decisis supports a judicial effort to preserve the decision under review even if that means replacing its rationale—or, rather, whether deference is inappropriate when the Court is engaged in revising a decision's rationale instead of reaffirming the decision wholesale.

38. *Cf.* Citizens United v. FEC, 558 U.S. 310, 356 (2010) (noting the argument that "corporate political speech can be banned in order to prevent corruption or its appearance").

39. *See* Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019) (noting that "[r]espondents have taken a new tack" in defending the precedents under review).

B. Retheorization and the Future of Chevron

The mechanics and validity of retheorization carry important ramifications for the future of the *Chevron* doctrine. We will explore *Chevron*'s rule and rationale in short order, but for now, a brief summary will set the stage.

In *Chevron*, the Supreme Court set forth principles to define the respective roles of the judiciary and the executive in the process of statutory interpretation. When litigation involves an agency's interpretation of a statute it is charged with administering, a reviewing court must begin, unremarkably, by asking "whether Congress has directly spoken to the precise question at issue."[40] If the answer is yes, that is the end of the matter, irrespective of what the agency might believe about the statute's meaning.[41] But when Congress's intent is unclear, the agency's interpretation is often entitled to deference so long as it is reasonable.[42] Judges must defer to the agency's reasonable construction even if they think the agency probably got it wrong.[43] *Chevron* thus furnished "a legal framework used by courts to resolve questions of statutory ambiguity."[44]

Chevron has become a source of considerable controversy. Among those who have challenged the decision are Justices Clarence Thomas[45] and Neil Gorsuch.[46] Likewise, just before he retired, Justice Anthony Kennedy filed a concurrence calling for reconsideration of "the premises that underlie *Chevron* and how courts have implemented that decision."[47] Justice Samuel Alito's dissent in the same case

40. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

41. *Id.* at 842–43.

42. *Id.* at 843. Not all statutes give rise to *Chevron* deference. *See* United States v. Mead Corp., 533 U.S. 218, 229–31 (2001) (identifying circumstances that can suggest the appropriateness of *Chevron* deference, prominently including "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed"); Hickman & Nielson, *supra* note 5, at 936 ("[I]t is especially important now for the bench and bar to recall that not every agency interpretation is eligible for *Chevron* deference.").

43. *See Chevron*, 467 U.S. at 843 n.11.

44. Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 612 (2014).

45. *See* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions.").

46. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2446 n.114 (2019) (Gorsuch, J., concurring in the judgment) (referring to "serious questions . . . about whether [*Chevron*] comports with the APA and the Constitution"); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (contending that "*Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power").

47. Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

referred to *Chevron* as "increasingly maligned," albeit still "good law."[48]

Against this backdrop, two questions emerge from the standpoint of stare decisis. The first is whether *Chevron* is not just incorrect, but so exceptionally problematic as to warrant overruling pursuant to the doctrine of stare decisis—which demands a special justification for any departures from precedent.[49] The second is whether the Justices should investigate alternative rationales for *Chevron* that might support the decision's retention. If retheorization is a legitimate component of the stare decisis analysis, the Justices could properly maintain a presumption of deference to precedent even as they put a faulty decision on firmer footing.

We thus return to the role of retheorization. In assessing the validity of that practice, the starting point is analyzing how a decision's rule and rationale work together to determine precedential effect.

II. THE PROCESS OF RETHEORIZATION

The previous Part introduced the concept of retheorization as a general matter and as applied to the *Chevron* doctrine. I explained how the implications of retheorization can affect a dubious precedent's durability.

If the act of retheorization extinguishes the deference owed to a precedent, a Justice considering whether to retain the precedent on a new rationale should proceed as if she were addressing a case of first impression. Only if the new rationale leads to the best approach on the merits may the precedent survive. Any presumption of continuity disintegrates the moment a Justice concludes that the precedent's articulated rationale is too flawed to accept on its own terms.

If, by contrast, retheorization is allowed to proceed against the backdrop of deference that defines the doctrine of stare decisis, it is appropriate for Justices to consider retaining a flawed precedent on a new rationale—and, in doing so, to operate with a presumption against overruling.

By breaking judicial decisions into their constituent parts, we can better understand how the doctrine of stare decisis attaches to

48. *Id.* at 2121, 2129 (Alito, J., dissenting).

49. *See, e.g.*, *Kisor*, 139 S. Ct. at 2422 ("[A]ny departure from the doctrine demands 'special justification'—something more than 'an argument that the precedent was wrongly decided.'" (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014))).

individual elements as well as the integrated whole. That process yields lessons about the validity of retheorization by adding specificity to the idea of what constitutes a binding judicial decision. Decisional rules and decisional rationales work together to shape a precedent's impact. The two concepts are deeply related, but they are analytically distinct.

A. Rules and Rationales

To retheorize a precedent is to preserve its rule of decision while furnishing a novel justification. Analyzing the impact of retheorization requires separating the precedential effect of decisional rules from the precedential effect of underlying rationales.

Distinguishing rules from rationales is part of a broader inquiry into a precedent's scope of constraint.[50] Some issues of precedential scope are fairly straightforward. A decision's mandate, meaning the court's "formal direction" about how to resolve the dispute before it, is binding.[51] So is the application of a particular legal provision to a contested set of facts. When, for example, the Supreme Court concludes that a red grouper does not qualify as a "tangible object" whose disposal (in an effort to avoid detection of unlawful fishing) is prohibited by 18 U.S.C. § 1519,[52] the same will be true in the next case involving a red grouper. The Court's interpretation of the statutory phrase "tangible object" will command deference and trigger the requirement of a special justification for any overruling in the years ahead.[53]

The same goes for future cases involving the disposal of other types of fish. The conclusion that § 1519's definition of "tangible object"[54] excludes red grouper suggests that the statute must also be

50. *See, e.g.*, Larry Alexander, *Precedential Constraint, Its Scope and Strength: A Brief Survey of the Possibilities and Their Merits*, *in* 3 ON THE PHILOSOPHY OF PRECEDENT 1 (Thomas Bustamante & Carlos Bernal Pulido eds., 2012) (distinguishing precedential scope from precedential strength, with the former defined as "how broadly precedents constrain" and the latter defined as "how strongly they do so"); *cf.* Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 1950 (2017) (contrasting the question "when a case could or should be overruled" with the question whether it "has generated binding law that would even need to be overruled").

51. Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 17 & n.70 (2013).

52. *See* Yates v. United States, 574 U.S. 528, 531–32 (2015).

53. The interpretation will also bind the lower courts, even if they believe that the Supreme Court was incorrect. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (instructing lower courts to leave to the Supreme Court "the prerogative of overruling its own decisions").

54. 18 U.S.C. § 1519 (2018).

interpreted to exclude smallmouth bass. Accepting this jump from red grouper to smallmouth bass illustrates a simple but foundational point: judicial precedents are binding not only in their application of law to fact, but also in the rules of decision they generate.[55]

Matters become more complicated when we search for principles to define the degree of generality at which rules should be characterized. If red grouper and smallmouth bass are not tangible objects under § 1519, what about toads? Snails? Digital photographs? Answering these questions requires identifying the applicable decisional rule. The Supreme Court observed, after considering § 1519 in context as part of the Sarbanes-Oxley Act, that Congress is unlikely to "have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial recordkeeping."[56] That explains the Court's interpretation of the statute to "cover only objects one can use to record or preserve information."[57] The Court's decision thus contains a "rule, as implied by the rationale necessary for the result," that is entitled to deference via the doctrine of stare decisis.[58]

The interaction between the decisional rule and the reasons that support it comes into focus as we move to the time-honored concept of *ratio decidendi*. Generally speaking, the holding of a decision is "the court's determination of the concrete problem before it."[59] The *ratio decidendi*, by comparison, is "a genus-proposition of which the concrete holding is one species or instance."[60] As Justice Gorsuch

55. *See, e.g.*, Frederick Schauer, *On Treating Unlike Cases Alike*, *in* 33 CONST. COMMENT. 437, 438 (2018) (describing the role of precedent in counseling like treatment of cases that are dissimilar in some respects); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 23 (2012) (arguing that a subsequent judge has a duty to treat a rule of precedent as "a general norm" to which his court "has already committed itself").

56. *Yates*, 574 U.S. at 546.

57. *Id.* at 536.

58. Solum, *supra* note 51, at 20.

59. BRYAN A. GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON, DIANE P. WOOD & STEPHEN BREYER, THE LAW OF JUDICIAL PRECEDENT 46 (2016); *see also id.* at 44 (noting that the holding "focus[es] on the legal questions actually presented to and decided by the court" and "constitutes the precedent").

60. *Id.*; *see also* Solum, *supra* note 51, at 22 (describing the *ratio decidendi* as "the rule that is logically implied by the stated reasons necessary to the resolution of the case on the facts before the appellate court and the legal arguments presented by the parties"); *cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1429 (2020) (Alito, J., dissenting) (describing "the narrowest understanding of a precedent as this Court has understood the concept" to mean "[t]he decision prescribes a particular outcome when all the conditions in a clearly defined set are met").

recently noted, the *ratio decidendi* relates to a "judicial decision's reasoning," which "allows it to have life and effect in the disposition of future cases."[61] The term encompasses both decisional rules and decisional rationales,[62] and it continues to play a significant role in shaping the law of precedent.[63]

In some cases, a decisional rule is easy to separate from its underlying rationale. Indeed, one can state countless doctrinal rules in terms that seem independent of underlying justifications. Speech restrictions that discriminate on the basis of content are invalid unless the government satisfies strict scrutiny.[64] A contract is voidable by reason of mutual mistake if the parties made an incorrect assumption that materially affects the deal.[65] Statements like these capture doctrinal rules without delving into the reasons that support them.

To be sure, the underlying rationale is relevant as a tool for guiding a decisional rule's application, particularly in difficult cases.[66] Nevertheless, the rule and rationale remain divisible. That divisibility raises questions about whether decisional rationales ought to receive

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61. *Ramos*, 140 S. Ct. at 1404 (opinion of Gorsuch, J.); *see also, e.g.*, Cap. Traction Co. v. Hof, 174 U.S. 1, 12 (1899) (describing the *ratio decidendi* as "the line of thought pervading and controlling the whole opinion"). By contrast, deference generally does not extend to dicta, meaning "statements untethered to the facts of the case and not presented for adjudication." GARNER ET AL., *supra* note 59, at 47. Yet there are exceptions, as courts (including the Supreme Court) occasionally treat certain types of dicta as carrying elevated import. *See, e.g.*, Kappos v. Hyatt, 566 U.S. 431, 443 (2012) (concluding that although a particular statement "was not strictly necessary" to the holding of the case that contained it, "it was also not the kind of ill-considered dicta that we are inclined to ignore"). This phenomenon is common in the context of vertical stare decisis, with lower federal courts frequently treating Supreme Court dicta with some degree of deference. *See* KOZEL, *supra* note 16, at 81–83.

62. *See, e.g.*, NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 67–68 (2008) ("Judicial reasoning may be integral to the *ratio*, but the *ratio* itself is more than the reasoning, and within many cases there will be judicial reasoning that [is] not part of the *ratio*, but *obiter dicta*.").

63. As noted above, Justice Gorsuch invoked the concept of *ratio decidendi* as defining the scope of precedent. *See Ramos*, 140 S. Ct. at 1404 (opinion of Gorsuch, J.). He quoted scholarship explaining that "[t]he traditional answer to the question of what is a precedent is that subsequent cases falling within the *ratio decidendi*—or *rationale*—of the precedent case are controlled by that case." *Id.* at 1404 & n.54 (quoting Frederick Schauer, *Precedent*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 129 (Andrei Marmor ed., 2012)).

64. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 341 (2010) ("The Court has upheld a narrow class of speech restrictions . . . based on an interest in allowing governmental entities to perform their functions.").

65. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 152 (Am. L. Inst. 1981).

66. *See, e.g.*, Nina Varsava, *How To Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMAN. 62, 93 (2018) ("Judges depend on the justifications behind rules when making determinations as to what rule some case stands for, and also whether a particular rule covers a new case.").

stare decisis effect in their own right. At least in situations where a rule of decision can be articulated independently of its underlying rationale, it is debatable whether precedential force should attach solely to the former, or to the latter as well.

As a matter of existing law, rationales, like rules, are entitled to stare decisis effect. Put differently, a precedent's binding scope includes its rationale and rule alike. Justice Brett Kavanaugh made this point in 2020, noting that "the result and the reasoning each independently have precedential force."[67] Justice Gorsuch agreed in his opinion in the same case.[68] Prior decisions offer similar sentiments, observing that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."[69] Justice Kennedy made much the same point in an early concurrence, linking stare decisis with judicial rules as well as their "explications."[70]

Like decisional rules, underlying rationales play a vital role in shaping the law. Treating those rationales as durable promotes the ideals of stability and impersonality that underlie the doctrine of stare decisis.[71]

B. Doctrine and Theory

The fact that decisional rationales are entitled to stare decisis effect complicates the validity of retheorization as a judicial technique. To replace one rationale with another is to alter precedent in a meaningful way. The reasons offered in support of a judicial decision cannot be swapped out like faulty engine parts.

Yet the question remains whether such alterations are lawful and legitimate if the alternative is an outright overruling, which would jettison a precedent's decisional rule along with its rationale. When a Justice revises a rationale to change the direction in which a rule is

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67. *Ramos*, 140 S. Ct. at 1416 n.6 (Kavanaugh, J., concurring in part); *see also id.* (explaining that "courts are . . . bound to follow both the result and the reasoning of a prior decision").

68. *Id.* at 1404 (opinion of Gorsuch, J.) ("It is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases.").

69. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996).

70. *See* County of Allegheny v. ACLU, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.").

71. *See* KOZEL, *supra* note 16, at 36–49 (describing the values the doctrine of stare decisis serves).

heading, stare decisis demands the presence of a special justification for the departure. What if the prospect of retheorization arises for a different reason? A Justice might conclude that a decision's rationale is untenable, but that the decision may be preserved on stare decisis grounds if it is put on firmer footing. In this situation, the vectors of precedent run in opposing directions, because preserving a decisional rule depends on updating an underlying rationale. Even if a Justice acknowledges that rationales carry precedential effect, she might accept revisions designed to uphold a rule that otherwise is in jeopardy. Utilized in this way, retheorization may support the goals of stare decisis even as it facilitates revision of a decision's rationale; the practice reflects a judicial attempt not to change the law, but rather to preserve it insofar as possible.

These countervailing forces inject complexity into the status of retheorization. And the Supreme Court has shown little appetite for addressing the issue. The Justices occasionally discuss the dynamics of replacing one rationale with another. In 1977, for example, a majority opinion penned by Justice William Rehnquist criticized the dissent for urging the retention of a precedent but "abandon[ing]" its *ratio decidendi*.[72] A few years later, Justice Rehnquist made a similar argument in dissent, criticizing a plurality opinion for "rais[ing] the banner of '*stare decisis*'" even while setting "out in search of a new rationale to support the result reached."[73]

The Court's most intriguing engagement with retheorization occurred in 2010's *Citizens United v. FEC*.[74] *Citizens United* was notable not only because the Justices reconsidered an important precedent, but also because the government made little attempt to defend the precedent on its own terms. The applicable decision, *Austin v. Michigan Chamber of Commerce*,[75] sustained certain restrictions on corporate political advocacy in the face of a First Amendment challenge. Under *Austin*, those restrictions reflected a permissible response to the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."[76] But when the Justices reconsidered *Austin* in

72. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 n.7 (1977).

73. Thomas v. Wash. Gas Light Co., 448 U.S. 261, 291 (1980) (Rehnquist, J., dissenting).

74. Citizens United v. FEC, 558 U.S. 310 (2010).

75. Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990).

76. *See id.* at 660.

Citizens United, the government took a different tack. Rather than focusing on the distorting effects of immense wealth—which, by 2010, appeared unlikely to move a majority of Justices—the government focused its attention on other arguments, such as the contention that corporate political advocacy causes actual and perceived corruption.[77]

Ultimately, the Court overruled *Austin*. Writing for the majority, Justice Kennedy noted that "[w]hen neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished."[78] In other words, at least when it is initiated by the parties to litigation, retheorization "diminish[es]" the force of stare decisis. Yet the majority offered nothing further on retheorization.

Chief Justice John Roberts and Justice John Paul Stevens added their own thoughts about the implications of retheorization, both in abbreviated fashion. To Chief Justice Roberts, the government's effort to retheorize *Austin* took stare decisis out of play. Stare decisis, he explained, is a doctrine of "preservation, not transformation."[79] When a party urges a new rationale upon the Court, its argument carries "no . . . precedential sway," but rather "must stand or fall on [its] own."[80] The Chief Justice linked this conclusion with "the rule-of-law values" underlying the judicial commitment to stare decisis—values that could be jeopardized by embracing novel rationales that transform judicial precedents.[81]

Writing in partial dissent, Justice Stevens saw little difference in whether a litigant chooses to defend a precedent's decisional rule by endorsing the articulated reasons or by proposing an alternative rationale.[82] The choice between reaffirming and overruling a decision belongs to the Court, and that choice ought not depend on the vagaries of litigation strategies. Justice Stevens also looked to considerations of reliance, which play a critical role in the Court's discussions of stare decisis. He posited that "[m]embers of the public . . . often rely on our bottom-line holdings far more than our precise legal arguments."[83] To the extent the Court's commitment to precedent is based on protecting

77. *See Citizens United*, 558 U.S. at 348–49.
78. *Id.* at 363.
79. *Id.* at 384 (Roberts, C.J., concurring).
80. *Id.* at 384–85.
81. *Id.* at 384.
82. *Id.* at 410 (Stevens, J., concurring in part and dissenting in part).
83. *Id.*

settled expectations, Justice Stevens suggested that the focus should be preserving established rules, even if it means revising their conceptual underpinnings.

