Shoring Up *Chevron*: A Defense of *Seminole Rock* Deference to Agency Regulatory Interpretations

Scott H. Angstreich[*]

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[*] Associate, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. This article was written while the author was the John M. Olin Fellow in Law at the Georgetown University Law Center and a John M. Olin Research Fellow in Law and Economics at Harvard Law School. I would like to thank Viet Dinh, Lars Noah, Kannon Shanmugam, and David Walker for their helpful comments and Robert Anthony, Judge Douglas Ginsburg, Christine Jolls, Russell Weaver, and Ann Woolhandler for their comments on a previous version of this article. I also would like to thank the John M. Olin Foundation, the Georgetown University Law Center, and the John M. Olin Center for Law, Economics and Business at Harvard Law School for financial and institutional support during the writing of this article. Finally, I would like to thank my family and especially my wife, Terri, for constant encouragement and support.

In *Christensen v. Harris County*, decided last Term, the Supreme Court for the first time expressly held that it would not grant *Chevron* deference to an agency's informal interpretation of a statute it administers. Three years earlier, however, the Court had held that *Seminole Rock* deference, which closely resembles *Chevron* deference, could be granted to an agency's informal interpretation of its own regulation. There are suggestions, in *Christensen* and in another case from last Term, that the Court will resolve this conflict by holding that no informal interpretations can receive *Chevron*-style deference. Yet, if the Court so held, it would effectively overrule *Seminole Rock*, for only a fraction of the cases implicating this doctrine involve formal regulatory interpretations. Although *Seminole Rock*, unlike *Chevron*, has thus far received little attention or criticism from judges and scholars, the conflict created by *Christensen* portends a reevaluation of the doctrine. This article defends *Seminole Rock* against claims that it gives agencies too great an incentive to promulgate vague regulations, violates the Administrative Procedure Act, and is incompatible with the constitutional principle of separation of powers. Rejecting *Seminole Rock* would impose substantial costs on regulated entities and on the courts without necessarily yielding clearer or better regulations. It would also undermine *Chevron*'s allocation of interpretive authority to administrative agencies by returning much of that authority to the courts. To protect *Chevron*'s distribution of authority, thereby leaving agencies and not courts with responsibility for assessing the wisdom of competing policy choices, the Supreme Court should limit *Christensen* to cases involving *Chevron* and should continue to review informal interpretations of regulations under *Seminole Rock*.

INTRODUCTION

In its seminal decision in *Chevron U.S.A. Inc. v. NRDC*,[1] the Supreme Court resolved a question of statutory interpretation by deferring to an agency interpretation that was embodied in a regulation that had been promulgated after notice and comment.[2] The agency's regulation, like formal agency adjudications, had the "force of law"; that is, it was binding on the public, the courts, and the agency itself.[3] Not all agency

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

[2] *See id.* at 845; 40 C.F.R. § 51.18(j)(1)(i)-(ii) (1983).

[3] *See, e.g.*, Robert A. Anthony, *Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 3 n.6 (1990) [hereinafter Anthony, *Agency Interpretations*].

interpretations of statutes, however, appear in formats that have the force of law. An agency can state its statutory interpretation in many other formats, including enforcement guidelines, opinion letters, policy manuals, and legal briefs. These informal formats lack the force of law, and courts had historically given less deference to interpretations in such formats than to interpretations in formats having the force of law.[4] Because the Court in *Chevron* was confronted with an interpretation in a format that had the force of law, it had no occasion to discuss the degree of deference due to an informal interpretation. Nonetheless, the Court's reasoning was sufficiently sweeping that it arguably eliminated the traditional distinction between formal and informal interpretive formats.[5] Whether *Chevron* actually did so, however, was a question the Supreme Court, in the words of a leading treatise, had been either "unable or unwilling" to answer.[6]

In probably the most important administrative law case of the past Term, the Court finally provided its answer and held that the traditional distinction survived *Chevron*.[7] In *Christensen v. Harris County*,[8] the Court considered the claim that Harris County violated the Fair Labor Standards Act (FLSA) by unilaterally imposing a compensatory time policy on county employees. The United States argued that, in interpreting the FLSA, the Court should defer to the Department of

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[4] *See, e.g., id.* at 12-13; Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 83 (1995) [hereinafter Pierce, *Seven Ways*]. I follow Robert Anthony in using "informal" to refer to interpretations in formats that lack the force of law. *See* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 17 (1996) [hereinafter Anthony, *Supreme Court*]; Anthony, *Agency Interpretations*, *supra* note 3, at 5.

[5] *See, e.g.*, Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 208 (1992); Thomas J. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1022 (1992); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 519.

[6] KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5, at 48 (Supp. 1999); *see* William Funk, *Supreme Court News*, ADMIN. & REG. L. NEWS, Summer 2000, at 8, 17; Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 973-74 (1998).

[7] Funk, *supra* note 6, at 8. "Probably," because the post-*Chevron* landscape is strewn with Supreme Court decisions that appeared, at the time, to undermine *Chevron*, but that ultimately had no such effect. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). A final verdict on the importance of *Christensen*, therefore, must await future Supreme Court application of the force-of-law rule it announced.

[8] 120 S. Ct. 1655 (2000).

Labor's reading of the statute. That interpretation was expressed in a 1992 opinion letter that supported the employees' position and was repeated in the amicus brief the Government filed.[9] All nine Justices agreed, under the first step of *Chevron*, that the statute was ambiguous regarding the question whether Harris County could impose its policy unilaterally.[10] They disagreed, however, about the appropriate degree of deference to be afforded to the Secretary's interpretation. Justice Thomas, writing for a five-Justice majority, held that interpretations contained in informal formats, such as the opinion letter and the brief, lack the force of law and "do not warrant *Chevron*-style deference."[11] As a result, the Court applied the less deferential standard set out in *Skidmore v. Swift & Co.*,[12] which holds that courts should accept agency interpretations only to the extent they are persuasive. The *Christensen* Court found the Secretary's interpretation wanting.[13] For the first time, therefore, the Court explicitly held that an informal statutory interpretation should not receive the same degree of deference as a formal statutory interpretation.

Yet *Christensen*'s likely effects extend beyond *Chevron* deference. The Court's decision also has potential implications, both positive and negative, for the doctrinal cousin of *Chevron* known as *Seminole Rock* deference. That doctrine states that a reviewing court should grant "controlling weight" to an agency's interpretation of its own regulation

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[9] *See* Brief of Amicus Curiae United States at 10, 12-13, 15, Christensen v. Harris County, 120 S. Ct. 1655 (2000) (No. 98-1167); Opinion Letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available at* 1992 WL 845100.

[10] *Christensen*, 120 S. Ct. at 1661; *id.* at 1663 (Souter, J., concurring); *id.* at 1665 (Scalia, J., concurring in part and concurring in judgment); *id.* at 1667 (Stevens, J., dissenting); *id.* at 1668 (Breyer, J., dissenting).

[11] *Christensen*, 120 S. Ct. at 1662. Joining in this portion of the opinion were the Chief Justice and Justices O'Connor, Kennedy, and Souter. Although Justice Scalia joined in the remainder of Justice Thomas's opinion and in the judgment of the Court — because he concluded that the agency's interpretation was unreasonable — he argued in a separate opinion that *Chevron* should apply to informal agency interpretations and that *Skidmore* was an anachronism in post-*Chevron* administrative law. *Id.* at 1664-65 (Scalia, J., concurring in part and concurring in judgment). The three dissenting Justices were agnostic on the question whether the Secretary's interpretation warranted *Chevron* deference, *see id.* at 1667 (Breyer, J., dissenting); *see also id.* at 1667 & n.2 (Stevens, J., dissenting) ("I fully agree with Justice Breyer's comments on *Chevron* . . . ."), but agreed with the majority that *Skidmore* "retains legal vitality." *Id.* at 1667-68 (Breyer, J., dissenting); *cf. id.* at 1667 (Stevens, J., dissenting) (applying *Skidmore*).

[12] 323 U.S. 134 (1944); *see also infra* Part I.D (describing Court's decision in *Skidmore* and standard for reviewing agency interpretations set out therein).

[13] *See Christensen*, 120 S. Ct. at 1663.

"unless it is plainly erroneous or inconsistent with the regulation."[14] In *Christensen*, the employees argued not only that the Department of Labor's statutory interpretation was due *Chevron* deference, but also that the Court should grant *Seminole Rock* deference to the 1992 opinion letter, which they contended interpreted both the FLSA and the regulations implementing the Act.[15] Once the opinion letter was read into those regulations, which the agency had promulgated after notice and comment, the interpretation in that letter — thus "laundered" through the regulation — would be entitled to *Chevron* deference under *Christensen*'s newly announced rule. The Court, however, refused to defer to the opinion letter in this context as well, reasoning that "deference is warranted only when the language of the regulation is ambiguous" and that the regulation at issue was not.[16] As a result, the Court had no need to decide whether its newly announced force-of-law rule applies in *Seminole Rock* cases.[17]

Three years earlier, however, the Court unanimously held that an informal interpretation of a regulation could receive *Seminole Rock* deference despite the fact that the interpretation appeared in an informal format. Writing for the Court in *Auer v. Robbins*,[18] Justice Scalia explained that it was irrelevant that the administrative interpretation appeared for the first time in an amicus brief, because "there is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."[19] Therefore, taking *Auer* and *Christensen* together, an interpretation of a regulation in a

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[14] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[15] *See* Petitioners' Reply Brief at 11-14, *Christensen* (No. 98-1167).

[16] *Christensen*, 120 S. Ct. at 1663.

[17] *Cf., e.g.*, United States v. LaBonte, 520 U.S. 751, 762 n.6 (1997) ("Inasmuch as we find the statute at issue here unambiguous, we need not decide whether the Commission is owed deference under *Chevron* . . . ."); John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 109 (1993) ("We need not grapple here with the difficult question of the deference due an agency view first precisely stated in a brief supporting a petitioner. . . . By reading the words 'to the extent' to mean nothing more than 'if,' the Department has exceeded the scope of available ambiguity."); Regents of the Univ. of Cal. v. Pub. Employment Relations Bd., 485 U.S. 589, 602 (1988) ("Because we have been able to ascertain Congress' clear intent based on our analysis of the statutes and their legislative history, we need not address the issue of deference to the agency.").

[18] 519 U.S. 452 (1997).

[19] *Id.* at 462.

format lacking the force of law warrants *Chevron*-style deference,[20] but such an interpretation of a statute does not.[21] Yet, in the interval between the Court's decisions in these two cases, no circuit court had concluded that *Auer*'s holding was limited to cases involving *Seminole Rock* deference. Instead, each of the five circuits to consider the question had cited *Auer* as authority for a court to grant *Chevron* deference to an interpretation that was found only in a brief.[22] These courts held — albeit implicitly, for none acknowledged that it was importing *Auer* from the *Seminole Rock* context into the *Chevron* context — that there are no relevant differences between the two deference doctrines. *Christensen* does no more than suggest such differences exist because, as noted above, the Court had no need to revisit or reaffirm its decision in *Auer*.[23]

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[20] *See infra* Part I.B (explaining that *Seminole Rock*'s standard of review closely resembles *Chevron* deference).

[21] Others have also noted the apparent conflict between *Christensen* and *Auer*. *E.g.*, Robert A. Anthony & Michael Asimow, *The Court's Deferences — a Foolish Inconsistency*, ADMIN. & REG. L. NEWS, Fall 2000, at 10, 10; Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of* Chevron, 42 WM. & MARY L. REV. (forthcoming 2001); *The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 369, 376 (2000).

[22] *See, e.g.*, United States v. Occidental Chem. Corp., 200 F.3d 143, 152 & n.11 (3d Cir. 1999); Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1082 (9th Cir. 1999); Molinary v. Powell Mountain Coal Co., Inc., 125 F.3d 231, 236 n.4 (4th Cir. 1997); Tax Analysts v. IRS, 117 F.3d 607, 613 (D.C. Cir. 1997); Lovilia Coal Co. v. Harvey, 109 F.3d 445, 452 (8th Cir. 1997). Two other circuits had briefly discussed this issue in dicta, both in ways that suggest they also understood *Auer* to authorize a court to grant *Chevron* deference to an interpretation in an agency's brief. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 563 (7th Cir. 1999); Gen. Signal Corp. v. Comm'r, 142 F.3d 546, 548 n.1 (2d Cir. 1998).

[23] *But see* Esden v. Bank of Boston, 229 F.3d 154, 169 & n.19 (2d Cir. 2000) (relying on Justice Scalia's separate opinion in *Christensen* to support proposition that *Auer* is still good law, but hedging its bets by stating in footnote that it would have upheld agency's interpretation if it had applied *Skidmore*); Bigelow v. Dep't of Def., 217 F.3d 875, 878 (D.C. Cir. 2000) ("[T]he Court [in *Christensen*] treated *Auer v. Robbins* as still good law despite the fact that the agency's interpretation — there of a regulation — appeared only in a legal brief."); Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n, 212 F.3d 1301, 1304 (D.C. Cir. 2000) (reading *Christensen* to have reaffirmed *Auer*). The D.C. Circuit appears to have read too much into the *Christensen* Court's discussion of *Auer*, in which it said only:

> Seeking to overcome the regulation's obvious meaning, the United States asserts that the agency's opinion letter interpreting the regulation should be given deference under our decision in *Auer v. Robbins*. In *Auer*, we held that an agency's interpretation of its own regulation is entitled to deference. But *Auer* deference is warranted only when the language of the regulation is ambiguous.

Christensen v. Harris County, 120 S. Ct. 1655, 1663 (2000). Note that the Court's description of *Auer* does not mention the issue of deference being due to a regulatory interpretation appearing in an informal format.

The central question that remains after *Christensen*, therefore, is whether the Court will continue to defer under *Seminole Rock* to informal agency interpretations. On the one hand, the Court could reaffirm *Auer*, thereby rejecting the implicit reasoning of those circuit courts that extended *Auer*'s holding to the *Chevron* context. To do so persuasively, however, the Court would need to explain the differences between *Chevron* and *Seminole Rock* that led it to conclude, in *Christensen*, that informal interpretations of statutes are reviewed under *Skidmore* but that informal interpretations of regulations, as it held in *Auer*, can receive *Seminole Rock* deference. Such a development would be a welcome one, for if there are differences between the two doctrines that would justify the disparate rules in *Auer* and *Christensen*, the Court has yet to identify them. Nor has the Court ever offered a justification for *Seminole Rock* deference with anything resembling the clarity and depth of reasoning found in *Chevron*. In explaining the basis for its different treatment under the two doctrines of interpretations in informal formats, the Court would surely be required to fill this void in its jurisprudence.

On the other hand, if the Court cannot make this distinction persuasively, then *Christensen* may presage the overruling of *Auer*. One hint that the Court will apply the same format rules under *Chevron* and *Seminole Rock* is found in *Christensen* itself. To support its holding that informal interpretive formats do not warrant *Chevron* deference, the Court cited a dictum from *Martin v. Occupational Safety & Health Review Commission*[24] that informal interpretations of regulations should be reviewed under *Skidmore*'s persuasiveness standard.[25] A second hint is found in *Geier v. American Honda Motor Co.*,[26] in which the four dissenting Justices would have applied *Christensen*'s force-of-law rule in refusing to grant *Seminole Rock* deference to an informal regulatory interpretation.[27]

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[24] 499 U.S. 144 (1991).

[25] *See id.* at 157, cited in *Christensen*, 120 S. Ct. at 1663.

[26] 120 S. Ct. 1913 (2000).

[27] *See Geier*, 120 S. Ct. at 1941 (Stevens, J., dissenting). Justices Souter, Thomas, and Ginsburg joined in Justice Stevens' opinion. Justice Breyer, writing for the Court, was willing to place "some weight" on the Secretary of Transportation's interpretation of the preemptive scope of a safety standard promulgated under the National Traffic and Motor Vehicle Safety Act of 1966, which appeared only in the Government's amicus brief. *Geier*, 120 S. Ct. at 1926. This appears to leave Justice Breyer as the only agnostic on the question whether informal interpretations can receive *Chevron*-style deference. *See supra* note 11.

Little should be drawn, however, from the Court's failure to accord the agency's

However, if the Court were to overrule *Auer*, then *Seminole Rock* would be stripped of much, if not all, of its legal vitality. As a practical matter, interpretations of regulations found in formats having the force of law make up a negligible fraction of the cases in which a court must decide whether to defer under *Seminole Rock*; the remainder involve interpretations set out in informal formats.[28] Accordingly, overruling *Auer* would force agencies to canvass their various regulatory interpretations and determine which are likely both to fail the *Skidmore* standard and to be worth the costs of re-promulgation through adjudication or notice and comment.[29]

Yet, a wholesale shift from *Seminole Rock* to *Skidmore*, and even the partial shift that would result from the Court's using *Christensen* to overrule *Auer*'s holding that *Seminole Rock* deference extends to informal regulatory interpretations, would undermine *Chevron*'s allocation of

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interpretation *Seminole Rock* deference. First, the Court had no need to determine the precise weight due because it sided with the Secretary when only "some weight" was placed on the interpretation. Second, three of the five Justices in the majority had previously stated that it is "not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference." Medtronic, Inc. v. Lohr, 518 U.S. 470, 512 (1996) (O'Connor, J., dissenting) (joined by Rehnquist, C.J., and Scalia and Thomas, JJ.). The level of deference not being relevant to the outcome, there was little reason to revisit an issue that had led to a 5-4 split in *Medtronic*. *See* Jack W. Campbell IV, *Regulatory Preemption in the* Garcia/Chevron *Era*, 59 U. PITT. L. REV. 805, 809-12 (1998).

[28] For example, from September 1997 through August 1999, the D.C. Circuit heard a total of 29 cases in which the question of deferring to an agency's interpretation of its own regulation was raised. In 28 of those cases, the agency's interpretation did not appear in either a notice-and-comment regulation or a formal adjudication. In nine of those 28, however, the interpretation was issued during an informal adjudication, the status of which under *Christensen* is unclear because, in listing formats that have or lack the force of law, the Court did not mention informal adjudications. *See Christensen*, 120 S. Ct. at 1662 (contrasting "formal adjudication[s] or notice-and-comment rulemaking[s]" with "opinion letters . . . policy statements, agency manuals, and enforcement guidelines"). The Eleventh Circuit has explained that it understands "the listing in *Christensen* to be illustrative and not to be an exhaustive or complete list of agency acts due deference." Gonzalez v. Reno, 215 F.3d 1243, 1245 n.3 (11th Cir.) (per curiam), *cert. denied*, 120 S. Ct. 2737 (2000); *accord In re* Sealed Case, 223 F.3d 775, 780 (D.C. Cir. 2000); Funk, *supra* note 6, at 17. The *Gonzalez* court held that the informal interpretation before it could receive *Chevron* deference because, unlike the opinion letter in *Christensen*, the informal adjudication had decided a party's rights "in the context of an actual and concrete dispute with and before that agency" and was "final and binding on Plaintiff unless he, in effect, appealed it to a court." *Gonzalez*, 215 F.3d at 1245. It seems likely, therefore, that some interpretations arrived at through informal adjudication will be held to satisfy *Christensen*'s force-of-law rule.

[29] Because an agency has relatively little control over the issues that will come before it during adjudications, *see* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 667-68 & n.265 (1996), re-promulgation of an informal interpretation through adjudication is likely to be a disfavored response to *Christensen* in both the *Seminole Rock* and *Chevron* contexts.

responsibility for statutory interpretation. A court cannot carry out *Chevron*'s instruction to uphold a regulation that is based on the administering agency's reasonable interpretation of an ambiguous statute until it has determined the meaning of the regulation. But if a court that applies *Skidmore* rejects an agency's informal interpretation of an ambiguous regulation, it will likely be unable to defer to the agency's statutory interpretation. The reason is simple. Having placed its own gloss on the regulation, that court would likely find itself asking at *Chevron* step two whether to defer to the statutory interpretation implied by its gloss, rather than by the agency's understanding of the regulation. Therefore, to the extent it is necessary to resolve the case, the court will have to make the policy decisions necessary to interpret the regulation and then the statute, in violation of *Chevron*'s directive that "[t]he responsibilities for assessing the wisdom of such policy choices . . . are not judicial ones."[30]

In this article, I argue that recognizing *Skidmore*'s potential for undermining *Chevron* leads to a justification for *Seminole Rock* deference that permits *Auer* and *Christensen* to coexist. The defense of *Seminole Rock* offered, however, is only a partial one, because current doctrine calls for a court to defer to an agency's interpretation of an ambiguous regulation even when that regulation does not implicate *Chevron* deference.[31] Nonetheless, even a partial defense of *Seminole Rock* is a step forward for a doctrine that "has long been one of the least worried-about principles of administrative law."[32] *Christensen* only highlights this longstanding need for a better understanding of why, and when, courts ought to defer to an agency's interpretation of its own regulation.

I begin in Part I by examining the similarities and differences in the standards of deference the Supreme Court announced in *Chevron* and *Seminole Rock*. Part I concludes with a discussion of *Skidmore*, comparing its persuasiveness standard with the reasonableness review the Court applies under the other two deference doctrines. In Part II, I turn to the justifications the Court has provided thus far for *Chevron* and *Semionle Rock*. Although the Court's statements have been somewhat opaque, it

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[30] Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 866 (1984).

[31] In such situations, failure to defer to an agency's regulatory interpretation could not undermine *Chevron*.

[32] *See* Manning, *supra* note 29, at 613-14.

appears to have provided a justification for *Seminole Rock* that follows its congressional delegation explanation for *Chevron*, making the different rules with respect to informal interpretations all the more puzzling. In Part III, I discuss the criticisms that Robert Anthony and John Manning, in separate articles,[33] have leveled against *Seminole Rock*. They conclude, for reasons that run from the practical to the constitutional, that the Supreme Court should overturn *Seminole Rock* and propose that courts should review most or all regulatory interpretations under *Skidmore*. In Part IV, I evaluate those criticisms, arguing first that Anthony's and Manning's practical arguments do not justify abandoning *Seminole Rock*. I argue further that *Seminole Rock* can be defended, in spite of their statutory and constitutional arguments, as a means of shoring up *Chevron* deference. The division of responsibility for statutory interpretation that *Chevron* formalized would be undermined if courts reviewed an agency's informal regulatory interpretation under *Skidmore*. This explanation not only provides a long-needed justification for *Seminole Rock*, but also resolves the apparent conflict between the results the Court reached in *Christensen* and *Auer*.

I. *CHEVRON*, *SEMINOLE ROCK*, AND *SKIDMORE* IN PRACTICE

The two-step analytical framework for judicial review of agency interpretations of statutes announced in *Chevron* has become firmly ingrained in the administrative law canon. As a result, it provides a useful point of reference for understanding the mechanics of the less frequently examined one-step test announced in *Seminole Rock*. After briefly describing how *Chevron* works in practice, I offer a more detailed examination of both the decision in *Seminole Rock* and the manner in which courts have applied it. Although the Court mentioned neither ambiguity nor reasonableness in *Seminole Rock*, these important aspects of *Chevron* play a role in the review of agency interpretations of regulations as well. Nonetheless, the two deference standards are not identical. After discussing the differences between these doctrines, I turn to the Court's decision in *Skidmore* and describe the manner in which the standard announced in that case, persuasiveness review of agency interpretations, differs from the reasonableness review applied under *Chevron* and *Seminole Rock*.

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[33] *See* Anthony, *Supreme Court*, *supra* note 4; Manning, *supra* note 29.

A. The Chevron Two-Step

Commentators have described and discussed the Court's decision in *Chevron* far too often to justify more than the briefest of expositions here.[34] *Chevron* involved the meaning of the term "stationary sources" in the Clean Air Act.[35] In 1980, the Environmental Protection Agency (EPA) defined a stationary source as a plant or any piece of identifiable equipment within a plant.[36] In 1981, under a new administration, the EPA changed course and defined the term "stationary source," pursuant to the so-called "bubble concept," to include only a plant in its entirety, as though all the individual pieces of equipment and their emissions were within a single bubble.[37] The D.C. Circuit rejected the agency's new interpretation, concluding that the "bubble concept" was incompatible with its understanding of the statute's purpose.[38] The Supreme Court reversed that decision, explaining that the "basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[39] Instead, having determined that Congress had not decided the question, the D.C. Circuit should have decided whether the EPA's decision to apply the bubble concept was reasonable.[40] The Supreme Court, after reviewing the text of the statute, the legislative history, and the agency's policy arguments, concluded that the agency's decision was reasonable and upheld it.[41]

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[34] *See, e.g.*, I KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 3.2-3.3, at 109-16 (3d ed. 1994); Merrill, *supra* note 5, at 975-80; Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 283-88 (1986); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2083-85 (1990) [hereinafter Sunstein, *Law and Administration*].

[35] 42 U.S.C. § 7502(b)(6) (1982).

[36] Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676, 52,696-97 (Aug. 7, 1980) (to be codified at 40 C.F.R. pts. 51, 52 & 124).

[37] Requirements for Preparation, Adoption, and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766, 50,766-67 (Oct. 14, 1981) (to be codified at 40 C.F.R. pts. 51 & 52).

[38] NRDC v. Gorsuch, 685 F.2d 718, 726-28 (D.C. Cir. 1982).

[39] Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842 (1984).

[40] *Id.* at 845.

[41] *Id.* at 859-66.

Prior to *Chevron*, the Supreme Court had addressed the question of deference to administrative agencies' interpretations of statutes in two lines of decisions that were "analytically in conflict, with the result that a court of appeals [had to] choose the one it deems more appropriate for the case at hand."[42] In *Chevron*, the Court replaced those lines of decisions with a two-part test.[43] If the statute is unambiguous,[44] then a court will, at *Chevron* step one, enforce the unambiguous intent of Congress,[45] irrespective of the agency's interpretation. Otherwise, at *Chevron* step two, the court will uphold any reasonable interpretation and "need not conclude that the agency construction was the only one it permissibly could have adopted . . . , or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[46] *Chevron* was not a radical break from past cases because the Court had sometimes deferred to agency interpretations of statutes.[47] Nonetheless, by clearly stating the manner in which a court should approach the question of deference to such interpretations, *Chevron* "established itself as one of the very few defining cases in the last [thirty] years of American public law."[48]

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[42] Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (Friendly, J.), *aff'd sub nom.* N.E. Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); *see* Merrill, *supra* note 5, at 972-75.

[43] *See Chevron*, 467 U.S. at 842-43.

[44] Although *Chevron* spoke in terms of "whether Congress has directly spoken to the precise question at issue," *id.* at 842, later cases have answered that question by reference to whether the statutory section is ambiguous or, instead, has a plain meaning. *See* Merrill, *supra* note 5, at 990-91.

[45] The Court injected some ambiguity into the first step with the following statement: "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." *Chevron*, 467 U.S. at 843 n.9. Exactly how the "traditional tools of statutory construction" operate at step one has been the subject of much debate. *See infra* text accompanying notes 54-57 and note 57.

[46] *Chevron*, 467 U.S. at 843 n.11.

[47] *See* Scalia, *supra* note 5, at 512; Starr, *supra* note 34, at 292.

[48] Sunstein, *Law and Administration*, *supra* note 34, at 2075. Interestingly, a scholar who has reviewed the papers of Justice Thurgood Marshall found "the absence of any evidence in the written record indicating that the Justices realized the full implications of their landmark administrative law decision in . . . *Chevron*." Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVT'L L. REP. 10606, 10613 (1993). Moreover, with only six Justices participating in the decision and the government, which had lost below, having failed to ask for reconsideration of the standard for reviewing agency interpretations, *Chevron* "was an unlikely candidate to produce a landmark decision on deference to executive interpretations of statutes." Merrill, *supra* note 5, at 975.

In practice, *Chevron* deference works as follows. In a case that raises a question of statutory interpretation on which an agency has opined,[49] the first question the court faces is whether Congress has delegated authority to that agency to administer this statute.[50] If so, that agency's interpretation is entitled to receive *Chevron* deference.[51] However, an agency normally does not administer a statute, for purposes of *Chevron*,

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[49] When no agency has offered an interpretation, matters are somewhat different. In a case in which the administering agency is not a party, a court can invoke the doctrine of primary jurisdiction and hold a case in abeyance while that agency addresses an issue that is both central to the case and particularly within the agency's competence. II DAVIS & PIERCE, *supra* note 34, §§ 14.1, 14.3, at 271-80, 285. In a recent case in which the Court declined to invoke primary jurisdiction because it had not been briefed or argued, the Court adopted an interpretation of the contested statutory sections that would "suffice for the purpose at hand," but noted that the agency remained free to interpret the statute differently in the future and that such an interpretation would be reviewed under *Chevron*. Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355, 366-69 & nn.10 & 14 (1994).

When the administering agency is a party to the case and has taken no position, a court must choose whether to interpret the statute itself or to remand the case so the agency can have another chance to inform the court of its interpretation. *Compare* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 378-79 (1986) (arguing that "if the agency has not offered a reasonable interpretation of the statute in this case; if it has not considered the matter thoroughly; . . . then the court should simply decide the question on its own"), *with* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 137 (1994) (arguing that, if agency has interpreted statute unreasonably, court should not have power to do more than remand matter to agency). The most recent guidance from the Supreme Court appears to favor the latter course of action. In *National Federation of Federal Employees, Local 1309 v. Department of the Interior*, 526 U.S. 86 (1999), the Court rejected at *Chevron* step two the Federal Labor Relations Authority's interpretation of provisions of the Federal Service Labor-Management Relations Statute, finding it to be a response to circuit court precedent rather than "an independently reasoned effort to develop complex labor policies." *Id.* at 100. After the Court overruled the precedent on which the Authority had based its interpretation, it remanded the matter so the Authority could have the opportunity to adopt an interpretation free from the constraints of that precedent. *Id.* Interestingly, Justice Breyer authored the opinion in *National Federation*, suggesting that he has modified his views on *Chevron*.

[50] *See* Brief of Amicus Curiae Professor Thomas W. Merrill in Support of Petitioner, at 14-20, United States v. Mead Corp., 120 S. Ct. 2193 (2000) (No. 99-1434).

[51] *See* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990); Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1516-18 (2000) [hereinafter Noah, *Enabling Acts*]. For example, courts have refused to grant *Chevron* deference to the Department of Justice's interpretations of federal criminal statutes on the ground that Congress intended those laws to be interpreted by the courts rather than by the agencies that administer them. *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 490 (1996) (citing cases).

when multiple agencies have responsibility for implementing that statute. For example, none of the many agencies that have passed regulations implementing the Freedom of Information Act receives *Chevron* deference, even if each of these agencies would receive such deference when interpreting its organic statute.[52] Second, assuming the agency's interpretation is a candidate for *Chevron* deference, the court asks whether Congress has spoken unambiguously on the issue before the court.[53] This question raises a host of subsidiary questions about which techniques of statutory interpretation are appropriate, both in interpreting statutes generally and in eliminating ambiguities,[54] and about how plausible an alternate interpretation must be before a statute can be deemed ambiguous.[55] In its recent decision in *Brown & Williamson*, the Court set forth three factors, ambitious in their scope, that a reviewing court should consider in determining whether Congress delegated interpretive authority to an agency.[56] The greater the freedom a court has to resolve an apparent ambiguity in a statute, the fewer the

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[52] *See, e.g.*, Tax Analysts v. IRS, 117 F.3d 607, 613 (D.C. Cir. 1997); FLRA v. Dep't of the Treasury, 884 F.2d 1446, 1451 (D.C. Cir. 1989); Prof'l Airways Sys. Specialists v. FLRA, 809 F.2d 855, 857 n.6 (D.C. Cir 1987); *see also* Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 642 & n.30 (1986) (Stevens, J., plurality) (refusing to grant *Chevron* deference to regulation promulgated under section of Rehabilitation Act authorizing any head of Executive Branch agency to promulgate regulations thereunder). *But cf.* Bragdon v. Abbott, 524 U.S. 624, 642 (1998) (noting that authority to administer Rehabilitation Act was delegated to multiple agencies, but declining to decide whether this precludes granting of *Chevron* deference because agency interpretation at issue could be upheld under *Skidmore*).

[53] Matters are somewhat different when the statute is one that the Supreme Court interpreted prior to its decision in *Chevron*. In such cases, the Court has held that its own pre-*Chevron* interpretation renders the statute unambiguous, even if it would have held, were it first interpreting the statute post-*Chevron*, that Congress had not spoken to the precise question at issue. Neal v. United States, 516 U.S. 284, 295 (1996); Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-37 (1992); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990). For discussion of the manner in which the Supreme Court and the circuit courts have addressed the conflict between stare decisis and *Chevron*, see generally Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225 (1997) [hereinafter Pierce, *Reconciling*].

[54] *See, e.g.*, Merrill, *supra* note 5, at 988; Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995).

[55] *See, e.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225-28 (1994); Scalia, *supra* note 5, at 520; Sunstein, *Law and Administration*, *supra* note 34, at 2091-92.

[56] FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1300-01 (2000). The Court explained that, in an attempt to ascertain Congress's unambiguous intent, it would look at the relevant provisions in light of the overall statutory scheme, the relationship between the relevant provisions and other statutes passed subsequently, and "a degree of common sense as to the manner in which Congress is likely to delegate a policy decision . . . to an administrative agency." *Id.* at 1300-01; *see also id.* at 1301-15 (undertaking those inquiries).

statutes that will be found to delegate authority to an agency.[57]

In its decision in *Christensen*, the Court added an intermediate step to the application of *Chevron*. After determining that the administering agency has interpreted an ambiguous provision of a statute, a reviewing court must now ascertain whether the agency's interpretation appears in a format that has the force of law. If so, then the interpretation can receive *Chevron* deference; otherwise, the court reviews it under *Skidmore*.[58] Although this intermediate inquiry will not be novel in the five circuits that had steadfastly refused to defer to informal agency interpretations,[59] the other eight circuits — including the D.C. Circuit[60] — had been willing to defer to informal interpretations.[61] The Supreme

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[57] *See* Thomas W. Kirby, *Giving Agencies Less Deference*, LEGAL TIMES, Mar. 27, 2000, at 66, 66-67 (arguing that decision "should mark the end of a simplistic and reflexive resort to *Chevron* deference whenever the statutory text at issue permits more than one reading"). In light of the broad set of materials the Court canvassed in reaching its conclusion that Congress unambiguously excluded tobacco products from the FDA's jurisdiction, *Brown & Williamson* suggests the Court may be rejuvenating the largely dormant debate regarding which tools of statutory construction a court can rely on at step one to resolve apparent ambiguities. *See* I DAVIS & PIERCE, *supra* note 34, § 3.6, at 126-30.

[58] The Third Circuit took a different approach in *Bellas v. CBS, Inc.*, 221 F.3d 517 (3d Cir. 2000), in which it acknowledged the applicability of *Chevron*, but explained that its decision not to defer to an agency's informal statutory interpretation "is consistent with" *Christensen* because the agency's "departure from the express language of the statute and its legislative history renders [the informal interpretation] unpersuasive." *Id.* at 530 n.12. The court thus appears to have conflated the *Skidmore* and *Chevron* standards.

[59] Namely, the First, Fifth, Seventh, Tenth, and Federal Circuits. *See, e.g.*, Mass. v. FDIC, 102 F.3d 615, 621 (1st Cir. 1996); Owsley v. San Antonio Indep. Sch. Dist., 187 F.3d 521, 524-25 (5th Cir. 1999); Cent. Midwest Interstate Low-Level Radioactive Waste Comm'n v. Pena, 113 F.3d 1468, 1473 (7th Cir. 1997); S. Ute Indian Tribe v. Amoco Prod. Co., 119 F.3d 816, 832 (10th Cir. 1997), *rev'd on other grounds*, 526 U.S. 865 (1999); Travelstead v. Derwinski, 978 F.2d 1244, 1250 (Fed. Cir. 1992).

[60] The D.C. Circuit hears the lion's share of the cases raising *Chevron* issues.

[61] Those being, in addition to the D.C. Circuit, the Second, Third, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits. *See, e.g.*, Interport Inc. v. Magaw, 135 F.3d 826, 829 (D.C. Cir. 1998); Kavanaugh v. Grand Union Co., 192 F.3d 269, 272 (2d Cir. 1999); Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 182 (3d Cir. 1995); Jones v. Am. Postal Workers Union, 192 F.3d 417, 427 (4th Cir. 1999); Your Home Visiting Nurse Servs., Inc. v. HHS, 132 F.3d 1135, 1139 (6th Cir. 1997), *aff'd*, 525 U.S. 449 (1999); Lovilia Coal Co. v. Harvey, 109 F.3d 445, 452 (8th Cir. 1997); Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1082 (9th Cir. 1999); Herman v. NationsBank Trust Co. (Ga.), 126 F.3d 1354, 1363 (11th Cir. 1997). The Third Circuit recently noted that "*Christensen* requires us to revisit our previously applied parameters of deference." Madison v. Res. for Human Dev., Inc., No. 99-1821, 2000 WL 1728579, at *9 (3d Cir. Nov. 15, 2000).

Court, apparently unaware of this split among the circuits,[62] thus rejected the manner in which a majority of the circuits had been applying *Chevron*.

Because the number of informal interpretations that agencies generate dwarfs the number of formal interpretations,[63] the impact of *Christensen* on the scope of *Chevron* could rival or surpass that of *Brown & Williamson*. Agencies must now determine which of their informal interpretations are unlikely to survive review under the less deferential *Skidmore* standard. For each such interpretation, agencies must then weigh the benefits of review under *Chevron* against the costs of re-promulgating the interpretations through formal adjudication or notice and comment.[64] Until agencies undertake this calculus and render formal interpretations, a great many agency interpretations, including those that had received grudging judicial deference under *Chevron*, will be newly vulnerable to challenge.

Finally, if the agency's interpretation appears in a formal format, the court must determine whether that interpretation is reasonable.[65] Since *Chevron*, two factors previously thought relevant to the reasonableness inquiry, whether the agency's interpretation is consistent with prior interpretations and longstanding, have been of little or no relevance.[66]

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[62] None of the opinions in *Christensen* mentions the prevailing practices in the Courts of Appeals, nor were they mentioned in the petition for certiorari or the briefs filed by the parties and amici.