The Court has not found occasion to elaborate upon these statements in the decade since *Citizens United*. In 2018, a majority noted the "dim view" *Citizens United* took of the government's attempt at retheorization.[84] The following year, the Court accepted the proposition that shifting justifications provide "another factor undermining the force of *stare decisis*."[85] It seems clear enough that some Justices view retheorization as diluting the strength of precedent. Yet the Court has not specified the extent of such dilution.

The Court's brief statements on retheorization indicate that when there is an unusually weak basis for protecting a precedent—or when there is an extraordinarily strong basis for overruling it—today's Justices should dispense with any attempt at saving the precedent by supplying a novel rationale. But diminishing the force of precedent is not the same as removing it altogether. Situations may arise in which a precedent's claim to deference is quite strong because, for example, it has engendered substantial reliance. In those situations, deference might well be appropriate despite any reduction in stare decisis effect brought about by retheorization. More fundamentally, the Court has not engaged the question whether (and when) retheorization provides a legitimate alternative to overruling. Both as a matter of doctrine and as a matter of theory, the status of retheorization remains uncertain.

It is understandable that there should be skepticism about efforts to retheorize precedent. Given that a decision's rationale exerts binding force in future cases, dismissing the articulated rationale can weaken the impersonality and continuity norms that the doctrine of stare decisis works to promote. There is also some difficulty in suggesting that a decision ought to receive deference—which is to say, the benefit of the doubt—while being coupled with a rationale that has never commanded the confidence of a majority of Justices. There is a reasonable argument that once a Justice has decided that she cannot accept a decision's articulated rationale, she should ask herself not whether there is some way to salvage the decision, but what is the most convincing argument on the merits.

84. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2472 (2018).

85. Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019).

Further support for this position comes from the fact that a decision's rationale affects its application. It follows that in some cases, we should expect the replacement of one rationale with another to alter the operation of a decisional rule.[86] In light of that reality, the argument goes, stare decisis has no place in encouraging a Justice to revise a problematic decision's rationale instead of overruling it outright.

These concerns are certainly valid, but their force dissipates when we return our attention to the conditions under which retheorization becomes a live option. The possibility of retheorization arises as an alternative to overruling. The question before the Court is whether to reject the precedent's rule and rationale alike or rather to preserve the former by revising the latter. Moreover, even if retheorization leads to changes in how a rule applies in marginal or exceptional cases, the rule's operation will not be affected in the lion's share of disputes. If the Court had reaffirmed *Austin*, many types of corporate political speech would be subject to regulation irrespective of whether the underlying rationale was based on the distorting influence of accumulated wealth or corruption of the political process. If the Court had reaffirmed *Abood*, agency fees for public sector unions could be constitutionally valid regardless of whether the government's justification in facilitating those fees was preventing free riding or ensuring an orderly and efficient workplace. And, as we will see, many administrative interpretations of statutes would be entitled to deference even if *Chevron*'s articulated rationale were replaced.

As these examples suggest, the goal of retheorization is to preserve *something* instead of *nothing*. The practice reflects a judicial effort to promote legal continuity and to look beyond one's individual preferences to the historic practices of the Court as an institution. It also protects settled expectations that have built up around a rule's operation and practical effects. Viewed against this backdrop, retheorization pushes adjudication in the same direction as the doctrine of stare decisis more generally. It is easy enough to recognize the vindication of stare decisis when the Court defers to a precedent's rule and its rationale. When circumstances take that possibility off the table, retheorization facilitates the maintenance of a stable core—the decisional rule—notwithstanding the inevitability of flux around the rationale.

86. *See, e.g.*, F. Andrew Hessick, *Remedial* Chevron, 97 N.C. L. REV. 1, 5 (2018) (describing ways in which *Chevron*'s rule might be affected by reconceptualizing the doctrine as a limitation on the remedial power of the courts).

III. CAN *CHEVRON* BE RETHEORIZED?

In some cases, retheorization will have little effect on the choice between retaining and jettisoning a precedent. The newly proposed rationale may be so obviously wrong that a majority of Justices would not dream of endorsing it. Or it may be so obviously correct that it will ensure the Court's embrace without any need for deference. Situations like these render the validity of retheorization largely academic. Yet just as stare decisis is most relevant when the scales hang roughly in balance, so, too, is retheorization. If a precedent's articulated reasoning is untenable but there is an alternative rationale that the Justices are debating, whether that latter justification warrants deference becomes a crucial question.

Which brings us to *Chevron*. *Chevron*'s rationale has received its share of criticism in recent years, including from some sitting Justices. If there is an alternative justification for *Chevron* that has wider appeal, it could affect a crucial pathway of modern administrative law.

A. Distilling Chevron*'s Rationale*

Chevron's decisional rule and motivating rationale are fairly easy to separate, at least as a threshold matter. The case's rule of decision provides that a reviewing court must begin by asking whether the statute at issue clearly resolves the pending dispute.[87] If the answer is yes, the court must follow the statute's command.[88] If the answer is no, the court often must defer to the interpretation of an agency charged with administering the statute, so long as the agency's interpretation is reasonable.[89] There is a great deal of nuance, of course, but this is the rule in basic terms.

As for the rationale behind the rule, the *Chevron* Court noted administrative agencies' subject matter expertise as well as their political accountability.[90] But the core justification, as reflected in *Chevron* itself and confirmed by subsequent cases, is grounded in congressional intent.[91] What might appear to be statutory ambiguities, the Court explained, are better understood as "legislative

87. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

88. *Id.* at 842–43.

89. *Id.*

90. *See id.* at 865; Gluck, *supra* note 44, at 610 ("[T]he Court announced *Chevron* with a hodgepodge of justifications . . . .").