[63] Pierce, *Seven Ways*, *supra* note 4, at 82; Rossi, *supra* note 21; Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468-69 (1992).

[64] *See also infra* text accompanying notes 254 and 326-27 (describing other costs and benefits of formal promulgation). The basic structure of notice-and-comment rulemaking is set forth in section 553 of the APA. The agency publishes a notice of proposed rulemaking in the Federal Register, which informs the public of the content or subject matter of the proposed rules. Interested persons then have an opportunity to comment through written submissions and, at the agency's option, through oral argument. The agency then issues its rule and includes a statement of basis and purpose, which contains the agency's response to commentators' positions. *See generally* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 534-37 (4th ed. 1999).

[65] As when the agency is a party but has offered no interpretation of a statute, if the court determines that the agency's interpretation is not reasonable, it must decide whether to remand the case and offer the agency another chance to adopt a reasonable interpretation or to interpret the statute itself. The same is true if the court holds that the agency erred in believing that Congress had spoken unambiguously and therefore that it could not adopt its preferred interpretation. *See supra* note 49.

[66] *See, e.g.*, Herz, *supra* note 5, at 198-99; Merrill, *supra* note 5, at 1018-19; Scalia, *supra* note 5, at 517-18. *But compare* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be 'arbitrary, capricious [or] an abuse of discretion.'

The court will accept the agency's interpretation if it is reasonable, even if it is not the most persuasive interpretation.[67] In sum, *Chevron* instructs courts to uphold those agency interpretations of ambiguous statutes that are reasonable, even when they are unpersuasive.[68]

But if these pitfalls are avoided, change is not invalidating . . . ." (quoting 5 U.S.C. § 706(2)(A)) (citations omitted), *and* Rust v. Sullivan, 500 U.S. 173, 186 (1991) ("This Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question."), *with* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 698 (1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."), *and* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) (same).

[67] Only once has the Supreme Court found that an agency's interpretation of an ambiguous statute was unreasonable. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 385-391 (1999); Lisa Schultz Bressman, Schechter Poultry *at the Millenium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1399-1400 (2000); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1261 (1997). That said, it is not clear that the Court has been more deferential to agencies following *Chevron*. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 358-63 (1994) (questioning whether *Chevron* has had impact on Court deference to agency views); *see generally* Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 583 & nn.379-85 (1997-1998) (discussing empirical debate on effect of *Chevron* at Supreme Court and circuit court levels and citing sources).

[68] The brevity of this account of *Chevron* deference, however, should not be taken to imply that all aspects of the doctrine are now settled law. Indeed, many questions about the scope of the *Chevron* deference remain unresolved. For example, it is unclear whether a court should afford less deference to an agency's assertion of authority beyond the core jurisdiction Congress delegated to it. *See* Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 992-93, 997-98, 1017 (1999); *see also* FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1300-01 (2000) (holding that *Chevron* provided appropriate framework for assessing FDA's assertion of jurisdiction over tobacco products, but not necessarily resolving question whether court must defer to agency's reasonable interpretation of its own ambiguous jurisdiction because Court resolved case at step one). It is also an open question whether the Administrative Procedure Act prevents *Chevron* deference from being accorded to an agency that administers a statute but has not been explicitly delegated substantive rulemaking power. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 199-200 (1998); *see also id.* at 203-06 (citing recent circuit court cases offering different answers to this question). It is also not clear to which agency deference is due when a statute confers enforcement authority upon two or more agencies. *See* DAVIS & PIERCE, *supra* note 6, § 3.5, at 60-62 (discussing cases in which circuit courts employed differing approaches in resolving this question).

B. The Seminole Rock One-Step

Unlike that of *Chevron*, the story of *Bowles v. Seminole Rock & Sand Co.*[69] has rarely been told.[70] In *Seminole Rock*, the Court decided a dispute regarding the meaning of a regulation issued by the Office of Price Administration under authority conferred by the Emergency Price Control Act of 1942. The regulation, one of many implementing a general price freeze, provided that "the maximum price [permitted to be charged] . . . shall be the highest price charged by the manufacturer during March, 1942," with "highest price" defined as:

> (i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942; or
>
> (ii) If the seller made no such delivery during March, 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month . . . .[71]

The Seminole Rock and Sand Company (*Seminole Rock*) had delivered crushed rock at a price of 60 cents per ton during March 1942. At that time it also had contracted to deliver such rock at $1.50 per ton, but made no deliveries during March under this contract. When *Seminole Rock* contracted to sell crushed rock at prices of 85 cents and $1 per ton after the price freeze took effect, the Office of Price Administration sought an injunction. The Administrator interpreted the regulation to set *Seminole*

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[69] 325 U.S. 410 (1945).

[70] Most of the literature on *Seminole Rock* has emanated from the pen of Russell Weaver. *See, e.g.*, Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 ARIZ. ST. L.J. 109 (1991) [hereinafter Weaver, *Challenging*]; Russell L. Weaver & Thomas A. Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-*Chevron *Assessment*, 22 MEM. ST. U. L. REV. 411 (1992); Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35 (1991); Russell L. Weaver, *Evaluating Regulatory Interpretations: Individual Statements*, 80 KY. L.J. 987 (1991-1992); Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681 (1984) [hereinafter Weaver, *Overview*]; Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587 (1984) [hereinafter Weaver, *The Deference Rule*]. Other scholars have recently begun to pay attention to *Seminole Rock* deference. *See, e.g.*, Anthony, *Supreme Court*, *supra* note 4, at 4-12; Manning, *supra* note 29; Nagy, *supra* note 6, at 966-79; Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 280-91, 322-23 (2000) [hereinafter Noah, *Divining Regulatory Intent*]. Apparently, there is only one older article that discusses the doctrine in any depth. Weaver, *The Deference Rule*, *supra*, at 589 n.17 (citing Frank C. Newman, *How Courts Interpret Regulations*, 35 CAL. L. REV. 509 (1947)).

[71] Maximum Price Regulation No. 188, §§ 1499.153(a), 1499.163(a)(2), 7 Fed. Reg. 7968, 7969 (Oct. 8, 1942).

Rock's maximum price based on its actual deliveries during March 1942; therefore, the contractual obligation to sell crushed rock at $1.50 per ton was irrelevant. The district court implicitly rejected that interpretation, concluding that the maximum price could be based on deliveries planned to occur during March 1942 when the failure to deliver the goods was not the seller's fault.[72]

The Fifth Circuit affirmed the decision. The court of appeals explained that, "to be binding upon and enforceable by the courts, administrative interpretations either of the law or regulations having the force and effect of law must be in harmony with and tend to effectuate the cardinal purposes of the law, and may not be unreasonable."[73] The Fifth Circuit thought it plainly "unreasonable and antagonistic to the spirit of the Act" to limit *Seminole Rock's* selling price to 60 cents per ton based on the happenstance that the purchaser under the higher price contract needed no crushed rock, and therefore took no deliveries, during March 1942.[74] The court then noted that the regulation could be interpreted consistent with its view of the equities. It interpreted "charged . . . for delivery" in the first clause to mean "either the delivery or offer of delivery . . . during March, 1942," and "offering price . . . for delivery" in the second clause to encompass only "prices quoted by the seller in negotiations" but not reduced to writing in a contract.[75]

The Supreme Court, however, rejected the appellate court's approach to reviewing the Administrator's interpretation, explaining:

> Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.[76]

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[72] Bowles v. Seminole Rock & Sand Co., 59 F. Supp. 751, 752 (S.D. Fla. 1944).

[73] Bowles v. Seminole Rock & Sand Co., 145 F.2d 482, 484 (5th Cir. 1944).

[74] *Id.* at 484-85.

[75] *Id.* at 485.

[76] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945).

The Administrator, as he had in the lower courts, claimed that the first clause set the maximum price based on actual deliveries during March 1942. *Seminole Rock*, apparently misunderstanding the circuit court's interpretation, argued that a maximum price could be set under the first clause only if a company had made both a charge and a delivery during March 1942.[77] Because the company had entered into the 60 cents per ton contract in 1941, it concluded that neither of its contracts satisfied those criteria and, therefore, that its maximum price should be set under the second clause at $1.50 per ton, its highest offering price during March 1942.[78]

The Court noted that the first clause was silent regarding whether the charge and the delivery must be made during March 1942, and stated that it thought the Administrator offered the better reading.[79] But, the Court continued, the administrative construction of the regulation's method of determining the ceiling price eliminated "[a]ny doubts concerning this interpretation."[80] The Administrator had previously issued a bulletin that defined "highest price" in accordance with the interpretation now proffered to the Court. The Administrator also informed the Court that the Office of Price Administration had consistently interpreted the regulation in this manner.[81] The Court held that this "consistent administrative interpretation," in combination with its reading of the regulation, required it to conclude that *Seminole Rock's* sales were capped, as the Administrator argued, at 60 cents per ton.[82] Nonetheless, the Court noted that it had not considered the validity of the regulation, because the statute required that issue be presented to the Emergency Court of Appeals initially, and was not "concerned with any possible hardship" application of the regulation, as interpreted, imposed

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[77] The Company appears to have been led astray by the Fifth Circuit's statement that the "plain intendment of the statutes and regulations . . . was to fix those prices indiscriminately at the highest price for which an article of commerce was bought and sold . . . during March, 1942." *Seminole Rock*, 145 F.2d at 484; *see* Respondents' Brief at 10-11, *Seminole Rock* (No. 914). The Government, on the other hand, understood the Fifth Circuit's holding. *See* Petitioners' Brief at 11, 15, *Seminole Rock* (No. 914).

[78] *See Seminole Rock*, 325 U.S. at 415.

[79] *Id.* at 415-17; *see also* Noah, *Diving Regulatory Intent*, *supra* note 70, at 286 n.111 (noting that Court referred to administrative interpretations of regulations "only after . . . engag[ing] in a careful textual analysis"). That textual analysis, however, was devoted to rejecting the Company's highly implausible reading of the regulation; the Court neither discussed the Fifth Circuit's more plausible interpretation nor engaged in an independent analysis of the regulation's terms.

[80] *Seminole Rock*, 325 U.S. at 417.

[81] *Id.*

[82] *Id.* at 418 & n.9.

on *Seminole Rock*.[83]

The Supreme Court has most often expressed the test for granting deference to an agency's interpretation of its own regulation in the terms set out in *Seminole Rock*: "the administrative interpretation [is] of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[84] This test, which lacks an express requirement that the agency's interpretation satisfy a reasonableness standard, has been described as an "indulgent if not downright abject standard of deference."[85] Yet the Court has twice explicitly referred to reasonableness in stating the standard of deference due an agency's interpretation of its own regulation. In those cases, the Court held that it is "obligated to regard as controlling a reasonable, consistently applied administrative interpretation."[86] In any event, even if "plainly erroneous or inconsistent" calls for a more deferential standard of review than does "unreasonable,"[87] in practice courts review agency interpretations of their own regulations under a standard nearly identical to that at *Chevron* step two.[88]

Moreover, although formally stated as a one-step test, *Seminole Rock* implicitly involves a preliminary analysis that mirrors *Chevron* step one.[89] Because a court will not defer to an interpretation that contradicts the

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[83] *Id.* at 418-19.

[84] *See, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); United States v. Larionoff, 431 U.S. 864, 872-73 (1977); INS v. Stanisic, 395 U.S. 62, 72 (1969); Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 276 (1969).

[85] Anthony, *Supreme Court*, *supra* note 4, at 4-5.

[86] Ehlert v. United States, 402 U.S. 99, 105 (1971); *accord* N. Ind. Pub. Serv. Co. v. Walton League of Am., Inc., 423 U.S. 12, 15 (1975) (per curiam); *see also* Weaver, *The Deference Rule*, *supra* note 70, at 591-95 (offering other variations on Court's phrasing of deference standard).

[87] While it is relatively easy to divide, as *Chevron* does, the set of possible interpretations into reasonable and unreasonable categories, it seems much harder to carve from the latter category those interpretations that are nonetheless not plainly erroneous.

[88] *See, e.g.*, Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 94-95 (1995); Mission Group Kan., Inc. v. Riley, 146 F.3d 775, 780 n.3 (10th Cir. 1998); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997); 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 30.12, at 259 (1958); Manning, *supra* note 29, at 628-29 & n.83; Nagy, *supra* note 6, at 970-71 & n.223; Weaver, *Challenging*, *supra* note 70, at 125. *But see, e.g.*, Nat'l Med. Enters., Inc. v. Shalala, 43 F.3d 691, 696-97 (D.C. Cir. 1995) ("Insofar as the Hospital's challenge calls into question the Secretary's interpretation of her own regulations, we apply a still more deferential standard than that afforded under *Chevron*.").

[89] *See* Manning, *supra* note 29, at 628-29; Weaver, *Challenging*, *supra* note 70, at 117-18.

clear meaning of the regulation, a reviewing court must determine if the regulation is unambiguous in the course of deciding whether to accord the agency's interpretation of deference.[90] If the court finds the regulation has a clear meaning, then for all practical purposes that is the end of the matter:[91] if the agency disagrees, then the court will not defer; if the agency agrees, then the deference doctrine does no work.[92] Accordingly, as the Court stated in *Christensen*, regulatory ambiguity is a prerequisite to *Seminole Rock* deference.[93] Therefore, with its implicit first step and its review of agency interpretations under a reasonableness standard, *Seminole Rock* in practice closely parallels *Chevron* in form and substance.[94]

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[90] The Court has recently suggested that, as with *Chevron*, an earlier Supreme Court interpretation renders unambiguous a regulation that would otherwise be a candidate for *Seminole Rock* deference. *See* Norfolk S. Ry. Co. v. Shanklin, 120 S. Ct. 1467, 1476 (2000) (citing Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990)); *see also supra* note 53 (describing *Maislin* and related cases). Yet in determining whether a regulation has a clear meaning, courts rarely consult a regulation's administrative history. *See* Noah, *Divining Regulatory Intent*, *supra* note 70, at 288-89 (Supreme Court); *id.* at 291-92 (lower courts). Thus, "dynamic interpretation (though exercised by agencies instead of courts), rather than either textualism or intentionalism, has been the norm for judicial interpretation of [notice-and-comment regulations]." *Id.* at 285.

[91] *See, e.g.*, Mun. Resale Serv. Customers v. FERC, 43 F.3d 1046, 1053 (6th Cir. 1995). Although not phrased in precisely these terms, this is what the Supreme Court did in *Christensen* — having determined that the regulation had a clear meaning, it accorded the agency's interpretation no deference. *See* Christensen v. Harris County, 120 S. Ct. 1655, 1663 (2000).

[92] Because *Seminole Rock* deference, like *Chevron* deference, tells a court to accept an interpretation even if it is not the one that court would have chosen, it is outcome determinative only when the court's choice differs from the agency's. *Cf.* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 87 ("If the principle of constitutional avoidance leads only to the same result that the interpreter would have reached without even considering the relevance of the Constitution, then it is hardly worth thinking about.").

Note that the Court could have stated the *Chevron* standard as a one-step test — for example, "a court must defer to an agency's interpretation of a statute it administers unless that interpretation is unreasonable" — without materially changing the mode of analysis, because an interpretation that contradicts Congress's unambiguous resolution of a policy choice is necessarily unreasonable. For this reason, Judge Stephen Williams has argued that there is no utility in distinguishing between *Chevron*'s two steps. Colloquy, *Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to the Agency*, 4 ADMIN. L.J. 113, 123-24 (1990).

[93] *But see* Stinson v. United States, 508 U.S. 36, 44 (1993) (granting *Seminole Rock* deference to Sentencing Commission's commentary to Sentencing Guidelines and stating that commentary explains how "even unambiguous" guidelines should be applied in practice). The Court, however, did not clearly hold in *Stinson* that a court should defer to commentary offering a reasonable, but unpersuasive, interpretation of an unambiguous guideline.

[94] As with *Chevron*, if the agency has not offered an interpretation of its regulation or

C. Chevron and Seminole Rock: Differences in Application

Despite the many similarities between *Chevron* and *Seminole Rock*, the doctrines differ in ways that are both practically important and relevant to the justification of *Seminole Rock* offered in this article. To begin with, I return to the two issues the Court in *Seminole Rock* expressly stated that it was not reaching: the "statutory validity of the regulation" and "any possible hardship that the enforcement of the [agency's interpretation] may impose."[95] Both of these issues, when addressed by courts, limit the effects of *Seminole Rock* deference. In addition, the distinction between amendments to and interpretations of regulations plays a role in the application of *Seminole Rock* for which there is rarely an analogue under *Chevron*. Finally, there are two respects in which *Seminole Rock* applies to a broader set of agency interpretations than does *Chevron*. Each of these is considered in the following sections.

1. Statutory Validity

As the Court recognized in *Seminole Rock*, deference to an agency's interpretation of its own regulation does not preclude a party from challenging the validity of the regulation as interpreted.[96] For example, in *Shalala v. Guernsey Memorial Hospital*,[97] the hospital argued both that the regulation, properly construed, required reimbursement according to generally accepted accounting principles and that the regulation, if the Secretary's interpretation was correct, violated the Medicare statute.[98] When the statute at issue is one the agency administers, however, review of the regulation, as interpreted, is normally governed by *Chevron*. Accordingly, the party claiming that the regulation violates the statute would have to demonstrate that the regulation, as interpreted, is

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offers an unreasonable interpretation, the reviewing court must decide whether to interpret the regulation itself or to give the agency a chance to come up with a reasonable interpretation. *See supra* notes 49 and 65.

[95] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 418-19 (1945).

[96] *See id.* at 414 ("The legality of the result reached by this process [of deference], of course, is quite a different matter."). Indeed, a party can contend that the regulation, as the agency has interpreted it, violates both the Constitution and the statute under which it was promulgated.

[97] 514 U.S. 87 (1994).

[98] *See id.* at 92-100; *id.* at 108-09 (O'Connor, J., dissenting).

contrary to the plain meaning of the statute, or is based on an unreasonable interpretation of the statute. As a result, in many cases the *Seminole Rock* one-step will be a prelude to the *Chevron* two-step, because the output of applying *Seminole Rock* deference is an input in the application of *Chevron* deference.

John Manning, however, has argued that the *Chevron* question is antecedent to the *Seminole Rock* question:

> It is important to note that because a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well. So to get to *Seminole Rock* deference, a court must first address the straightforward *Chevron* question whether an agency regulation, as interpreted, violates the statute. *Seminole Rock* addresses the further question whether the agency's interpretation is consistent with the regulation.[99]

This puts the cart before the horse. A court following Manning's approach could hold that (a) the regulation, as interpreted, does not violate the statute, but (b) the interpretation is inconsistent with the regulation. If so, the court then must either remand the case so the agency can revise its interpretation of the regulation or determine on its own what the regulation means. A court choosing the latter course would then have to decide whether the regulation, in view of its actual meaning, violates the statute. Either way, the first holding, that the regulation does not violate the statute, is a mere advisory opinion regarding the validity of a regulation that the court ultimately concludes does not exist. The same would be true if the court were to hold both that (a) the regulation, as interpreted, violates the statute, and (b) the interpretation is inconsistent with the regulation. However, when a court holds *both* that the agency's interpretation is consistent with its regulation and that the regulation, so construed, does not violate the statute, the ordering of the inquiry is irrelevant.[100]

The consequences of *Seminole Rock*, therefore, are limited by the requirement that an agency's regulatory interpretation not cause the

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[99] Manning, *supra* note 29, at 627 n.78 (citation omitted); *accord id.* at 639 n.139.

[100] This was the case in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), which Manning cites to support his position. Manning, *supra* note 29, at 639 n.139. Although in that case the Court addressed a *Chevron* question before turning to a *Seminole Rock* question, nowhere did the Court hold that the question whether to grant *Chevron* deference is anterior to the question whether to grant *Seminole Rock* deference when both are at issue, nor did it intimate that it addressed the issues in that order for that reason. *See Arkansas*, 503 U.S. at 105-08 (*Chevron*); *id.* at 109-14 (*Seminole Rock*).

regulation being interpreted to violate the statute under which it was promulgated. As a result of this requirement, however, *Seminole Rock* and *Chevron* are interdependent. When an agency's interpretation of a statute is contained in a regulation, a court reviewing that interpretation under *Chevron* must first ascertain the meaning of the regulation. This initial inquiry is governed by *Seminole Rock*. As I argue below,[101] this interdependence provides a sufficient basis for retaining *Seminole Rock*, despite criticisms that have been raised against the doctrine.

2. Possible Hardship

The Court in *Seminole Rock* also declined to decide whether the agency's interpretation inflicted hardship on Seminole Rock. The D.C. Circuit has often held that due process requires that a regulated entity have sufficient notice of an agency's interpretation of a regulation before it may be punished for violating that regulation as interpreted.[102] In these cases, the court's decision to defer to an agency's interpretation of its regulation is separate from its decision to enforce that regulation against a party. For example, consider *Trinity Broadcasting of Florida, Inc. v. FCC*.[103] In *Trinity*, the Federal Communication Commission (FCC) had denied a license renewal application based on its interpretation of the "minority-controlled" exemption to a regulation limiting ownership of multiple television stations to twelve.[104] A competitor claimed that Trinity violated the regulation because none of its thirteen stations was minority-controlled. The FCC agreed, finding that, although the board of Trinity's thirteenth station was majority-minority, the minority board members did not have the *de facto* control the regulation required. The

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[101] *Infra* Part IV.C.

[102] *See, e.g.*, United States v. Chrysler Corp., 158 F.3d 1350, 1354-57 (D.C. Cir. 1998); Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1328-29, 1333-34 (D.C. Cir. 1995); Rollins Envtl. Servs. (NJ) Inc. v. EPA, 937 F.2d 649, 653 (D.C. Cir. 1991). Other circuits have also held similarly. *See* DAVIS & PIERCE, *supra* note 6, § 6.10, at 203-09 (citing cases); Manning, *supra* note 29, at 670 & n.281 (same). Although the same standard could be applied to an agency's statutory interpretation, I am aware of no case in which a court has deferred to an agency's interpretation of a statute but held that a party cannot be punished for violating the statute, as interpreted, because it lacked adequate notice of the agency's interpretation.

[103] 211 F.3d 618 (D.C. Cir. 2000).

[104] That regulation, which Congress has since eliminated, allowed a broadcaster with interests in twelve non-minority-controlled stations to have interests in two additional minority-controlled stations. *Id.* at 621 (describing 47 C.F.R. § 73.3555(d)(1) (1990)).

court deferred to this interpretation of the regulation,[105] but nonetheless vacated the Commission's decision because it found that Trinity lacked sufficient notice of that interpretation.[106] In doing so, the court noted that, although it reviews an agency's interpretation under a "plainly wrong" standard, when it reviews an agency's decision to impose punishment for violating a regulation as interpreted it asks whether the agency's interpretation was "ascertainably certain" to the regulated entity.[107]

Although the regulation at issue in *Trinity Broadcasting* is no longer in effect,[108] if it were, then the D.C. Circuit's decision presumably would have served to place future license applicants on notice of the FCC's interpretation. In a sense, therefore, the court held that the agency's interpretation was authoritative in future cases only. Yet there are two grounds for questioning the D.C. Circuit's approach. First, as the Third Circuit has held, the manner in which an agency provides notice to regulated entities could be a reason for refusing to defer to an agency's interpretation of its own regulation in the first place.[109] As long as *Seminole Rock* deference extends to informal regulatory interpretations, however, whether the interpretive format used provided sufficient notice should go to the enforceability of the interpretation, not its meaning.[110] Second, one may wonder about the propriety of a court opining on the validity of a regulatory interpretation only to reject the agency's application of that regulation, as interpreted, in the case before it. When a court can resolve a case by holding that a regulated party cannot be punished because it lacked notice of the agency's interpretation, there appears to be no call for it to render what is, essentially, an advisory opinion on the reasonableness of the interpretation.

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[105] *See id.* at 625-27 (applying *Seminole Rock*).

[106] *Id.* at 628-32.

[107] *Id.* at 628.

[108] *See supra* note 104.

[109] *See* FLRA v. Dep't of Navy, 966 F.2d 747, 762-65 (3d Cir. 1992) (en banc) (holding that interpretation "confined to an *amicus* brief and [an] unpublished letter," but discussed in other judicial decisions, was "wholly inadequate to notify the public of the agency's interpretation" and that interpretation was therefore unreasonable as disseminated); *see also* Manning, *supra* note 29, at 670 & n.282 (implying that practice of D.C. and other circuits requires court to hold "that an agency interpretation of a regulation [is] invalid because of a lack of fair notice").

[110] *See FLRA*, 966 F.2d at 775-76 (Rosenn, J., dissenting); *infra* Part IV.A.2.

3. Interpretations and Amendments

The Administrative Procedure Act (APA) requires that an amendment to a regulation, like the regulation itself, be promulgated after notice and comment.[111] An agency, however, may promulgate an interpretive rule without engaging in notice-and-comment procedures.[112] This distinction between amending and interpreting a regulation is the source of two different judicially imposed limitations on *Seminole Rock*.

First, to prevent agencies from evading the APA's requirement that amendments be promulgated after notice and comment, some courts have attempted to identify those interpretations that should not receive *Seminole Rock* deference because they are actually improperly promulgated amendments. These courts refuse to apply *Seminole Rock* deference to such interpretations, even though they are neither plainly erroneous nor inconsistent with the regulation.[113] Determining which regulatory interpretations are really amendments, not surprisingly, is a difficult exercise in line-drawing.[114] The basic insight, however, is that an

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[111] *See* 5 U.S.C. §§ 551(5), 553(b); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 396; Weaver, *Challenging*, *supra* note 70, at 120 & n.47.

[112] 5 U.S.C. § 553(b)(3)(A). As the name suggests, an interpretive rule contains an agency's interpretation of a pre-existing legal right or duty. *See, e.g.*, Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1110 (D.C. Cir. 1993). Four main features distinguish interpretive rules from legislative rules. Interpretive rules do not bind the public, courts, or the agency itself; need not be promulgated through notice-and-comment procedures; may be promulgated without any congressional authorization; and cannot, of their own force, impose any new duties or create any new rights. *See* I DAVIS & PIERCE, *supra* note 34, § 6.3, at 233-34; *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311, 1322-23 (1992) (distinguishing interpretive rules from legislative rules and policy statements). Although the distinction between the two types of rules is often difficult to draw in practice, the essential difference for purposes of this article is the absence of a notice-and-comment requirement when an agency promulgates an interpretive rule. Note, however, that a rule that does nothing more than interpret the meaning of a statutory or regulatory term could be promulgated after notice and comment; under *Christensen*, such a rule would likely receive *Chevron* deference. *See* Herz, *supra* note 5, at 212.

[113] A similar concern could arise with respect to those few statutes that require an agency to set forth its interpretation of the statute in a regulation promulgated after notice and comment. *See, e.g.*, Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 108-09 (1995) (O'Connor, J., dissenting). After *Christensen*, an agency could still attempt to use an adjudication to promulgate an interpretation that Congress had required it to issue after notice and comment.

[114] *See* Anthony, *Supreme Court*, *supra* note 4, at 8; Asimow, *supra* note 111, at 396; Noah,

interpretation should not be deemed an amendment if there is "a logical connection between the substantive content of the established regulation . . . and the substantive content of the document that purports to interpret it, such that the latter flows fairly from and is justified by the former."[115]

The Tenth Circuit employed a variation on this formulation in *Mission Group Kansas, Inc. v. Riley*.[116] The court refused to defer to an agency's interpretation of a regulation that allowed it to impose on a school seeking certain federal funds "any additional conditions . . . the Secretary requires the institution to meet."[117] Despite the breadth of "any additional conditions," the court refused to hold that the agency's selected condition was a permissible interpretation of that phrase.[118] Instead, the court looked to the procedures culminating in promulgation of the regulation to determine "whether potentially affected parties were given an opportunity to comment on the 'interpretation' now advanced."[119] The court concluded that they were not given such an opportunity because the administrative materials issued in this rulemaking gave little indication to regulated parties of how the Secretary proposed to use the extremely broad discretion in the regulation.[120] The Seventh Circuit, by contrast, applied a different variation on that formulation in holding that an ostensible regulatory interpretation was actually an amendment because "[t]here is no process of cloistered, appellate-court type reasoning by which the Department of Agriculture could have excogitated the [interpretive] rule from the . . . regulation."[121]

The second way in which courts have used the difference between amendments and interpretations to limit the reach of *Seminole Rock*

Divining Regulatory Intent, *supra* note 70, at 297; Weaver, *Challenging*, *supra* note 70, at 121. One can understand the Court's refusal in *Christensen* to grant *Seminole Rock* deference to the regulatory interpretation contained in the opinion letter to reflect not simply the conclusion that the regulation had a plain meaning, *supra* note 91, but also the desire to enforce this line between amendments and interpretations. *See* Christensen v. Harris County, 120 S. Ct. 1655, 1663 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

[115] Anthony, *Supreme Court*, *supra* note 4, at 8.

[116] 146 F.3d 775 (10th Cir. 1998).

[117] 34 C.F.R. § 668.14(a)(1) (1999).

[118] *Mission Group*, 146 F.3d at 781.

[119] *Id.* at 782 (citing Anthony, *Supreme Court*, *supra* note 4, at 8).

[120] *Id.*; *see also infra* text accompanying notes 337-43 and note 343 (discussing case further and criticizing conclusion).

[121] Hoctor v. Dep't of Agric., 82 F.3d 165, 171 (7th Cir. 1996).

involves the agency's freedom to change its interpretation. The Supreme Court has held that it will not refuse to grant *Chevron* deference to an agency interpretation merely because it contradicts a prior position.[122] The D.C. Circuit, however, has rejected the argument that an agency has the same freedom to change an interpretation of a regulation under *Seminole Rock*.[123] The court distinguished the two deference rules as follows:

> That delegation [to resolve ambiguities in statutory language] is, as the Supreme Court recognized in *Chevron*, itself a continuing one; there is no barrier to an agency altering its initial interpretation to adopt another reasonable interpretation — even one that represents a new policy response generated by a different administration. . . . But Congress — and it is congressional will that is crucial — has said more, specifically on the subject of regulations. Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to *"repeals"* or *"amendments."* . . . To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements.[124]

Underlying the D.C. Circuit's approach is the same concern that agencies might be evading notice-and-comment procedures that motivated courts to require some connection, beyond mere reasonableness, between an interpretive document and the regulation interpreted. By refusing to permit agencies to change a regulatory interpretation except by amendment, the D.C. Circuit has expanded the category of interpretations that will be deemed amendments. Even an interpretation that clearly follows from a regulation would be rejected under this standard if it conflicted with an earlier interpretation.

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[122] Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996); Rust v. Sullivan, 500 U.S. 173, 186 (1991); I DAVIS & PIERCE, *supra* note 34, § 3.5, at 122; Scalia, *supra* note 5, at 518.

[123] Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997).

[124] *Id.*

Although this proposition is settled law in the D.C. Circuit[125] and was cited approvingly by the four dissenting Justices in *Geier*,[126] no other circuit currently follows this approach.[127] The D.C. Circuit's rule has also come under attack from commentators, who claim that it does not comport with the APA. Although the D.C. Circuit is correct that Congress has spoken to the procedures an agency must follow in amending or repealing a regulation, these commentators note that the APA's explicit exemption from those procedures for interpretive rules makes no distinction between initial and subsequent interpretations.[128] Accordingly, they conclude that "where a document does actually interpret a regulation . . . it is exempt, even if . . . it contradicts a prior interpretation or impairs investment-backed reliance interests."[129] The agency must explain its reasons for changing interpretations, and the new interpretation must itself be reasonable.[130] If an agency does this, then the interpretation should receive *Seminole Rock* deference.[131]

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[125] *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1028 (D.C. Cir. 2000); Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999); *see also* Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94-95 (D.C. Cir. 1997) (restating *Paralyzed Veterans* rule in dictum); *cf.* Hudson v. FAA, 192 F.3d 1031, 1035-36 (D.C. Cir. 1999) (distinguishing policy statements from interpretations for purposes of *Paralyzed Veterans* rule and holding that agency can alter former without engaging in notice-and-comment rulemaking).

Richard Pierce has recently argued that *Paralyzed Veterans* squarely conflicts with the D.C. Circuit's earlier decision in *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993), and that the *Paralyzed Veterans* court therefore lacked the authority to hold as it did, given the D.C. Circuit's rule that one panel of the court may not overrule another. Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 570 (2000) [hereinafter Pierce, *Distinguishing*]; *see also Am. Mining Congress*, 995 F.2d at 1111-13 (holding that agency's informal interpretation of regulation, which altered earlier interpretation of that regulation, did not need to be promulgated after notice and comment).

[126] Geier v. Am. Honda Motor Co., 120 S. Ct. 1913, 1942 (2000) (Stevens, J., dissenting) (noting "the APA's requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation").

[127] The Third Circuit had adopted the D.C. Circuit's position in *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 174 F.3d 166, 175-77 (3d Cir. 1999), but the panel granted a motion for rehearing, vacated its opinion, and then issued a decision that did not address an agency's ability to change an interpretation of a regulation. *See* Caruso v. Blockbuster-Sony Music Entm't Centre, 193 F.3d 730 (3d Cir. 1999).

[128] DAVIS & PIERCE, *supra* note 6, § 6.3, at 155-56; Michael Asimow & Robert A. Anthony, *A Second Opinion? Inconsistent Interpretive Rules*, ADMIN. & REG. L. NEWS, Winter 2000, at 16, 16; *see also* Pierce, *Distinguishing*, *supra* note 125, at 566-73 (concluding, after close analysis of court's reasoning and citations to precedent, that "decision in *Paralyzed Veterans* was a mistake").

[129] Asimow & Anthony, *supra* note 128, at 16; *accord* DAVIS & PIERCE, *supra* note 6, § 6.3, at 155-56.

[130] *See* Asimow & Anthony, *supra* note 128, at 16.

[131] *But see id.* at 16-17 (arguing that *Seminole Rock* should be replaced with *Skidmore*).

4. The Broader Scope of *Seminole Rock*

There are two respects in which *Seminole Rock* applies to a larger set of agency interpretations than *Chevron*. The first is the disparate treatment of informal interpretations. As explained above, where *Christensen* limited *Chevron* deference to interpretations that have the force of law, *Auer* held that *Seminole Rock* deference can be granted regardless of the format in which an interpretation appears, as long as the interpretation represents the agency's "fair and considered judgment."[132] Prior to *Christensen*, this was not a clear distinction between the two doctrines.[133] For example, in *Pension Benefit Guaranty Corp. v. LTV Corp.*,[134] the Court deferred to an agency's interpretation of a statute contained only in an opinion letter, without distinguishing between formal and informal interpretations.[135] By contrast, in *Metropolitan Stevedore Co. v. Rambo*,[136] the Court refused to grant *Chevron* deference to an interpretation that, among other things, was not "embodied in any regulation or similarly

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[132] Auer v. Robbins, 519 U.S. 452, 462 (1997).

[133] *See* sources cited *supra* note 5. The opinion in *Christensen*, however, suggests that the Court thought it was settled law that interpretations found in formats lacking the force of law do not receive *Chevron* deference, as it stated its conclusion without elaboration, offering only a string cite of three cases and one secondary source. *See* Christensen v. Harris County, 120 S. Ct. 1655, 1662-63 (2000). Yet none of the four citations clearly supports the proposition the Court took for granted in *Christensen*. The reasoning in the first of those cases, *Reno v. Koray*, 515 U.S. 50, 61 (1995), has been aptly criticized as "jumbled" for appearing to state that both some deference and *Chevron* deference is due to an informal interpretation. *See* Anthony, *Supreme Court*, *supra* note 4, at 19; *see also* Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 182 (3d Cir. 1995) (reading *Koray* to require court to grant reasonable informal interpretation "considerable weight under principles announced in *Chevron*"). The second case cited, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-58 (1991), cites neither *Chevron* nor its progeny and, as Justice Scalia noted in *Christensen*, had not been used in later cases to preclude the granting of *Chevron* deference to informal interpretations. *Christensen*, 529 U.S. at 1664 (Scalia, J., concurring in part and concurring in judgment) (citing cases). The third case, as noted earlier, actually states in a dictum that *Seminole Rock* deference is not warranted for an informal interpretation of a regulation. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1991). Finally, while the secondary source cited argues that *Chevron* deference should apply only to formal interpretations, it explicitly states that the Court "has not yet addressed the issue in a definitive manner." I DAVIS & PIERCE, *supra* note 34, § 3.5, at 120-21.

[134] 496 U.S. 633 (1990).

[135] *Id.* at 650-52.

[136] 521 U.S. 121 (1997).

binding policy pronouncement."[137] Nor was it clear prior to *Auer* that *Seminole Rock* deference extended to informal interpretations, despite the Court's decision to defer to such an interpretation in *Seminole Rock* itself and its express decision to do so in *Gardebring v. Jenkins*.[138] As noted above, in *Martin v. Occupational Safety & Health Review Commission*[139] the Court stated in a dictum that an informal interpretation of a regulation should be reviewed under *Skidmore*, not *Seminole Rock*.[140] Yet, the Court did not expressly address contradictory decisions or dicta in either *Christensen* or *Auer*. Thus, the disparate treatment of informal interpretations under the two doctrines is neither completely settled nor particularly well explained.[141]

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[137] *Id.* at 137 n.9, 138; *see also* City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 339 n.5 (1994) ("[W]e need not consider whether an agency interpretation expressed in a memorandum like the Administrator's in this case is entitled to any less deference under *Chevron* than an interpretation adopted by rule published in the Federal Register, or by adjudication."); Davis v. United States, 495 U.S. 472, 484 (1990) ("Although the Service's interpretive rulings do not have the force and effect of regulations, we give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use." (citation omitted)); FDIC v. Phila. Gear Corp., 476 U.S. 426, 439 (1986) ("Although the FDIC's interpretation of the relevant statute has not been reduced to a specific regulation, we conclude nevertheless that the FDIC's practice and belief . . . are entitled in the circumstances of this case to the 'considerable weight [that] should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.'" (quoting Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 844 (1984))).