91. *See* Gluck, *supra* note 44, at 610 ("[T]he Court . . . has explicitly re-grounded *Chevron* in congressional intent.").

delegation[s]," albeit of the "implicit" rather than "explicit" variety.[92] Whether Congress "intentionally" left an issue to be addressed by the agency or did so "inadvertently,"[93] judges must interpret the resulting gap as a delegation of authority to the executive branch. In recent years the Court has underscored that *Chevron*'s animating force is the primacy of congressional intent, emphasizing the decision's interpretive "presumption that Congress . . . desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[94]

Chevron thus revolves around an interpretive inference. When judges consider a statute and encounter ambiguity surrounding the matter in dispute, they must conclude that Congress meant to allocate discretion to the agency rather than the courts. The corollary is that judges are forbidden from construing statutory ambiguity any other way when they confront statutes that fall within the scope of *Chevron*'s rule. Judges cannot conclude that an ambiguity reflects a congressional trade-off or oversight calling for judicial resolution. Per *Chevron,* the Supreme Court has already told future courts which inference to draw from ambiguity, and it has done so on a categorical basis.[95] The *reason* why courts must defer to agencies is, at base, because that is what Congress intended. The *rule* that flows from this reason is the familiar two-step, which searches first for statutory clarity and then, where such clarity is lacking, prescribes deference to reasonable administrative interpretations.

B. Challenging Chevron*'s Rationale*

Having distinguished *Chevron*'s decisional rule from its supporting rationale, we are in position to take a closer look at

92. *Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.").

93. *Id.* at 865.

94. *See* United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 488 (2012) ("*Chevron* and later cases find in unambiguous language a clear sign that Congress did *not* delegate gap-filling authority to an agency; and they find in ambiguous language at least a presumptive indication that Congress did delegate that gap-filling authority."); United States v. Mead Corp., 533 U.S. 218, 229 (2001) (describing Congress's expectation that the relevant agency is empowered to exercise "its generally conferred authority to resolve a particular statutory ambiguity"); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001) ("The Supreme Court in recent years has endorsed the notion that *Chevron* rests on implied congressional intent.").

95. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (describing the categorical nature of the *Chevron* approach).

criticisms of *Chevron*. The goals in doing so are to discern the source of dissatisfaction and determine whether any alternative rationales might have greater appeal.

A prominent challenge to *Chevron* takes direct issue with the Court's intent-based rationale. This challenge casts doubt on the premise that congressional ambiguity must be understood as a delegation of interpretive authority to administrative agencies.[96] There is, the argument goes, no basis for drawing such a conclusion. As then-Judge Gorsuch asked several years ago, "where exactly has Congress expressed" the intent to "'delegate' its 'legislative authority' to the executive to make 'reasonable' policy choices"?[97] He cautioned that "[t]rying to infer the intentions of an institution composed of 535 members is a notoriously doubtful business under the best of circumstances," and drawing such inferences from nothing more than silence makes matters worse.[98] Moreover, the Administrative Procedure Act ("APA") charges courts with "interpret[ing] . . . statutory provisions."[99] This enacted language arguably reflects Congress's intention that courts should "overturn agency action inconsistent with [judicial] interpretations."[100]

That is where the prospect of retheorization comes in. A Justice who is not convinced that *Chevron* properly captures congressional intent still may be reluctant to repudiate the decision's rule in light of other factors, including its prominence, its citation by numerous opinions,[101] and the reliance it has engendered.[102] Dismissing such a

96. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring).

97. *Id.*

98. *Id.*; *see also* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 798 (2010) ("The conditions under which ambiguity arises support the conclusion that Congress does not intend to delegate interpretive power to agencies whenever a statute is ambiguous."); Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 562 (2009) (noting the "wide range of legal scholars" who "have characterized the congressional delegation rationale for *Chevron* as a fiction").

99. 5 U.S.C. § 706 (2018).

100. *See Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 195 (1998) (discussing the "tension between *Chevron* and Section 706").

101. *See, e.g.*, Gluck, *supra* note 44, at 612 ("[*Chevron*] is the most cited administrative law case in history . . . .").

102. *See, e.g.*, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 996 (2013) (discussing *Chevron*'s prominence within the legislative branch);

pivotal decision might strike some Justices as creating tension with an institutional commitment to continuity and impersonality. But if there were an alternative explanation for *Chevron*—one that rested not on inferences about congressional intent but instead on other considerations—those Justices might be intrigued.[103]

The role of retheorization is different for those who deem *Chevron* to be unconstitutional. Some critics contend that, irrespective of whether *Chevron*'s assumption about congressional intent is accurate, the legislative branch may not circumvent the judiciary by giving agencies the authority to resolve statutory ambiguities.[104] The claim is that such delegation runs afoul of Article I, which vests legislative power in Congress, not the executive.[105] The delegation also creates potential problems under Article III by "wrest[ing] from Courts the ultimate interpretive authority to 'say what the law is.'"[106] Understood against this backdrop, *Chevron* undermines the ability of "independent courts" to "declar[e] the law's meaning" and serve as a meaningful check on the executive.[107]

For those who find these constitutional arguments convincing, *Chevron*'s susceptibility to retheorization is beside the point. A Justice who believes that *Chevron*'s rule is irredeemably unconstitutional and that considerations of stare decisis are not powerful enough to carry the day need not dwell on the legitimacy and mechanics of retheorization.[108] But for those who see no inherent constitutional problem with the *Chevron* rule—as well as those who see the constitutional question as close enough to be subject to reasonable

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Hessick, *supra* note 86, at 2 ("Since it was decided in 1984, *Chevron* has been invoked in thousands of judicial decisions, and today it regularly underlies policy decisions made by Congress and agencies.").

103. There are other potential bases for challenging *Chevron* beyond those discussed above. For one account, see Beermann, *supra* note 98, at 782–84.

104. Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

105. U.S. CONST. art. I, § 1; *see also, e.g.*, Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1199 (2016) ("[A]gency interpretation is unconstitutional to the extent it is an exercise of subdelegated legislative power.").