[138] 485 U.S. 415, 429-30 (1988). That the Court so held has been largely forgotten; not only did the Court fail to cite *Gardebring* in *Auer*, but its holding with respect to informal interpretive formats has only been followed twice, both times in Third Circuit opinions. Conn. Gen. Life Ins. Co. v. Comm'r, 177 F.3d 136, 144 (3d Cir. 1999); Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 183 n.9 (3d Cir. 1995).

[139] 499 U.S. 144 (1991).

[140] *See id.* at 157. The Court cited three pre-*Chevron* cases to support this dictum, each of which held only that *Skidmore* provides the standard for reviewing an informal interpretation of a statute. *See id.*

[141] One issue raised by the combination of *Christensen* and *Auer* is how the Supreme Court will respond to an agency that promulgates a regulation that repeats verbatim the operative statutory language and then offers an informal interpretation of the regulation. Presumably the Court would treat the informal interpretation as a statutory interpretation, even though it formally interprets the regulation, and would refuse to defer to it under *Christensen*. *See* Weaver, *The Deference Rule*, *supra* note 70, at 611 (arguing that, "[i]f the interpretation of a regulation is inextricably intertwined with the interpretation of a statute (as when the regulation contains an ambiguous term taken directly from the governing statute), the problem should be treated as one of statutory interpretation"). If the Court did not do so, agencies would have a simple way to evade *Christensen*'s force-of-law rule. *Cf.* Anthony & Asimow, *supra* note 21, at 11 (pointing to possibility that agencies will promulgate vague regulations and then seek *Seminole Rock* deference in order to get around *Christensen*).

Second, *Seminole Rock* applies in cases in which *Chevron* deference does not. An agency need not administer a statute for purposes of *Chevron* for a court to defer to that agency's interpretation of an ambiguous regulation promulgated under the statute. In addition, although a court normally will apply *Seminole Rock* deference only to an interpretation of the agency that promulgated and administers a regulation,[142] the fact that multiple agencies administer a regulation will not necessarily preclude one or more of those agencies from receiving *Seminole Rock* deference.[143] For example, a court could defer under *Seminole Rock* to an agency's interpretation of its regulations implementing the Freedom of Information Act, even though the court would not defer to the agency's claim that its regulations, as interpreted, are compatible with the statute. Although this conclusion follows logically from the prerequisites to *Chevron* deference,[144] there appear to be no reported cases involving such a scenario. A likely explanation is that courts, prior to *Christensen*, could simply test an informal regulatory interpretation directly against the statute, thereby blurring this distinction between *Chevron* and *Seminole Rock*.[145] The Supreme Court did this in *United States v. LaBonte*,[146] in which it was faced with a Sentencing Guideline implementing a section of the criminal code and commentary interpreting that Guideline. Although the Court had previously held that commentary should

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[142] *See, e.g.*, Soc. Sec. Adm'r v. FLRA, 201 F.3d 465, 471 (D.C. Cir. 2000); DAVIS & PIERCE, *supra* note 6, § 6.10, at 211. One exception to this general rule arises when Congress transfers administrative authority for a statute from the promulgating agency to another agency, which then interprets regulations promulgated prior to the transfer. Amerada Hess Pipeline Corp. v. FERC, 117 F.3d 596, 600-01 (D.C. Cir 1997). A second arises when Congress can be understood to have delegated authority to one agency to interpret a regulation promulgated by a second agency. Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697-98 (1991).

[143] Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151-52 (1991); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 585 (D.C. Cir. 1997). *But see* Caiola v. Carroll, 851 F.2d 395, 399 (D.C. Cir. 1988) (refusing to defer to interpretation of regulation offered by one of three agencies that jointly promulgated and administered regulation).

[144] *See supra* text accompanying notes 50-52.

[145] Another possible explanation is that it is rare for an agency to have statutory authority to promulgate regulations but either to share duties for administering that statute or to lack administrative authority altogether. Alternatively, when that situation exists, agencies might choose not to proceed by regulation or parties might not have reason to challenge the agency's interpretation of the regulation.

[146] 520 U.S. 751 (1997).

receive the equivalent of *Seminole Rock* deference[147] and it was clear that the commentary was a permissible interpretation of the Guideline,[148] the Court declined to decide whether the Sentencing Commission can receive *Chevron* deference with respect to interpretations of the criminal code contained in its Guidelines.[149] Instead, the Court compared the commentary — rather than the Guideline, as interpreted — against the plain meaning of the statute.[150] After *Christensen*, we can expect to see cases making this distinction between *Seminole Rock* and *Chevron*.[151]

D. The Skidmore Standard

Although *Chevron* and *Seminole Rock* subject agency interpretations to reasonableness review, *Skidmore* authorizes judicial acceptance of an interpretation only in those cases in which the court is persuaded by the agency's position. Persuasiveness is the same standard a court applies under non-deferential review. Indeed, a court should accept any interpretation it finds persuasive, no matter what its source. In *Skidmore*, the Supreme Court simply recognized that agencies, by virtue of their experience, will often be a source of persuasive interpretations. This is a common-sense recognition,[152] but one that is not limited to agencies, for others may also have special knowledge that gives a court reason to believe that their interpretations likely are correct.[153] Accordingly, it is somewhat misleading to describe *Skidmore* as a doctrine of deference to agencies. Following *Christensen*, *Skidmore* looks set to reemerge as an

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[147] *See* Stinson v. United States, 508 U.S. 36, 38 (1993); *see also infra* text accompanying notes 220-26 (describing *Stinson*).

[148] *See LaBonte*, 520 U.S. at 753-55.

[149] *See id.* at 762 n.6.

[150] *See id.* at 757-62.

[151] Following *Christensen*, courts can no longer avoid the question whether an agency's interpretation gets *Chevron* deference by testing an informal regulatory interpretation directly against a statute. Accordingly, we should expect to see cases in which a court holds that an agency receives *Seminole Rock* deference for its interpretation of a regulation but does not receive *Chevron* deference for the interpretation of the statute contained in that regulation.

[152] I DAVIS & PIERCE, *supra* note 34, § 6.3, at 242-43; *see also* Brief of Amicus Curiae Professor Thomas W. Merrill in Support of Petitioner at 7-10, United States v. Mead Corp., 120 S. Ct. 2193 (2000) (No. 99-1434) (describing different justifications for *Chevron* and *Skidmore*).

[153] *See* Brief of Amicus Curiae Professor Thomas W. Merrill in Support of Petitioner at 11, *Mead* (No. 99-1434); *cf.* Salve Regina Coll. v. Russell, 499 U.S. 225, 231-33 (1991) (holding that court of appeals should review district court's determination of law de novo, but allowing that court of appeals could find, under *Skidmore*-like standard, "that the district court's analytical sophistication and research have exhausted the state-law inquiry, [leaving] little more . . . [to] be said in the appellate opinion").

important doctrine in judicial review of agency interpretations of statutes. If the Court were to extend its force-of-law rule to agency interpretations of regulations, then *Skidmore* would assume increased importance in that context as well.

In *Skidmore v. Swift & Co.*,[154] the Supreme Court faced the question whether "waiting time" should be counted as "working time" for the purpose of calculating overtime pay under the Fair Labor Standards Act (FLSA).[155] The Court recognized that Congress had conferred authority to resolve disputes under the FLSA upon the judiciary, rather than an agency.[156] Nonetheless, the Court noted that the Administrator, who had authority to enforce the FLSA through litigation, had "accumulated a considerable experience in the problems of ascertaining working time" in circumstances such as those presented in *Skidmore*.[157] The courts below had held that "waiting time" may never count as "working time" under the FLSA, yet the Administrator argued in an amicus brief that, on the facts of this case, some of the waiting time should be counted as working time.[158] This position was consistent with an interpretive bulletin he had issued previously, which called for flexible treatment of waiting time, rather than an all-or-nothing solution.[159]

The Supreme Court noted that the FLSA was silent on the question of the degree of deference due to the Administrator's interpretation of the statute. Justice Jackson, writing for the Court, canvassed a number of factors relevant to the answer.[160] On the one hand, the Administrator does not reach his conclusions after adversarial proceedings and those conclusions are not binding on the courts. On the other hand, the Administrator's interpretations control the government's enforcement policy and are "based upon more specialized experience and broader investigations and information" than a judge is likely to have.[161]

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[154] 323 U.S. 134 (1944).

[155] Specifically, the question was whether the nights a handful of employees spent in or near their employer's fire hall, waiting to answer any alarms that might sound, constituted hours worked, for which they were due overtime pay. *Id.* at 135-36.

[156] *Id.* at 137.

[157] *Id.* at 137-38.

[158] *Id.* at 139.

[159] *Id.* at 138-39.

[160] *Id.* at 139-40.

[161] *Id.* at 139.

Balancing these factors, the Court concluded that the Administrator's judgments are "entitled to respect," and that 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."[162] The Court, however, did not apply the standard it announced to the Administrator's position. Instead, based on its own interpretation of the statute, it held that the lower courts erroneously interpreted the FLSA to preclude counting any waiting time as working time.[163] The Court then remanded the case for further proceedings, presumably for the lower courts to consider the Administrator's position under the standard it had announced.[164]

Exactly what *Skidmore* entails as a standard of deference to an agency is difficult to determine. By virtue of its administrative experience, an agency will often be in a better position than any other party to offer a persuasive interpretation.[165] Yet the factors Justice Jackson cited presumably bear on the persuasiveness of any proffered interpretation of a statute, whether its source is a litigant, an academic, a judge from another circuit, or the agency that administers the statute.[166] Even so-called "post-enactment legislative history," which the Court has said is due little weight,[167] could be the source of a persuasive interpretation because an interpretation of a statute is no less correct for its having been offered in that form. A court may decline to give special weight to such an interpretation, but surely will adopt it if convinced it is the most persuasive interpretation. What role, then, does an agency's sponsorship of an argument play in *Skidmore*'s multi-factor analysis? Justice Breyer, while a circuit judge, concluded that the "simple fact that the agency *has* a position, in and of itself, is of only marginal significance."[168] Colin

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[162] *Id.* at 140.

[163] *Id.* at 136, 140. In the companion case to *Skidmore*, *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), the Court interpreted the FLSA and held that it did not categorically exclude waiting time from the definition of working time. *Id.* at 132-34; *see also Skidmore*, 323 U.S. at 136 (following *Armour*).

[164] *Skidmore*, 323 U.S. at 140.

[165] I DAVIS & PIERCE, *supra* note 34, § 6.3, at 242.

[166] Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L REV. 549, 565 (1985) [hereinafter Diver, *Statutory Interpretation*]. *But see* Rossi, *supra* note 21 (arguing that *Skidmore* should be understood as type of heightened hard look inquiry, or "reasonableness with a bite," at *Chevron* step two).

[167] *See, e.g.*, Pub. Employees Ret. Sys., v. Betts, 492 U.S. 158, 168 (1989); Pierce v. Underwood, 487 U.S. 552, 566-67 (1988); Weinberger v. Rossi, 456 U.S. 25, 35-36 (1982).

[168] Mayburg v. Sec'y of Health & Human Servs., 740 F.2d 100, 106 (1st Cir. 1984).

Diver similarly contends that, under *Skidmore*, an "argument's *pedigree* adds nothing to the persuasive force inherent in its reasoning."[169] Therefore, whether an agency has an advantage over other parties in interpreting a statute or a regulation is contingent on the agency's having greater expertise in the matter and making its reasoning sufficiently clear.[170]

Despite this difference, *Skidmore*, *Chevron*, and *Seminole Rock* share many common features. In cases involving both *Chevron* and *Skidmore*, the Court has found support for an agency's statutory interpretation in Congress's decision to reenact the relevant statute without changing the interpreted provisions.[171] Moreover, in many cases it will not matter whether a court selects *Skidmore* rather than *Chevron* or *Seminole Rock*. A court will reject an interpretation at odds with the plain meaning of a statute or regulation under any of the doctrines.[172] Further, if the agency's interpretation is either the most persuasive or unreasonable, then a court will reach the same result under all three doctrines, respectively accepting or rejecting the interpretation.[173]

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[169] Diver, *Statutory Interpretation*, *supra* note 166, at 565.

[170] However, one factor motivating Justice Jackson's decision was the belief that "the standards of public enforcement and those for determining private rights [should] be at variance only when justified by very good reasons." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Because only an agency can control the standards of public enforcement, on this interpretation of *Skidmore* the administering agency will always occupy a privileged position as compared with other interpreters. Yet it is not clear that Justice Jackson's concern with minimizing the differences between the set of cases in which a private citizen *can* pursue a claim and those in which the government *will* pursue a claim is a reason for accepting an agency's interpretation of a statute, especially when creation of a private right of action can be understood to reflect Congress's desire for maximum enforcement of the law. *See, e.g.*, Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1197, 1213-16 (1982). In any event, Justice Jackson concluded that the agency's interpretation has only "power to persuade," and not "power to control." *Skidmore*, 323 U.S. at 140. Accordingly, even if his concern is relevant to interpreting a statute or regulation, it could, at most, operate as a tie breaker.

[171] *See, e.g.*, Young v. Cmty. Nutrition Inst., 76 U.S. 974, 983 (1986) (applying *Chevron* analysis); I DAVIS & PIERCE, *supra* note 34, § 6.3, at 245-46 (citing *Skidmore* cases).

[172] *See, e.g.*, John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 109 (1993).

[173] For example, in the first case to apply *Christensen*, the D.C. Circuit found the distinction between *Chevron* and *Skidmore* to be irrelevant, because it held that the agency's interpretation contradicted the clear meaning of the statute and was, in any event, unreasonable. *See* Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 643-45 & n.2 (D.C. Cir. 2000).

In view of these similarities it may be tempting to say that the choice between *Skidmore* and either *Chevron* or *Seminole Rock* is of relatively little importance. Indeed, as then-Judge Breyer noted, "one can find many cases in which the opinion suggests that the court believed the agency's legal interpretation was correct and added citations to 'deference' to bolster the argument."[174] For example, in *Hertzberg v. Dignity Partners, Inc.*,[175] after independently interpreting a provision of the Securities Act of 1933,[176] the Ninth Circuit explained in the closing paragraph of its opinion why it would defer to the similar interpretation of the SEC, which it was mentioning for the first time.[177] Sometimes the court's decision not to employ deference is even clearer. For example, in *Anderson v. Edwards*[178] the Supreme Court explained that it had "no occasion to decide whether we must defer to the agency's position" under *Seminole Rock* because it had "independently reached the same conclusion."[179]

Nonetheless, the area in which the three doctrines do not overlap, their treatment of an agency's unpersuasive but reasonable interpretation, is significant for two reasons.[180] First, the set of unpersuasive but

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[174] Breyer, *supra* note 49, at 379.

[175] 191 F.3d 1076 (9th Cir. 1999).

[176] *Id.* at 1079-82.

[177] *Id.* at 1082.

[178] 514 U.S. 143 (1995).

[179] *Id.* at 157 n.7; *see also* DAVIS & PIERCE, *supra* note 6, § 6.10, at 202 (criticizing decision because "it makes no sense for a court to ignore completely an agency's interpretation of its rules").

[180] Admittedly, deference is a "mealy-mouthed" word, Scalia, *supra* note 5, at 514, and we still lack an explanation of what it is that a court should do differently when it defers — that is, how deference should alter a court's decisionmaking process from that which it would employ in a case in which no deference was due. *See* Diver, *Statutory Interpretation, supra* note 166, at 564-66 (noting gap in literature, which has yet to be filled); *see also* Anthony, *Agency Interpretations, supra* note 3, at 40 ("As a matter of practical judicial psychology, it may often make little operational difference whether an interpretation is reviewed independently but given *Skidmore* consideration or is reviewed for reasonableness under *Chevron* Step 2."); Russell L. Weaver, Chevron: Martin, *Anthony, and Format Requirements*, 40 U. KAN. L. REV. 587, 607 (1992) [hereinafter Weaver, *Format Requirements*] ("In theory, courts approach interpretive questions quite differently under the two standards. . . . Whether courts actually apply *Chevron* and *Skidmore* standards in this way is unclear."). As noted above, in many cases deference appears as an afterthought and in others a court avoids the deference question because it has done the interpretive work itself and agrees with the agency. In neither type of case can the obligation to defer to an agency's interpretation be said to have altered the court's approach. If that is all there is to deference, then the "debate over whether and when deference is appropriate becomes pointless." Diver, *Statutory Interpretation, supra* note 166, at 564. Nonetheless, it does not seem too great a leap of faith to take the Supreme Court at its word and accept that deference is "both a factor in the decisionmaking process and an explanation for its

reasonable interpretations of ambiguous regulations and statutes is relatively large and, in a case involving such an interpretation, the choice of doctrine is outcome determinative.[181] Indeed, in both *Chevron* and *Seminole Rock* the circuit court's view of the most persuasive interpretation contradicted the position of the administering agency. Second, *Chevron* and *Seminole Rock* tell a court to adopt a mindset toward questions of interpretation different from that required by *Skidmore*. A court applying *Skidmore* is seeking the interpretation that is correct, in the sense that it is the most persuasive. A premise of both *Chevron* and *Seminole Rock* deference, however, "is that no such thing exists."[182] Instead of seeking the one right answer to an interpretive question, a court applying *Chevron* and *Seminole Rock* asks whether the agency has arrived at a reasonable answer, of which there likely are many.

II. JUSTIFYING DEFERENCE

The defining characteristic of both *Seminole Rock* and *Chevron* is that they instruct a court to accept an interpretation it finds unpersuasive, as long as the interpretation is not unreasonable. For a number of reasons, the decision to give agencies this benefit regarding their interpretations of statutes and regulations requires justification. In *Marbury v. Madison*, Chief Justice Marshall famously stated that it "is emphatically the duty of the judicial department to say what the law is."[183] The Administrative Procedure Act (APA) similarly instructs a reviewing court to "decide all

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outcome." *Id.*

[181] Two Eleventh Circuit cases involving the question whether a satellite rebroadcaster is a "cable system" under 17 U.S.C. § 111 illustrate the outcome determinative nature of the choice of doctrines. In *NBC, Inc. v. Satellite Broadcast Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991), the court held that Satellite Broadcast Networks was a cable system under the statute, rejecting as unpersuasive the contrary view the Copyright Office (the administering agency) had expressed in a policy decision. *See id.* at 1469-70 & n.4. When that court considered the issue again, after the Copyright Office had promulgated regulations codifying its interpretation of "cable system," it deferred to the agency's position under *Chevron* despite its prior rejection of that interpretation. *See* Satellite Broad. & Communications Ass'n v. Oman, 17 F.3d 344, 347-48 (11th Cir. 1994).

[182] Herz, *supra* note 5, at 196; *see also* Anthony, *Agency Interpretations*, *supra* note 3, at 40 ("[T]he conceptual difference is large. An interpretation subject to the limited review of *Chevron*'s Step 2 binds the court — and therefore is law — unless it can be found unreasonable.").

[183] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms of an agency action."[184] Further, if the purpose of judicial review of agency action is to ensure that the agency stays within the bounds of its authority, then accepting the agency's interpretation of those bounds, when its interpretation is not persuasive but merely reasonable, appears counterintuitive to say the least. Cass Sunstein has put this point succinctly in his observation that "foxes should not guard henhouses."[185] In contrast, this problem of justification does not affect *Skidmore*, which calls for review of an agency's interpretation under the same persuasiveness standard that courts apply to the arguments of almost every other entity.[186]

I turn in this Part to the justifications the Court has offered for *Chevron* and *Seminole Rock* — that is, for giving agencies preferential treatment with respect to at least some of their interpretations of statutes and regulations. Although the Court has not clearly explained its rationale for *Seminole Rock* deference, what it has said has much in common with the justification it has offered for *Chevron* deference. Namely, that Congress has delegated power to agencies to resolve these interpretive questions and, therefore, the responsibility of the judiciary is to ensure that agencies have not exceeded the bounds of the authority delegated.

A. The Court's Justifications for Chevron Deference

The Court's explanation of its decision in *Chevron* has been described and critiqued in more articles than one could mention. As with the discussion of how *Chevron* operates in practice, the following description is brief.[187] In *Chevron*, the Court held that an agency's authority to fill in statutory gaps derives from Congress's delegation, either explicit or

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[184] 5 U.S.C. § 706 (2000).

[185] *E.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 467 (1987) [hereinafter, Sunstein, *Constitutionalism*].

[186] An exception to that general rule, at least in certain contexts, is Congress. *See, e.g.*, Fraternal Order of Police v. United States, 173 F.3d 898, 903-04 (D.C. Cir. 1999) (upholding Congress's decision to permit convicted felons to receive government-issued firearms, but to prohibit domestic violence misdemeanants from receiving such guns, on ground that it is "not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not to domestic violence misdemeanants").

[187] It is beyond the scope of this article to respond to those who argue that *Chevron* should be overturned or modified substantially. For some of those criticisms and responses thereto, see, for example, I DAVIS & PIERCE, *supra* note 34, § 3.3, at 114-16.

implicit, of that authority to the agency.[188] It defended its decision to imply such a delegation from the mere presence of a statutory gap by reference to the agency's superior competence. The Court did not rely on any claim that the agency could better interpret the statute,[189] but claimed instead that the agency could better and more legitimately resolve the conflicting policy arguments that underlay the question of statutory interpretation.[190] In recognizing that agencies have greater political accountability than courts, the Supreme Court "broke new ground by invoking democratic theory as a basis for requiring deference to executive interpretations."[191]

The Court's justification of *Chevron* deference, therefore, drew upon three factors. First, Congress had delegated authority through the Clean Air Act to the EPA to make second-level policy decisions.[192] Indeed,

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[188] *See* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843-44 (1984). Arguably, the Court distinguished between explicit and implicit delegations, granting more deference to interpretations made under the authority granted by the former ("controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute") than by the latter ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation"). *Id.*; *see* Anthony, *Agency Interpretations*, *supra* note 3, at 25, 30; Weaver, *The Deference Rule*, *supra* note 70, at 590-91. The Court has not maintained this distinction, nor have the lower courts, and the difference between the two standards as a practical matter is difficult to discern. *See* Anthony, *Agency Interpretations*, *supra* note 3, at 17; Levin, *supra* note 67, at 1268 & n.64; *cf.* United States v. McKinney, 919 F.2d 405, 422-23 (7th Cir. 1990) (Posner, J., concurring) (accepting distinction between deferential and plenary review, but arguing that "endorsement of multiple standards of [deferential] review . . . greatly exaggerates the utility of verbal differentiation").

[189] *See* Herz, *supra* note 5, at 196; Scalia, *supra* note 5, at 514.

[190] *See Chevron*, 467 U.S. at 865; *see also* Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 651-52 (1990) ("[T]he judgments about the way the real world works that have gone into the [agency's] policy are precisely the kind that agencies are better equipped to make than are courts. This practical agency expertise is one of the principal justifications behind *Chevron* deference." (footnote omitted)); Laurence H. Silberman, Chevron — *The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 822-23 (1990) ("[*Chevron*] is simply a sound recognition that a political branch, the executive, has a greater claim to make policy than the judiciary.").

[191] Merrill, *supra* note 5, at 978.

[192] By "second-level policy decisions," I mean decisions that Congress could have made itself, but did not. Such policy decisions are subordinate to, and thus governed by, those policy decisions Congress made in the statute, regardless whether Congress has offered only the broadest statement of policy or has enacted a quite detailed statute. However many policy decisions Congress makes, the agency will still face further, subordinate policy decisions. *See* Louis L. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 369 (1947); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make*

Chevron is a clear recognition of the permissibility of such delegations of policymaking authority, notwithstanding whatever force the nondelegation doctrine had or has.[193] Second, the agency has more experience, and therefore more expertise, in making the policy decisions required to interpret that class of statutes. Third, the agency is politically accountable through the President, whereas Article III judges, with lifetime tenure and salary protection, lack such accountability.[194] From these factors, the Court reached the conclusion that a statute's delegation of administrative authority should be understood — in the absence of Congress's clearly resolving the issue or vesting that authority in the courts — to authorize the agency to resolve policy disputes underlying the interpretation of statutory ambiguities.

Insofar as *Chevron* instructs lower courts to treat a statutory ambiguity as an implicit delegation of interpretive authority, it is widely understood to rest on a fiction.[195] This is a plausible fiction with respect to statutes enacted after the Court's decision in *Chevron* because the enacting Congresses can be presumed to have known that any ambiguity in such statutes would implicitly delegate power to the administering agency.[196] Yet, it is at best a benign fiction with respect to previously enacted statutes,[197] because those enacting Congresses likely had a

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Political Decisions, 1 J.L. ECON. & ORG. 81, 97 (1985). To paraphrase the anecdote about Hindu cosmology, it is policy all the way down.

[193] *See* Herz, *supra* note 5, at 188-89; Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 834 (1991). Indeed, the D.C. Circuit has recently held that, under *Chevron*, a court faced with a statute containing an ambiguous intelligible principle should not interpret that statute itself — as had been the pre-*Chevron* judicial practice — but should instead review the agency's interpretation thereof at *Chevron* step two, deferring to it if reasonable and rejecting it if unreasonable. *See* Am. Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4, 7-8 (D.C. Cir. 1999), *cert. granted sub nom.* Browner v. Am. Trucking Ass'ns, Inc., 120 S. Ct. 2003 (2000), and Am. Trucking Ass'ns, Inc. v. Browner, 120 S. Ct. 2193 (2000).

[194] In this regard, the Court implicitly rejected then-Justice Rehnquist's comparison of Congress, composed of "the elected representatives of the people," with agencies, composed of "nonelected officials in the Executive Branch." Am. Textile Mfrs. Inst., Inc. v. Donovan (*Cotton Dust*), 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting). Justice Rehnquist did not participate in *Chevron*. *See* Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 495, 506-07 (1985).

[195] *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 469-76 (1989); Herz, *supra* note 5, at 195; Merrill, *supra* note 5, at 979; Scalia, *supra* note 5, at 517; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989).

[196] *See* Merrill, *supra* note 5, at 995; Pierce, *Reconciling*, *supra* note 53, at 2231-32; Scalia, *supra* note 5, at 517.

[197] For example, some commentators have noted that *Chevron* permits the Court to exercise greater control over the lower courts than it could under the case-by-case method,

different understanding of the consequences of statutory ambiguity.[198] In any event, this fiction enables defenders of *Chevron* to refute the charge that the decision requires the judiciary to cede to executive agencies the duty "to say what the law is."[199] As Henry Monaghan persuasively argued a year before the Court's decision in *Chevron*, when Congress has authorized an agency to interpret a statute, a court follows its duty to interpret the law by granting deference to the agency's interpretation.[200]

B. The Court's Justifications for Seminole Rock Deference

Like the mechanics of *Seminole Rock* deference, its justifications have received considerably less attention than those of *Chevron* deference. To the extent commentators have discussed *Seminole Rock*, they have described it as "based on common sense"[201] or as following "a fortiori from" the decision to grant deference to an agency's interpretation of a

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given the Court's limited docket and the sheer magnitude of regulatory policymaking. *See, e.g.*, Pierce, *Reconciling*, *supra* note 53, at 2233-34; Peter L. Strauss, *One Hundred Fifty Cases Per Year*, 87 COLUM. L. REV. 1093, 1118-29 (1987). Similarly, litigants in a case involving an agency interpretation of a statute face less uncertainty under *Chevron* than they did under the two strands of contradictory case law that preceded it. *See* Sunstein, *Law and Administration*, *supra* note 34, at 2090-91.

[198] *See* Manning, *supra* note 29, at 625.

[199] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also, e.g.*, Starr, *supra* note 34, at 283 (noting facial tension between *Chevron* and *Marbury*); Sunstein, *Constitutionalism*, *supra* note 185, at 467-68 (arguing that *Chevron* "flatly contradicts separation-of-powers principles that date back to *Marbury*").

[200] *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983); *see also* I DAVIS & PIERCE, *supra* note 34, § 3.3, at 114 ("Like the *Chevron* Court, the *Marbury* Court recognized that issues of policy are to be resolved by the politically accountable Branches."); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 983-84 (1988) ("[T]he reviewing court continues to exercise independent legal judgment: not concerning whether the agency decided a legal issue 'correctly,' but whether the agency acted within the scope of its discretionary lawmaking or law-applying authority."). John Duffy has recently argued that this fiction comports with section 558(b) of the APA, which forbids agencies from issuing substantive rules except "as authorized by law," only when the agency's organic statute includes general rulemaking authority. *See* Duffy, *supra* note 68, at 197-200.

[201] I DAVIS & PIERCE, *supra* note 34, § 6.10, at 282; *see also id.* ("The agency typically is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purposes in issuing the rule. Courts have significant institutional disadvantages in attempting to resolve these critical issues.").

statute.[202] The *Seminole Rock* Court appears to have thought similarly, as that Court stated the deference principle without explanation, as though it were axiomatic. Nor is any explanation found in earlier decisions in which the Court deferred to an agency's construction of its own regulation.[203] *Udall v. Tallman*,[204] the first Supreme Court decision to proffer an explanation, expressly adopted the "a fortiori" approach. Writing for the Court, Chief Justice Warren stated, "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."[205] That decision, and ones like it, did not explain why greater deference was in order; instead, the statements are presented as though the reasoning were self-evident.[206]

In the past decade, the Court has come closer to formulating an explanation for *Seminole Rock* deference. Some commentators have argued that the Court clearly did so in two cases decided in 1991, *Martin v. Occupational Safety & Health Review Commission*[207] and *Pauley v. BethEnergy Mines, Inc.*[208] They contend that the Court, having reformulated the rationale for deferring to an agency's interpretation of an ambiguous statute in *Chevron*, adopted a similar rationale for *Seminole Rock* deference.[209] Although these decisions contain more substantial discussions of the reasons for granting *Seminole Rock* deference than prior cases, neither decision offers a general justification for the practice of deferring to an agency's interpretation of an ambiguous regulation. Instead, the better reading of both is that the Court justified deferring by

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[202] RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 193 (3d ed. 1998); *see also* 4 DAVIS, *supra* note 88, § 30.12, at 259-60 ("[P]erhaps an administrative interpretation of a regulation is deserving of greater weight than administrative interpretation of a statute, because an agency may be assumed to know more about its own intent than about the intent of Congress.").

[203] *See, e.g.*, FCC v. Pottsville Broad. Co., 309 U.S. 134, 143 n.6 (1940); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 325 (1933); United States v. Eaton, 169 U.S. 331, 343 (1898).

[204] 380 U.S. 1 (1965).

[205] *Id.* at 16.

[206] *See* Jewett v. Comm'r, 455 U.S. 305, 318 (1982) ("This canon of construction, which generally applies to the Commissioner's interpretation of the Internal Revenue Code, is even more forceful when applied to the Commissioner's interpretation of his own Regulation."); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980) ("The Court has often repeated the general proposition that considerable deference is due 'the interpretation given [a] statute by the officers or agency charged with its administration.' An agency's construction of its own regulations has been regarded as especially due that respect.").

[207] 499 U.S. 144 (1991).

[208] 501 U.S. 680 (1991).

[209] *See* CASS ET AL., *supra* note 202, at 192; Manning, *supra* note 29, at 619 & n.34.

reference to features of the particular statutes at issue. In *Allentown Mack Sales & Service, Inc. v. NLRB*,[210] however, the court appears to have moved away from statute-specific justifications and toward the *Chevron*-style delegation rationale that these commentators find in the 1991 cases.

1. *Martin* and *Pauley*: Statute-Specific Deference

In *Martin*, the Court considered whether deference is due to the Secretary of Labor or to the Occupational Safety and Health Review Commission (OSHRC) when they offer reasonable but inconsistent interpretations of a regulation promulgated under the Occupational Safety and Health (OSH) Act by the Secretary, but administered by both.[211] The Court assumed that it was to defer to one of the agencies' interpretations and, therefore, asked only whether Congress had conferred "interpretive lawmaking power" on the Secretary or the OSHRC.[212] The Court answered this question by reference to the OSH Act's structure and history, from which it inferred "that the power to render authoritative interpretations of OSH Act regulations is a 'necessary adjunct' of the Secretary's powers to promulgate and to enforce national health and safety standards."[213] The Court's decision was explicitly limited to the question of the division of powers between the two agencies under this statute.[214] That said, when the Court restated its conclusion, it did so in language susceptible of more general application, explaining: "Congress did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them."[215] This restatement suggests that, unless Congress specifies otherwise, the power to interpret regulations is part and parcel of the delegated power to promulgate those regulations.

Pauley sends similarly conflicting signals about the scope of the Court's holding. The Black Lung Benefits Reform Act (BLBRA) authorized the Department of Labor to adopt interim regulations for

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[210] 522 U.S. 359 (1998).

[211] *Martin*, 499 U.S. at 146.

[212] *Id.* at 150-51; *see* Anthony, *Supreme Court*, *supra* note 4, at 21.

[213] *Martin*, 499 U.S. at 152.

[214] *Id.* at 157.

[215] *Id.* at 157-58. *But cf. id.* at 153 (presuming, rather than deciding, this point).

processing certain claims. The statute required that the criteria in any such regulations "shall not be more restrictive than the criteria" in interim regulations that the Department of Health, Education, and Welfare (HEW) had previously promulgated. Although the Department of Labor regulations differed significantly from the HEW regulations, the Secretary of Labor relied on her own interpretation of the HEW regulations in claiming that the Department's regulations satisfied the statutory standard.[216] Therefore, as in *Martin*, the Court was not presented with the standard *Seminole Rock* situation in which a single agency offers an interpretation of its own regulation.

In evaluating the Secretary's claim, the Court read the phrase "not . . . more restrictive than" to delegate to the Secretary of Labor the "authority to interpret HEW's regulations and the discretion to promulgate interim regulations based on a reasonable interpretation thereof."[217] Although this conclusion was based on the text of the BLBRA, the Court rejected the contention that only HEW's interpretation of its interim regulations could warrant deference in language that, as in *Martin*, appears to be more generally applicable. The Court stated: "In our view, this position misunderstands the principles underlying judicial deference to agency interpretations, as well as the scope of authority delegated to the Secretary of Labor in the BLBRA."[218] Having said that, the Court launched into a discussion of its rationale for *Chevron* deference, from which one could imply that it was also explaining *Seminole Rock* deference.[219]

Support for the limited reading of *Martin* and *Pauley* is found in the Court's subsequent decision in *Stinson v. United States*.[220] That case raised the question whether commentary to the Sentencing Guidelines deserves deference and, if so, what type. In answering that question, the Court distinguished between *Chevron* and *Seminole Rock*.[221] Commentary, the Court noted, "has a function different from an agency's legislative rule" and "is not the product of delegated authority for rulemaking."[222]

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[216] Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 688-89, 700-01 (1991).

[217] *Id.* at 697-98.

[218] *Id.* at 696.

[219] *See id.* at 696-97. Such an implication would be dicta, as the Court held not that the Secretary of Labor had authority to interpret her own regulations, but that Congress had explicitly delegated to her the authority to interpret regulations promulgated and administered by another agency.

[220] 508 U.S. 36 (1993).

[221] *Id.* at 43-47.

[222] *Id.* at 44.

Therefore, it was inapposite to analogize commentary to an agency's interpretation of a statute it administers.[223] Instead, the Court understood the Guidelines to be the equivalent of legislative rules[224] and the commentary to be akin to an agency's interpretation thereof.[225] As in *Pauley* and *Martin*, the Court looked to the role the statute contemplated for the Sentencing Commission in holding that *Seminole Rock* deference was appropriate for commentary.[226] Again, the Court did not follow *Chevron* in applying a general assumption that Congress intends to delegate to agencies the authority to resolve regulatory ambiguities, but instead looked to the specific text of an agency's governing statute to justify *Seminole Rock* deference.

2. *Allentown Mack*: Deference as Background Principle

In its most recent decision to contain a justification of *Seminole Rock* deference, *Allentown Mack Sales & Service, Inc. v. NLRB*,[227] the Court appears to have departed from its statute-specific justifications. The NLRB had found Allentown Mack guilty of an unfair labor practice because it had polled its employees' support for their union while lacking "a reasonable doubt, based on objective considerations, that the Union continued to enjoy the support of a majority of the bargaining unit."[228] Allentown Mack argued that the NLRB actually employed a more demanding standard than the reasonable doubt standard it claimed to apply. The Court recognized that the NLRB, consistent with the National Labor Relations Act, likely could have adopted that more demanding standard formally.[229] The Court then asked whether it mattered that the NLRB "formally le[ft] in place the reasonable-doubt and preponderance standards, but consistently appl[ied] them as though

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[223] *Id.*

[224] Although not a "precise" equivalent, because "Congress has a role in promulgating the guidelines." *Id.*

[225] *Id.* at 45.

[226] *Id.*

[227] 522 U.S. 359 (1998).

[228] *Id.* at 366 (quoting 316 N.L.R.B. 1199, 1199 (1995)).

[229] That standard, like the Board's reasonable doubt standard, would likely be promulgated through adjudication as the NLRB has apparently only ever promulgated one notice-and-comment regulation. *Id.* at 374.

they meant something other than what they say."[230] The Court, in an opinion by Justice Scalia, held that substantial evidence review has "no room within it for deference to an agency's eccentric view of what a reasonable fact finder ought to demand" and, therefore, the NLRB was required "to apply in fact the clearly understood legal standards that it enunciates in principle."[231] Against the dissent's charge that this holding was inconsistent with the deference granted to an agency's interpretation of its own rules,[232] Justice Scalia responded:

> Substantive review of an agency's interpretation of its regulations is governed only by that general provision of the Administrative Procedure Act which requires courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). It falls well within this text to give the agency the benefit of the doubt as to the meaning of its regulation. On-the-record agency factfinding, however, is also governed by . . . [t]he "substantial evidence" test [which] already gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the *court* . . . , but merely the degree that *could* satisfy a reasonable factfinder.[233]

Although this discussion by no means expressly adopted a *Chevron*-style justification for *Seminole Rock*, Justice Scalia's invocation of section 706(2)(A) of the APA is explicable only on that basis.

The judicial review provision of the APA requires courts to "interpret . . . statutory provisions, and determine the meaning . . . of the terms of an agency action."[234] One can reconcile *Chevron* deference with this requirement by recognizing that other statutes are also relevant to a

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[230] *Id.*

[231] *Id.* at 376-77.