106. *Michigan*, 135 S. Ct. at 2712; *see also* Hamburger, *supra* note 105, at 1205 ("When a judge defers to an agency's interpretation of a statute, he defers to its judgment about what the law is, and he thereby violates his office or duty to exercise his own independent judgment.").

107. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). For an analysis of potential challenges to *Chevron* on separation-of-powers grounds, see Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 26–27 (2017).

108. The same goes for other types of constitutional challenges, such as the contention that *Chevron* raises due process concerns. *See* Hamburger, *supra* note 105, at 1211–13.

debate—it is possible to uphold the rule on an alternative basis even if the case's prevailing, intent-based rationale is untenable.[109] This distinction suggests the need for precision in examining the grounds for challenging debatable precedents, in the context of administrative law and as a general matter. Some arguments (such as unassailable constitutional arguments) against a given precedent may be dispositive, but others leave open the possibility of preservation through retheorization.

C. Replacing Chevron*'s Rationale*

Even if one views *Chevron*'s intent-based rationale as untenable, the possibility remains that there are other, more persuasive routes to something like the two-step *Chevron* rule. Exploring those routes initiates the process of retheorizing *Chevron* in pursuit of firmer footing.

There is no shortage of alternative accounts of *Chevron*. For decades, scholars have advanced justifications for the decision that minimize or avoid the need to draw inferences about congressional intent. The pages that follow offer a brief sampling. The point is not to compile every possible argument in support of *Chevron*'s rule. My aim is to illustrate the process of seeking a sounder and more acceptable justification for a prominent Supreme Court precedent.

1. Chevron *as Statutory Interpretation.* The simplest defense of *Chevron*'s rule is as a straightforward interpretation of the text of the APA.[110] A Justice might read the APA to imply that in situations of statutory ambiguity, courts should defer to reasonable constructions issued by the agency administering the statute.[111] Of course, this argument is open to challenge as a textual matter. Even so, it is useful in illustrating the dynamics of retheorization.

If a Justice were to view *Chevron*'s rule as a plausible interpretation of the APA, and if she were to conclude further that

109. On distinctions among potential challenges to *Chevron*, see Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 885 (2020) (discussing the argument that "*Chevron* is wrong not because (or not *just* because) it departs from the general understanding of judicial duty, but because it departs from the particular duty to attend to additional, particular positive law on judicial review, namely the APA").

110. *See* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1615 (2019) ("*Chevron* is not incompatible with the original meaning of the governing provision of the Administrative Procedure Act . . . .").

111. 5 U.S.C. § 706 (2018).

preserving the rule is desirable on grounds of stability, continuity, and impersonality, she might be inclined to uphold *Chevron* as the product of straightforward statutory interpretation. Congress could enact a statute providing that whenever an agency is charged with administering a statute, courts should defer to the relevant agency's reasonable interpretation of ambiguous language. A court that interpreted such a statute to mean what it says would not be relying on categorical assumptions about congressional behavior. It would be accepting and respecting Congress's instructions. Whether Congress is wise to enact statutes that cut across numerous disputes and contexts has no bearing on the judicial calculus. This same analysis would apply if a Justice construed the APA as expressing Congress's intention to enact something like the *Chevron* rule.

2. Chevron *as Remedial Principle.* Rather than approaching *Chevron* as the product of statutory interpretation, one could reimagine the decision as the application of remedial principles. In a recent article, Professor Andrew Hessick reconceptualizes *Chevron* not as requiring judicial deference to interpretations by agencies, but rather as limiting courts' remedial powers. Courts "have the power to interpret laws de novo," but their authority to vacate is limited to unreasonable agency actions.[112] This theory does not presume to tell courts which inferences they must draw from ambiguous statutory language. Courts would interpret statutes de novo, unencumbered by wide-ranging assumptions about tacit congressional intent. *Chevron*'s impact would be in guiding remedial choices once the interpretive process is complete.

As Professor Hessick notes by way of comparison, in order to receive injunctive relief, a plaintiff must go beyond demonstrating a violation of rights.[113] An injunction demands more, including a determination that the balance of hardships supports the award of an equitable remedy.[114] A retheorized *Chevron* doctrine would operate in much the same way. A Justice who could not accept the *Chevron* Court's wide-ranging assumptions about implicit congressional intent might nevertheless conclude that invalidating an administrative

112. *See* Hessick, *supra* note 86, at 5.

113. *See id.* at 15 ("To obtain an injunction, a plaintiff must establish that the defendant has violated . . . the plaintiff's rights. But that showing is not sufficient by itself.").

114. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) ("A plaintiff must demonstrate . . . that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted.").

interpretation requires something more than disagreement with the agency's reading of the law. Such a Justice would have a sound basis for reaffirming *Chevron*'s decisional rule on grounds of stare decisis, so long as retheorization is a valid adjudicative technique. Again, the debate ends up revolving around the legitimacy of retheorizing precedent.

3. Chevron *as Judicial Management.* Rather than a reflection of implicit congressional intent, *Chevron* may be a tool for sound administration of the federal judiciary. There are many federal statutes, but only one Supreme Court. Given the Justices' limited capacity, we might expect lower courts effectively to issue the final word on numerous statutory disputes. To the extent that lower courts reach different conclusions about the best reading of ambiguous statutory provisions, their divergence could impair, at least for a while, "national uniformity in the administration of national statutes."[115] Instead of asking each court to reach its own conclusion about the meaning of a disputed statute, it may be preferable to encourage deference to a single agency charged with administering the statute.[116]

For a Justice who rejects *Chevron*'s intent-based rationale, this argument from judicial management is—like the textual and remedial arguments discussed above—a position that warrants consideration. Different Justices may reach different conclusions about the soundness of deferring to administrative determinations in order to promote uniformity and efficiency in the interpretation of federal statutes. Still, for any Justices who find this judicial management rationale to be plausible, there is another potential basis for retheorizing *Chevron* by pairing its established rule with a revised set of reasons.

* * *

The foregoing examples only scratch the surface of possible retheorizations of *Chevron*.[117] The point of introducing them is not to

115. Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987).