[232] *Id.* at 390 (Breyer, J., dissenting) ("[T]he majority's interpretation departs from settled principles permitting agencies broad leeway to interpret their own rules, which may be established through rulemaking or adjudication.").

[233] *Allentown Mack*, 522 U.S. at 377. Although *Seminole Rock* appears to require a level of deference more than "the benefit of the doubt" and *Allentown Mack* might therefore be thought to signal a reduction in the amount of deference a court gives to an agency's interpretation of its own regulations, the only circuit courts to have addressed the matter have treated the two standards as equivalent. *See* United States v. Hubbell, 167 F.3d 552, 559-60 & n.5 (D.C. Cir. 1999); Mission Group Kan., Inc. v. Riley, 146 F.3d 775, 780 & n.3 (10th Cir. 1998); *cf.* Anthony, *Supreme Court*, *supra* note 4, at 5 n.10 ("The arbitrary-and-capricious segment of APA § 706(2)(A) would ordinarily import a reasonableness element into the review standard.").

[234] 5 U.S.C. § 706 (2000).

court's duties under section 706 of the APA.[235] Once the reviewing court interprets the statute to delegate interpretive authority to an agency, the only question it must answer is whether the agency exercised its delegated authority in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[236] Justice Scalia, in claiming that this standard also governs judicial review of an agency's interpretation of its own regulation, must similarly understand the agency to have been delegated interpretive authority. Unlike in *Martin*, *Pauley*, and *Stinson*, the Court in *Allentown Mack* did not derive this delegation of interpretive authority from the text or structure of a particular statute. Instead, Justice Scalia's opinion reads as though it states a general rule that applies to all agencies that have authority to promulgate regulations. One could infer from *Allentown Mack* that the Court has adopted as a background principle "that the power to render authoritative interpretations of . . . regulations is a 'necessary adjunct' of the . . . power[] to promulgate" regulations.[237]

This inference is plausible because the factors supporting the Court's implication of a delegation in *Chevron* are also found in the *Seminole Rock* context. First, in the typical *Seminole Rock* case, the agency interpreting the regulation also promulgated it and, therefore, is operating under a statute that delegates some authority to it.[238] Second, interpretations of ambiguous regulations can entail the same type of resolution of policy disputes as statutory interpretations.[239] As a result, the agency's relative superiority over a court with respect to policymaking competence and political legitimacy come into play in *Seminole Rock* deference. That said, it is a stretch to read Justice Scalia's passing reference to section 706(2)(A) as a clear holding that *Seminole Rock*, like *Chevron*, is based on an implicit delegation rationale. Moreover, the Court continues to rely in *Seminole*

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[235] Anthony, *Supreme Court*, *supra* note 4, at 24.

[236] 5 U.S.C. § 706(2)(A).

[237] Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 152 (1991).

[238] Cases involving split enforcement authority and transferred or overlapping jurisdiction, all of which could result in a statute conferring the authority to administer a regulation upon an agency that did not promulgate it, present a slightly different scenario. *See* Melanie E. Walker, Comment, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. CHI. L. REV. 1341, 1361-70 (1999).

[239] *See, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); *Martin*, 499 U.S. at 151.

Rock cases on a factor that was not part of its justification of *Chevron* deference — the advantages an agency possesses in ascertaining the meaning of a regulation it promulgated — suggesting that the Court may not be ready to adopt identical justifications for the two deference doctrines.[240]

Despite the opaqueness of the Court's justification of *Seminole Rock* deference in these four cases, each suggests that the Court is moving in the direction of transposing its justification for *Chevron* into the *Seminole Rock* context.[241] This move continues a trend from the Court's pre-1984 cases, in which the Court also imported the justification it then provided for deferring to an agency's statutory interpretation into its justification for *Seminole Rock* deference.[242] Yet the Court's recent attempts to provide such markedly similar justifications for *Chevron* and *Seminole Rock* make the disparate results in *Christensen* and *Auer* harder to explain. If the implicit delegation of authority to interpret statutes does not encompass interpretations rendered informally, what reasons can lead one to conclude that a similar implicit delegation of authority permits deference to informal interpretations of regulations? Before offering an answer to this question, I examine the criticisms that Anthony and Manning have raised against *Seminole Rock*.

III. THE ASSAULT ON *SEMINOLE ROCK*

For most of its 55-year history, *Seminole Rock* has lurked beneath the surface and evaded scholarly and judicial criticism. Although agency interpretations did not always prevail, courts accepted the propriety of *Seminole Rock* and held simply that the particular interpretation did not

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[240] *See* Stinson v. United States, 508 U.S. 36, 45 (1993); Manning, *supra* note 29, at 630-31; Weaver, *Overview*, *supra* note 70, at 726; *cf. Martin*, 499 U.S. at 152 ("The Secretary enjoys readily identifiable structural advantages over the Commission in rendering authoritative interpretations of OSH Act regulations. Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question."). Presumably, the Secretary is also in a better position to do so than a reviewing court, a question not before the Court in *Martin*, which took as given that it should defer to some agency's reasonable interpretation of an ambiguous regulation. *See* I DAVIS & PIERCE, *supra* note 34, § 6.10, at 282; *cf.* CASS ET AL., *supra* note 202, at 193 ("Does th[e] rationale [in *Martin*] also apply to the allocation of interpretive power between an agency and a reviewing court?").

[241] *But see* Noah, *Divining Regulatory Intent*, *supra* note 70, at 294 (claiming that "the stated rationale for treating agency interpretations as authoritative rests on the debatable ground that current officials can best identify their predecessors' original intent").

[242] *See* Jewett v. Comm'r, 455 U.S. 305, 318 (1982); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 & n.9 (1980); Udall v. Tallman, 380 U.S. 1, 16 (1965).

satisfy the deferential standard.[243] Reasons for rejecting an agency's view included inconsistent agency interpretations,[244] a lack of expertise regarding the subject matter of the interpretation,[245] and incompatibility with the regulation being interpreted.[246] Even in more recent cases, in which the Supreme Court split 5-4 on the question whether to defer to an agency's interpretation of its regulation, the dissenting Justices claimed only that the interpretation at issue did not warrant deference; they did not challenge the Court's continued adherence to *Seminole Rock*.[247]

Although *Seminole Rock* has continued to avoid judicial scrutiny,[248] Robert Anthony and John Manning have recently offered substantial criticisms of the doctrine. Their criticisms overlap as both claim that

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[243] *See* 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 7:22, at 106 (1978).

[244] *See, e.g.*, N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 539 n.29 (1982).

[245] *See, e.g.*, Jicarilla Apache Tribe v. FERC, 578 F.2d 289, 292-93 (10th Cir. 1978); S. Mut. Help Ass'n, Inc. v. Califano, 574 F.2d 518, 526-27 (D.C. Cir. 1977).

[246] *See, e.g.*, Columbus Cmty. Hosp., Inc. v. Califano, 614 F.2d 181, 187-88 (8th Cir. 1980).

[247] *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 108-09 (1995) (O'Connor, J., dissenting) (arguing that, because statute at issue explicitly required that regulation specify methods for calculating costs, Secretary's claim that regulation promulgated contained no such methods violated statute); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 518 (1994) (Thomas, J., dissenting) (concluding that "the Secretary's construction of [the regulation] runs afoul of [its] plain meaning . . . and therefore . . . violat[es]" APA section 706(2)(A)). John Manning, however, has claimed that the dissenting Justices in these cases "have begun to question the basis for *Seminole Rock* deference." Manning, *supra* note 29, at 615. He is correct to note that, in *Guernsey*, Justice O'Connor argued that deferring to the agency's informal interpretation relieved it of the statutory obligation to act via regulation and allowed it to avoid "giving the public a valuable opportunity to comment on the regulation's wisdom." *Guernsey*, 514 U.S. at 110 (O'Connor, J., dissenting). Manning also rightly notes that, in *Thomas Jefferson*, Justice Thomas criticized the majority for permitting the agency "merely [to] replace[] statutory ambiguity with regulatory ambiguity." *Thomas Jefferson*, 512 U.S. at 525 (Thomas, J., dissenting). Yet, in the end, Manning recognizes that "the concerns expressed in both *Thomas Jefferson University* and *Guernsey Memorial Hospital* were directed at the particular circumstances of each case, and all of the Justices professed continued adherence to *Seminole Rock*"; his ultimate contention is only that "the dissents in these cases point to deeper questions about the continuing wisdom of adhering to *Seminole Rock*." Manning, *supra* note 29, at 616.

[248] Three published opinions have mentioned Manning's criticisms of *Seminole Rock*. *See* Caruso v. Blockbuster-Sony Music Entm't Centre, 193 F.3d 730, 733 (3d Cir. 1999); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584-85 & n.2 (D.C. Cir. 1997); Natural Gas Clearinghouse v. FERC, 108 F.3d 397, 399 (D.C. Cir. 1997). Only in *Paralyzed Veterans* did the court pause to address some of Manning's arguments. The Tenth Circuit adopted one of Anthony's criticisms of the way courts have applied *Seminole Rock*. *See* Mission Group Kan., Inc. v. Riley, 146 F.3d 775, 782 (10th Cir. 1998). Anthony's critique of the doctrine itself, however, has thus far gone unnoticed by the federal courts.

Seminole Rock significantly increases an agency's incentive to promulgate a vague regulation and to fill in the details informally. Agencies, they argue, can thereby avoid subjecting their policy decisions to the rigors of notice-and-comment rulemaking and the attendant judicial review. In addition to describing the negative consequences that they see flowing from regulatory ambiguity, each offers another reason against continued adherence to *Seminole Rock*. For Anthony, deference to an agency's informal interpretation of its regulation violates the requirement in section 706 of the APA that a reviewing court "determine the meaning . . . of the terms of an agency action."[249] He rejects the claim that Congress has implicitly delegated to agencies the power to interpret their regulations authoritatively in informal formats. For Manning, the problem with *Seminole Rock* goes beyond incompatibility with other statutes. Drawing on the principle of separation of powers, he argues that even an explicit delegation of authority to issue binding interpretations of regulations contradicts a premise of the Constitution — "that a fusion of lawmaking and law-exposition is especially dangerous to our liberties."[250]

Both Anthony and Manning argue that courts should review informal agency interpretations of regulations under *Skidmore* and not *Seminole Rock*. Although Anthony appears to accept that *Seminole Rock* deference can be accorded to some regulatory interpretations set forth in adjudications, Manning would extend *Skidmore* to all of an agency's interpretations of its own regulations.[251] Replacing *Seminole Rock* with *Skidmore*, they contend, would have significant beneficial consequences on agency rulemaking. In this part, I first review their incentive-based arguments against *Seminole Rock*. I then describe Anthony's claim that *Seminole Rock* violates the APA and Manning's contention that the doctrine conflicts with an important constitutional premise.

A. Seminole Rock and Agency Incentives

Central to both Anthony's and Manning's criticisms of *Seminole Rock* is the insight that the interpretive rules courts apply *ex post* affect the manner in which agencies draft regulations *ex ante*. As Anthony puts it, the doctrine "generates incentives to be vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law

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[249] 5 U.S.C. § 706 (2000).

[250] Manning, *supra* note 29, at 617.

[251] Therefore, neither would be completely satisfied if the Court used *Christensen* to overrule *Auer*.

without observance of notice and comment procedures."[252] Manning makes the point similarly, claiming that *Seminole Rock* "removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean . . . the agency bears little, if any, risk of its own opacity or imprecision."[253] An agency that decided to devote extra time and resources during the notice-and-comment process to clarify an ambiguous regulatory provision, they note, would risk judicial scrutiny of the resolution it adopted. That agency, they claim, would prefer to take the relatively less onerous path, in terms of both expenditure of effort and standard of judicial review, of deferring its clarification of that question.

Manning acknowledges that *Seminole Rock* is not the only source of incentives bearing on an agency's level of investment in clear rules.[254] Clear rules, he notes, reduce an agency's costs of enforcement by making it easier both for regulated parties to comply and for the agency to prove noncompliance. In addition, clarity can reduce an agency's internal management costs by making it easier for the central administration to control officials in the field. Finally, because an agency can change a clear rule only by initiating another notice-and-comment rulemaking proceeding, clarity makes it more costly for a subsequent administration to alter previously adopted policies.

Although each of these considerations provides an agency with an incentive to reduce regulatory vagueness, Manning contends that *Seminole Rock* removes "an important incentive for adopting transparent and self-limiting rules."[255] Namely, that agencies bear little of the cost of adopting vague rules when their subsequent interpretations receive *Seminole Rock* deference. On the theory that the agency is "the party best positioned to avoid" ambiguity,[256] Manning argues that agency regulations should be governed by "the traditional principle that courts should construe ambiguities against the drafter responsible for them."[257]

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[252] Anthony, *Supreme Court*, *supra* note 4, at 12.

[253] Manning, *supra* note 29, at 655.

[254] *See id.* at 655-56.

[255] *Id.* at 648.

[256] *Id.* at 668.

[257] *Id.* at 656.

Anthony and Manning claim that replacing *Seminole Rock* with *Skidmore* would increase an agency's incentive to promulgate clear regulations. Because *Skidmore* entails more searching judicial scrutiny of an agency's *ex post* regulatory interpretations, an agency seeking to control the meaning of its regulations would more often find it worthwhile to invest in reducing the ambiguity in its regulations *ex ante*. By increasing an agency's incentive to promulgate clear regulations, application of *Skidmore* would mitigate what Anthony and Manning identify as *Seminole Rock*'s adverse consequences. First, they argue that agencies will make greater use of the APA's notice-and-comment procedures if courts review regulatory interpretations under *Skidmore*. Second, the clearer regulations likely to be promulgated under *Skidmore* would provide regulated entities with superior notice of the rules with which they must comply. Third, according to Manning, agencies would have less ability to conceal political bargains and greater ability to resist pressure from individual legislators and interest groups if courts reviewed regulatory interpretations under *Skidmore*.

1. *Skidmore* and the Use of Notice and Comment

Manning argues that "the power of self-interpretation under *Seminole Rock* reduces the efficacy of notice-and-comment rulemaking."[258] He contends that agencies can promulgate vague regulations secure in the knowledge that they will have ample latitude to interpret those regulations subsequently and, therefore, will have little need to initiate a new rulemaking proceeding in order to give a novel interpretation legal effect. By giving agencies the incentive to transfer substantive policy decisions from formal, *ex ante* processes to informal, *ex post* processes, *Seminole Rock* allows them to avoid those procedures, particularly the invitation of and response to public comments, that "help to legitimate delegated rulemaking power."[259] On the other hand, an agency facing review of its *ex post* resolutions of policy issues under *Skidmore* would have greater incentive to resolve those issues in the regulation itself. The agency would thereby increase public participation in and scrutiny of its decisions during the notice-and-comment process.[260]

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[258] *Id.* at 662.

[259] *Id.* at 661; *see also* Pierce, *Seven Ways*, *supra* note 4, at 85-86 (criticizing any effort by agencies to issue "extremely general" rules through notice and comment and then to answer controversial questions through interpretation).

[260] *See* Manning, *supra* note 29, at 663, 689-90. In making this argument, Manning convincingly defends it against two possible lines of attack. First, he rejects the claim that

Anthony likewise objects to *Seminole Rock* on the ground that it encourages agencies to avoid notice-and-comment rulemaking.[261] He contends that this problem is exacerbated by the manner in which the Supreme Court has applied the doctrine. Namely, the Court has failed "to separate the question of the weight to be given the interpretation from the question of whether the interpretative document is one that is entitled to exemption from APA notice-and-comment requirements."[262] He argues that whether an agency's interpretation is actually an improperly promulgated legislative rule is a "threshold question" that the Court "has regularly neglected to address."[263] This point is similar to one discussed in Part I — to preserve the APA's distinction between amendments and interpretations, courts have held that not all informal documents purportedly interpreting a regulation can be given *Seminole Rock* deference.[264] In this context, when the Court fails to ensure that an informal interpretation is, in fact, exempt from the APA's notice-and-comment requirement, "an 'interpretation' that does not really interpret can acquire binding force while remaining cut off from congressional intent, cut off from APA requirements, and cut off from meaningful judicial control."[265]

2. Ambiguity and the Problem of Notice

Anthony and Manning also argue that *Seminole Rock* encourages vague regulations which, in turn, fail to give adequate notice to regulated entities of their responsibilities under the law. Because *Seminole Rock* requires courts to defer to any reasonable agency interpretation, even if that interpretation "would not be obvious to 'the most astute reader,'"[266]

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hard-look review will cause agencies to resolve most major policy issues during the notice-and-comment procedures. *See id.* at 663-64. Second, he responds to the claim that any avoidance of notice and comment caused by *Seminole Rock* is not troubling because agencies usually are free to develop policy solely through adjudication and thereby to avoid notice-and-comment rulemaking altogether. *See id.* at 664-68.

[261] *See* Anthony, *Supreme Court*, *supra* note 4, at 12.

[262] *Id.* at 6.

[263] *Id.* at 6 & n.13.

[264] *See supra* text accompanying notes 113-21.

[265] Anthony, *Supreme Court*, *supra* note 4, at 8.

[266] Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (quoting Rollins Envtl. Servs., Inc. v. EPA, 937 F.2d 649, 652 (D.C. Cir. 1991)).

"[r]easonable contrary interpretations favoring other parties are trampled."[267] Regulated entities may have difficulty planning their affairs with confidence when they lack knowledge of the interpretation on which an agency will eventually settle.[268] Accordingly, Manning argues that the notice-giving function is frustrated to the extent that *Seminole Rock* allows agencies to adopt ambiguous and imprecise regulations, binding the courts and public to unpredictable constructions thereof.[269]

Manning recognizes that the notice-related harms of vague regulations are mitigated in two ways. First, courts often refuse to uphold penalties for violating a vague regulation when a party lacked notice of the agency's interpretation.[270] Second, courts usually give less deference to an agency's interpretation both when an agency departs from a prior interpretation without explanation and when different officials within an agency offer inconsistent interpretations.[271] Nonetheless, because conclusive resolution of the meaning of a regulation is neither instantaneous nor costless, Manning concludes that it is still "desirable to provide incentives for agencies to draft clearer regulations."[272] The switch to *Skidmore*, he continues, would not only provide such an incentive, but would also give a regulated entity reason to think that its persuasive interpretation of a regulation could prevail and thus reason to act in accordance with that interpretation.

That said, Manning acknowledges that the switch to *Skidmore* would result in notice-related costs as well. In cases in which an agency has issued a clear interpretation of a vague regulation, *Seminole Rock* allows regulated entities to rely on that interpretation. *Skidmore*, on the other hand, makes it more likely that final resolution of the interpretive issue will have to await judicial review, possibly in the Supreme Court.[273] Manning concludes that, all things considered, there is likely to be less indeterminacy under *Skidmore* than that which exists currently under *Seminole Rock*.[274]

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[267] Anthony, *Supreme Court*, *supra* note 4, at 10.

[268] Manning, *supra* note 29, at 671.

[269] *Id.* at 669.

[270] *See id.* at 670-71; *see also supra* text accompanying notes 102-07 (describing this practice).