116. *See id.* (explaining that *Chevron* "can be seen as a device for managing the courts of appeals").

117. For other sources describing various justifications for *Chevron*, see, for example, Merrill & Hickman, *supra* note 94, at 863–72; Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2227–37 (1997).

interrogate them on the merits. Nor is it to crown a successor to *Chevron*'s intent-based rationale, assuming one believes a successor is required. The goal is to provide a blueprint for how retheorization works and why it matters.

The validity of retheorization has implications for the trajectory of precedent across countless domains. In the case of *Chevron*, retheorization becomes crucial if one or more Justices: (1) reject the decision's existing, intent-based rationale; but (2) see value in preserving its rule for reasons of stability, reliance, or impersonality; and (3) view an alternative rationale as plausible. If these conditions are met, the validity of retheorization and the fate of *Chevron* go hand in hand.

D. Implications

If the Supreme Court were to overrule *Chevron* and hold that administrative agencies' interpretations of statutes are not entitled to any deference from judges, even when the statutes are ambiguous and the agencies' interpretations are reasonable, it would create a significant disruption in the law. Overruling *Chevron* could—depending on the rule that emerged in its place[118]—have a profound effect on federal statutory interpretation and adjudication. An overruling could also influence administrative action and legislative drafting. Whether or not one sees any benefit arising from these types of developments, the continuity of the legal framework would be impaired.[119]

If, by contrast, the Supreme Court were to renounce *Chevron*'s intent-based rationale while retaining its rule of decision on other grounds, the attendant disruption to the legal framework would be far less dramatic. A court faced with statutory ambiguity would still defer to a reasonable interpretation put forth by an agency tasked with administering the statute. Likewise, the legislative and executive branches would continue to operate within the extant deference regime. Perhaps the retheorization of *Chevron* would affect the

118. *See, e.g.*, Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1080 (2016) ("Abandoning *Chevron* may not . . . change the frequency and extent of judicial deference as much as *Chevron*'s critics hope or its supporters fear.").

119. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (describing the "greatest purpose" of stare decisis as "to serve a constitutional ideal—the rule of law").

operation of its rule in a subset of cases,[120] but the impact would be far weaker than if the Court were to renounce *Chevron*'s rule altogether.

Among the principal functions of stare decisis is to prevent judicial disagreements from destabilizing the law.[121] As the *Chevron* example illustrates, retheorization can aid in that enterprise. Every Justice accepts that some precedents are so exceptionally problematic as to demand overruling.[122] Along similar lines, some precedents ought to be repudiated rather than preserved via retheorization. But in other cases, retheorization offers a middle ground between reaffirming and overruling. When a Justice sees value in retaining an existing rule but cannot accept its underlying rationale, retheorization opens a third path. It provides a mechanism for minimizing disruption by confirming the durability of precedents' decisional rules even while altering their established rationales.

Stare decisis is, by nature, a second-best solution; better to have been right all along.[123] Retheorization occupies a similar space in the jurisprudential landscape. Deference to precedent finds its fullest expression when today's Justices endorse their predecessors' rules and reasons alike. If that is not possible, some continuity may be preferable to none.

IV. AFTER RETHEORIZATION

This Article has focused on situations in which a precedent's actual rationale is irredeemably flawed—and beyond the power of stare decisis to save—but an alternative rationale is available. The central question is whether a Justice who confronts such a situation should defer to precedent by adopting the alternative rationale so long as it is plausible. Determining whether deference is appropriate at the moment of retheorization is important and complicated, which explains the Article's effort to engage the issue in depth. A separate question is what happens *after* retheorization. The answer to that

120. *See supra* Part III.C.

121. *See* KOZEL, *supra* note 16, at 41 (discussing the relationship between stare decisis and judicial impersonality).

122. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part) (observing in 2020 that "[a]ll Justices now on this Court agree that it is sometimes appropriate for the Court to overrule erroneous decisions").

123. *Cf.* KOZEL, *supra* note 16, at 100 (discussing the utility of second-best analysis for the doctrine of stare decisis, with a focus on "optimizing the performance of an imperfect system").

question, I submit, is a great deal clearer: a retheorized precedent carries full stare decisis effect in future cases.

To understand why, it helps to return to general principles of stare decisis. The law of precedent provides that Supreme Court decisions receive deference going forward. On occasion, the Court has described stare decisis as diminished for precedents that deviate from settled law.[124] Notwithstanding these statements, precedents generally receive deference regardless of whether they arose from an overruling. That practice seems both sensible and unavoidable. If all decisions that depart from precedent were viewed with suspicion, any overruling could lead to perpetual flux. Rather than treating an overruling as an isolated, extraordinary event, the Court would trend toward deciding each case based on the conclusions of a majority of sitting Justices.

When the Court overrules a decision, it does not necessarily undermine the doctrine of stare decisis. To the contrary, the doctrine contemplates departures from precedent under certain circumstances. The point of stare decisis is to ensure that overrulings do not occur too lightly, too frequently, or for the wrong reasons. A decision that overrules precedent for reasons that are consistent with the doctrine of stare decisis does nothing untoward, and it stands on the same footing as other decisions in the deference it warrants.

Regardless of whether a precedent departed too hastily from the cases that came before it, the relevant question for today's Court is what should happen *next*. Overruling a decision will tend to be more disruptive than retaining it, even if the decision was not as solicitous of precedent as it should have been. Judicial flip-flops over a short period of time can suggest the primacy of the composition of the Court and erode the durability of legal principles. Hence the importance of treating precedents with presumptive respect regardless of whether they arose from an overruling.

For decisions that are the product of retheorization rather than outright overruling, there is all the more reason to defer. The genesis of retheorization is the recognition that a precedent is unlikely to survive in its present form. Rather than jettisoning a precedent's rule of decision as well as its rationale, a Justice can use retheorization to salvage that which is salvageable. By preserving the decisional rule on

124. *See, e.g.*, *Citizens United*, 558 U.S. at 363 (overruling a decision that "itself contravened this Court's earlier precedents"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64 (1996) (offering among the justifications for overruling that the precedent under review "deviated sharply" from established law).

new grounds, the Justice protects settled expectations and promotes legal continuity to the extent possible under the circumstances. As a result, it is fitting that retheorized precedents be vested with full stare decisis effect going forward. That is true as a categorical matter, and it is true of *Chevron*. A retheorized *Chevron* would continue to warrant deference for its rule of decision. It would also warrant deference for its newly adopted rationale—provided that the rationale falls within the protection afforded by stare decisis, which is the topic of the next Part.

V. IS *CHEVRON* ENTITLED TO DEFERENCE IN THE FIRST PLACE?

Chevron is notable not only for its prominence, but also for the nature of the rule it sets forth. The case's rule of decision sweeps far beyond the resolution of a particular dispute about the meaning of the Clean Air Act. It is widely understood to have established a broad analytical approach that applies to numerous statutes, as interpreted by numerous administrative agencies, implicating numerous fact patterns. At the same time, *Chevron* is not a full-fledged methodology of interpretation such as textualism or purposivism. It does not claim to set forth a framework for the resolution of every dispute over a federal statute's meaning.

The nature of *Chevron*'s rule creates uncertainty about the role of stare decisis, as I have explained in other work.[125] The Supreme Court has consistently treated *Chevron*'s rule of decision as binding precedent.[126] The implication is that the *Chevron* Court, acting at a particular moment in time and operating within a discrete statutory context, possessed wide-ranging authority to shape the trajectory of the law in future cases involving the interpretation of statutes other than the Clean Air Act. On that understanding, the *Chevron* Court wielded enormous influence, extending far beyond the case presented for

125. *See* Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1152–53 (2019) (asking whether stare decisis ought to apply to rules like the *Chevron* framework).

126. *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting) (observing that *Chevron* "remains good law"); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1346 (2018) (explaining that the authors' judicial respondents viewed *Chevron* as carrying "indisputable precedential weight"); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1817 (2010) (describing the Supreme Court's treatment of *Chevron* as evidence of its acceptance of "methodological stare decisis" in a discrete context).

review. At the same time, *Chevron* reduced the interpretive discretion of future Justices across a range of disputes and scenarios. It accordingly raised concerns about giving judges too much power to make binding pronouncements on matters not before them.

These concerns are all the more resonant because of what *Chevron* purports to do. As originally rationalized, *Chevron* tells judges which conclusions they must draw from the fact of congressional ambiguity. If ambiguity exists, there is no room for independent analysis where *Chevron* applies. The only permissible inference is a delegation of authority to the relevant administrative agency. *Chevron* reduces, on a macro level, judges' authority to reach their own conclusions about the meaning of legal texts.

This combination of exceptional breadth and intrusion upon interpretive choice arguably places *Chevron* beyond the domain of stare decisis. As Justice Gorsuch recently suggested in discussing the related issue of agencies' interpretations of their own regulations, it may be going too far to extend stare decisis to "generally applicable interpretive methods."[127] Deference to precedent is appropriate for decisions that "settle the meaning of a single statute or regulation or resolve a particular case."[128] Deference also applies to many rules embodied in judicial decisions. But not all rules are similarly situated when it comes to stare decisis, and those that compel interpretive choices demand a sacrifice from today's judges—while handing a commensurate power to yesterday's judges—that may be too much to bear.

If this argument has merit, the *Chevron* framework carries no claim to deference under the law of stare decisis. This conclusion does not owe solely to *Chevron*'s rule of decision. It is the product of *Chevron*'s broad rule combined with its rationale, the latter of which makes a core interpretive choice on behalf of future judges and Justices. Had the *Chevron* Court set forth the same decisional rule on a *different* rationale—such as one of the rationales described above in Part III.C—it might have avoided this problematic intrusion upon interpretive discretion. In that scenario, *Chevron* could fall within the customary bounds of stare decisis.

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127. Kisor v. Wilkie, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring in the judgment); *see also* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 114 n.1 (2015) (Thomas, J., concurring in the judgment) (citing CALEB NELSON, STATUTORY INTERPRETATION 701 (2011)).

128. *Kisor*, 139 S. Ct. at 2444 (Gorsuch, J., concurring in the judgment).

Despite this conceptual complexity, and notwithstanding objections raised by some Justices, the Court continues to characterize *Chevron* as settled law, presumably warranting respect as a binding precedent. The status quo is a situation in which *Chevron* is treated as falling within the bounds of the doctrine of stare decisis. For any Justices who accept the view that *Chevron* is presumptively binding but who harbor serious doubts about its intent-based rationale, the prospect of retheorization remains salient.

CONCLUSION

This Article has made four claims. First and foremost, it is worthwhile to examine the phenomenon of retheorization, whereby a court replaces a precedent's faulty rationale as a way of preserving its decisional rule. Second, the law and theory of retheorization remain unsettled at the Supreme Court, leaving a need for further analysis. Third, the Justices should—consistent with the aims of stare decisis—view retheorization as a legitimate and useful mechanism for promoting the stability of legal rules.

Finally, *Chevron* is a good candidate for preservation via retheorization, assuming that a majority of Justices reject its intent-based rationale. *Chevron*'s two-step rule is a major component of modern administrative law. What is more, scholars have offered a variety of possibilities for defending much of *Chevron*'s rule without needing to rely on the reasons the Court set forth in 1984. Overruling *Chevron* would be "a jolt to the legal system"[129]—whatever the merits of that decision's original rationale, and whatever regime arose in its place. The most complete safeguard against such a jolt is reaffirmance. When that option is off the table, retheorization is a valuable second-best approach. Stare decisis suggests that those binding elements of a judicial decision which *can* be saved *should* be saved, barring some exceptional justification for departure. Retheorization represents a partial victory for precedent when the alternative is a sound defeat.

129. *Confirmation Hearing*, *supra* note 9, at 144 (statement of Hon. John G. Roberts, Jr.).