[271] *See* Manning, *supra* note 29, at 673-74.

[272] *See id.* at 670-71.

[273] *See id.* at 694-95.

[274] *See id.* at 695-96; *see also infra* text accompanying notes 355-60 (describing this argument further and critiquing it).

3. *Seminole Rock* and Political Controls

Finally, Manning argues that *Seminole Rock* has a deleterious effect on the political controls that the President and Congress can exercise over agency action "by making agency decisionmaking more vulnerable to the influence of narrow interest groups."[275] This vulnerability takes two forms. Taking a cue from the public choice literature, which claims that statutes favoring special interest groups will use misleading language to mask the deal codified therein, Manning first contends that *Seminole Rock* similarly permits agencies to conceal political bargains with narrow interest groups.[276] Second, he suggests that "the transmission of interest group influence through the medium of individual legislators and legislative committees becomes less costly" when an agency can give a regulation any meaning it could reasonably bear.[277] Legislators charged with oversight of an agency, who are not necessarily representative of Congress as a whole, can pressure that agency to interpret a regulation in a manner pleasing to a narrow group of constituents. Manning claims that switching to *Skidmore* would help alleviate both of these effects. Not only would it raise the costs of using vague language to cloak a political deal by inviting more searching judicial review of subsequent interpretations, but it would also offer a bulwark against congressional pressure. As Manning imagines it, the agency head could respond to a committee chair by saying: "I would like to accommodate you, but we would have to amend the regulation, as I think a court would construe it to mean X."[278]

B. Seminole Rock, the APA, and the Constitution

In addition to their incentive-based arguments against *Seminole Rock* deference, both Anthony and Manning have deeper arguments against the doctrine. Anthony's claim that granting *Seminole Rock* deference to an agency's informal interpretation of its own regulation violates section 706 of the APA is independent of his other criticisms of the doctrine. Even if *Seminole Rock* were shown to have beneficial effects on an

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[275] Manning, *supra* note 29, at 676.

[276] *Id.* at 678-79.

[277] *Id.* at 679.

[278] *Id.* at 679-80 (internal quotation marks omitted).

agency's rulemaking incentives, that such deference contradicts congressional commands would be a sufficient reason for switching to *Skidmore*. By contrast, Manning's claim, that *Seminole Rock* "contradicts the constitutional premise that lawmaking and law-exposition must be distinct,"[279] is not offered as an independent criticism. Rather than arguing that *Seminole Rock* is unconstitutional, notwithstanding its effects, he relies on the constitutional premise to bolster his incentive-based arguments against the doctrine.

1. The APA's Standard for Review of Agency Action

Section 706 of the APA requires a reviewing court to "determine the meaning or applicability of the terms of an agency action."[280] Anthony argues that the clear purpose of this portion of section 706 "was to arm affected persons with recourse to an independent judicial interpreter of the agency's legislative act, where, after all, the agency is often an adverse party."[281] Therefore, this provision makes it "wrong for the courts to abdicate their office of determining the meaning of the agency regulation and submissively giving controlling effect to a not-inconsistent agency position."[282] Anthony recognizes that courts, in reviewing agency actions, have rarely engaged in wholly independent review and accepts that courts should fairly consider an agency's interpretation. That type of consideration, however, is provided by *Skidmore*, which calls for the court to "interpret the regulation, not merely to decide whether the agency interpretation should be accepted or rejected."[283]

Anthony, however, accepts that granting *Chevron* deference to an agency's statutory interpretations, at least following *Christensen*, is compatible with section 706. Although he criticizes the Court for having made no effort in *Chevron* to square the deference rule it announced with

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[279] *Id.* at 654.

[280] 5 U.S.C. § 706 (2000).

[281] Anthony, *Supreme Court*, *supra* note 4, at 9.

[282] *Id.* *Seminole Rock* was decided a year prior to the enactment of the APA. *Cf.* Noah, *Divining Regulatory Intent*, *supra* note 70, at 285-86 (arguing that Court's reliance on deference rule may be explained by lack of "useful pre-promulgation materials to consult when asked to interpret an unclear agency rule"). Since then, the Supreme Court has not attempted an explicit reconciliation of the doctrine with the APA. *But cf.* *supra* text accompanying notes 233-39 (suggesting that Court has implicitly offered such reconciliation in *Allentown Mack*).

[283] Anthony, *Supreme Court*, *supra* note 4, at 11.

the APA,[284] Anthony thinks that the current understanding of *Chevron*'s justification provides such a reconciliation. When Congress has delegated lawmaking power to an agency, a court is following the APA's instruction to "interpret . . . statutory provisions"[285] when it reads the statute to have granted the agency such power and asks only whether the agency reasonably exercised that power.[286] The essential condition for Anthony, however, is that Congress has delegated lawmaking authority to the agency — "both a delegation conferring authority to make law on the subject matter and a delegation of authority to make law in the particular format . . . through which the interpretation was set forth."[287] Thus, long before *Christensen*, Anthony had been arguing that deferential review under *Chevron* should be accorded only to interpretations in formats that Congress intended to have the force of law.[288]

Anthony argues that the same analysis should carry over to the *Seminole Rock* context.[289] As he puts it:

> Issuance of informal rule documents without observing legislative rulemaking procedures cannot be "lawmaking," even if their subject is interpretation of regulations. While the agency may indeed possess delegated subject-matter authority to interpret its own regulations, the exercise of that power to make law depends upon using the procedure and format that Congress has specified for making law, usually notice-and-comment.[290]

In other words, Anthony is willing to accept that Congress intends its delegation of authority to promulgate regulations to carry with it the authority to interpret those regulations. He does not, however, accept the proposition that Congress is indifferent to the procedures through which an agency exercises that interpretive authority.[291] Although

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[284] *Id.* at 24.

[285] 5 U.S.C. § 706.

[286] Anthony, *Supreme Court*, *supra* note 4, at 23-24.

[287] *Id.* at 25.

[288] *See* Anthony, *Agency Interpretations*, *supra* note 3, at 31-40, 42-63.

[289] *See* Anthony, *Supreme Court*, *supra* note 4, at 10.

[290] *Id.* at 10 n.29.

[291] Anthony does not, however, deny that Congress might affirmatively give informal interpretations the force of law in particular situations. As an example, he points to *Ford*

Anthony does not clearly state which formats he thinks are deserving of *Seminole Rock* deference, his conclusions regarding the formats that should receive *Chevron* deference provide some guidance. It appears that he would approve of a court granting *Seminole Rock* deference to an agency interpretation promulgated after notice and comment or through adjudication, as long as the interpretation pertained to either a mixed question of law and fact or a pure question of law that was pivotal to the adjudicative decision.[292] Because interpretations contained in a notice-and-comment rulemaking are more properly characterized as amendments and do not implicate *Seminole Rock*,[293] Anthony can be understood to argue that deference to regulatory interpretations is consistent with section 706 of the APA if it is limited to a subset of an agency's adjudicative interpretations.[294] The rest of an agency's regulatory interpretations should receive no more than *Skidmore* consideration.

Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980), in which the Court deferred to an agency's informal interpretation because, *inter alia*, Congress had enacted statutory provisions that created safe-harbors for compliance with those informal interpretations. *See id.* at 566-68; Anthony, *Agency Interpretations*, *supra* note 3, at 37-38 & n.164. The Supreme Court appears to face another such case in *Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000). The Federal Circuit, in a decision that pre-dated *Christensen*, held that no deference was due to the Customs Service's informal interpretation of a provision of the Harmonized Tariff Schedules of the United States. *Id.* at 1306-08. Congress, however, expressly authorized the Secretary of the Treasury to promulgate "regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned." 19 U.S.C. § 1502(a) (2000). The Secretary has done so, and Customs' informal interpretation was issued thereunder. *See* 19 C.F.R. § 177.9(a) (2000). The Government has argued that *Chevron* deference is due to such interpretations under the reasoning in *Milhollin* and that nothing in *Christensen* is to the contrary. *See* Petitioner's Brief at 27-32, United States v. Mead Corp., 120 S. Ct. 2193 (2000) (No. 99-1434).

[292] *See* Anthony, *Agency Interpretations*, *supra* note 3, at 44-50. Anthony allows that Congress may intend that some of an agency's informal adjudications, but not all of its formal adjudications, carry the force of law. Anthony's position, therefore, differs somewhat from the Court's in *Christensen*, but the extent to which it does is unclear. *See supra* note 28.

[293] *Cf.* Braxton v. United States, 500 U.S. 344, 347-48 (1991) (noting that new regulation is analogous to clarifying amendment passed by Congress to resolve conflict that has arisen regarding interpretation of statute).

[294] In his discussion of *Chevron*, Anthony also appears to approve of decisions in which the Supreme Court gave *Chevron* deference to agencies' informal "determinations of how they will proceed in the exercise of their powers." Anthony, *Agency Interpretations*, *supra* note 3, at 52-55. Presumably, Anthony would not object to a court granting *Seminole Rock* deference to an analogous informal regulatory interpretation.

2. Separation of Powers and *Seminole Rock*

Manning's constitutional argument against *Seminole Rock* begins with the proposition that, in adopting background principles for interpreting vague statutes that create or regulate administrative agencies, a court should presume that Congress opts "for arrangements that best conform to the basic structural commitments of our constitutional scheme of government."[295] Drawing on constitutional text and structure, as well as the intellectual traditions underlying the Constitution, Manning argues that one such basic commitment is the meaningful separation of the law-enacting and law-interpreting functions.[296] In cases such as *Chadha*,[297] *Bowsher*,[298] and *MWAA*,[299] the Supreme Court enforced this principle by holding "categorically . . . that Congress cannot delegate any legislative power to its own components or agents."[300] As Manning explains, the constitutional requirement that Congress pass laws through bicameralism and presentment[301] is compromised, if not eviscerated, if Congress can delegate its legislative power to persons or entities that are under its control but not bound by that requirement.[302] From the separation of powers tradition and case law, Manning draws the following rule: "If Congress omits to specify its policies clearly during the process of bicameralism and presentment, it does so only at the price of forfeiting its power of policy specification to a separate expositor beyond its immediate control."[303]

Chevron satisfies this rule. When Congress promulgates an ambiguous statute, a reviewing court will look to the interpretation offered by the administering agency, rather than one offered by Congress. As Manning puts it, "separation remains between the relevant lawmaker (Congress) and at least one entity (the agency) with independent authority to

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[295] Manning, *supra* note 29, at 637.

[296] *Id.* at 639; *see also id.* at 640-44 (text and structure); *id.* at 645-48 (intellectual traditions).

[297] INS v. Chadha, 462 U.S. 919 (1983).

[298] Bowsher v. Synar, 478 U.S. 714 (1986).

[299] Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991).

[300] Manning, *supra* note 29, at 651.

[301] U.S. CONST. art. I, § 7.

[302] Manning, *supra* note 29, at 651.

[303] *Id.* at 654.

interpret the applicable legal text."[304] *Seminole Rock*, by contrast, contains no such separation. Because the same official is empowered both to promulgate and to interpret a regulation, "the agency lawmaker has effective control of the exposition of the legal text that it has created."[305] This leads Manning to call for the Supreme Court to revisit *Seminole Rock*, "with the objective of imposing an independent judicial check on agencies' interpretations of their own regulations."[306] He concludes that the standard the Supreme Court set out in *Skidmore* provides that independent check, while also appropriately recognizing that an agency's experience and expertise may give it valuable insight into a regulation's meaning.[307]

Manning uses his conclusion that the Constitution contemplates a price for issuing ambiguous legal rules — the cost of "ceding control of meaning to another branch"[308] — to buttress his incentive-based claims. For example, he draws on concerns about unfettered legislative power that underly the separation of powers principle,[309] to support his claim that *Seminole Rock* removes an important incentive toward regulatory clarity.[310] Similarly, his suggestion that *Seminole Rock* undermines the APA's notice-and-comment procedures relies on an analogy to the way in which the Court's separation of powers case law has protected the constitutional requirement of bicameralism and presentment.[311] The same is true of Manning's arguments regarding notice and political controls on agency action.[312] He does not, however, argue either that *Seminole Rock* is unconstitutional or that Congress lacks the power explicitly to confer upon an agency the authority to interpret its own regulations.[313]

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[304] *Id.* at 639.

[305] *Id.*

[306] *Id.* at 682.

[307] *See id.* at 686-90.

[308] *Id.* at 669.

[309] *Id.* at 648 (noting Montesquieu's observation that "the magistracy, as executor of the laws, retains all the power it has given itself as legislator" (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne Cohler et al. eds. & trans. 1989)) (internal quotation marks omitted)).

[310] *See id.* at 655.

[311] *Id.* at 660-62.

[312] *See id.* at 669, 674-75.

[313] *Cf. id.* at 637 (implying that *Seminole Rock* deference would be appropriate if Congress clearly indicated its intent to delegate to agency authority to interpret its regulations).

IV. DEFENDING *SEMINOLE ROCK*

Anthony and Manning have made a strong case against continued judicial adherence to *Seminole Rock*.[314] Not only do they claim that granting *Chevron*-style deference to an agency's interpretation of its own regulation provides agencies with an incentive to write vague regulations, but they also contend that such deference is incompatible with both the APA and the constitutional principle of separation of powers. In this part, I evaluate their critique and conclude that even though their incentive-based arguments are ultimately unpersuasive, Anthony's claim that *Seminole Rock* violates the APA — which gains some support from Manning's separation of powers argument — poses a significant obstacle to the doctrine's retention.

Nonetheless, this obstacle is not insurmountable. Deference to an agency's informal regulatory interpretation can be reconciled with the APA by reference to *Chevron*'s dependence on *Seminole Rock*. Agencies' delegated power to interpret ambiguous statutes would be severely compromised if courts did not defer to agencies' reasonable interpretations of their regulations. Therefore, Congress should be understood to have delegated to agencies the authority to issue binding informal interpretations of those regulations that implicate *Chevron* deference in order to give effect to the delegation of authority to interpret statutes.[315]

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[314] The only response to those arguments of which I am aware in the academic literature is found in Walker, *supra* note 238, at 1356-61. For discussion of some of Walker's arguments, see *infra* text accompanying notes 390-92 and note 443.

[315] To be sure, this justification for *Seminole Rock* depends on acceptance of the validity and utility of *Chevron*. Thus, those with doubts about *Chevron* are unlikely to find it persuasive. Yet those with such doubts surely have, to the extent they have thought about the issue, similar doubts about *Seminole Rock*. Indeed, I cannot conceive of a coherent position that would countenance granting *Chevron*-style deference to an agency's interpretation of its own regulation but not to its interpretation of a statute it administers. Although an agency may have greater expertise with regard to the former, expertise provides a reason for concluding that an agency's interpretation is persuasive, not for accepting that interpretation when a court concludes that it is not. From the perspective of defending *Seminole Rock*, therefore, those who do not accept *Chevron* are already lost.

A. Incentives and Interpretive Choice

The argument that *Seminole Rock* offers agencies improper incentives plays an important role in the critique of the doctrine. It is doubtful that either Anthony or Manning would be as opposed to its persistence if they thought its effects were benign or if they thought that switching to *Skidmore* would have worse consequences. And it is hard to quarrel with their core intuition that, all else equal, an agency anticipating review under *Seminole Rock* will have less incentive to invest in promulgating clear regulations than would an agency anticipating review under *Skidmore*.[316] Yet clarity, the use of language that is easily understood within the regulated community, is not the sole regulatory virtue. As Colin Diver argued in an article offering an analysis of the optimal precision of regulations, there are two other regulatory virtues: accessibility and congruence.[317] A rule is accessible when it can be applied "to concrete situations without excessive difficulty or effort" and is congruent when "the substantive content of the message communicated in [the regulation] produces the desired behavior."[318] An assessment of the comparative benefits of *Seminole Rock* and *Skidmore* must take into account their effects on all three virtues, not simply on regulatory clarity.

If increases in clarity were always positively correlated, or at least never negatively correlated, with increases in accessibility and congruence, then *Skidmore* would have a decided advantage over *Seminole Rock*. But, as Diver notes, clarity is sometimes negatively correlated with accessibility and congruence and the drafter of a rule often must make tradeoffs among them.[319] Increasing the clarity of a rule, for example, "may increase the variance between intended and actual outcomes" in view of the rule-maker's imperfect foresight.[320] This

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[316] *But cf.* Cass. R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 973, 1004 (1995) (noting that separating lawmaking from law-interpreting and/or law-enforcing creates incentive to avoid clear rules because ambiguity maintains flexibility for entity drafting laws and imposes costs on entities charged with interpretation and enforcement) [hereinafter Sunstein, *Problems*].

[317] *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 67 (1983) [hereinafter Diver, *Optimal Precision*]. What I refer to as clarity, Diver calls transparency.

[318] *Id.*; *cf.* Sunstein, *Problems*, *supra* note 316, at 961 n.23 (noting that "uncertainty could also arise if . . . provisions specified *ex ante* . . . depend on certain facts that are hard to ascertain" *ex ante*).

[319] *See* Diver, *Optimal Precision*, *supra* note 317, at 70-71.

[320] *Id.* at 73; *see* Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CAL. L. REV. 541, 545 (1994); Sunstein, *Problems*, *supra*

variance is not without social cost.[321] To illustrate this, consider Diver's example of a regulation designed to prevent unsafe pilots from flying commercial planes.[322] A clear rule that commercial pilots must retire on their sixtieth birthday will ground some highly capable 60-year olds and allow some highly questionable 55-year olds to continue flying. A somewhat vaguer rule, such as pilots found to pose an unreasonable risk of accident may not fly, may yield better results by providing for individual assessments of pilot capabilities. This is not to say that vagueness is always preferable to clarity, but rather to say that a clearer rule is not always superior. For example, Diver concludes that, in view of the lack of better proxies for riskiness than age and the high cost of individual determinations, the "retire at age 60" rule is superior to the "unreasonable risk" rule.[323]

How an agency makes the tradeoffs between clarity, accessibility, and congruence has effects both on the behavior of regulated entities and on the costs of promulgating and administering the regulation. Diver identifies four principal categories of costs and benefits that vary with the clarity of a rule: rate of compliance, over- and under-inclusiveness, costs of rulemaking, and costs of applying a rule.[324] Increases in a regulation's clarity will have both positive and negative effects with respect to each of these categories. For example, as a regulation gets clearer, it is usually easier to enforce, thus reducing the costs of applying the rule and increasing the incentive of regulated entities to comply. However, beyond a certain point a regulation may be too clear. When a regulation is specified in great detail it can become difficult to identify the applicable regulatory subprovision and, therefore, more costly to enforce and less likely to induce compliance. Increased clarity also adds to the costs of promulgating the rule. Not only must the agency acquire the information needed to develop precise rules, but greater precision is likely to spark conflict among regulated entities who disagree with the

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note 316, at 992.

[321] *See* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 406 (1989) ("The rules that the agency is imposing may be too complex and shaded to be captured in clear language, and the effort to do so may only mislead the regulatees or distort the administrative process.").

[322] *See* Diver, *Optimal Precision*, *supra* note 317, at 69.

[323] *Id.* at 80-83; *accord* Sunstein, *Problems*, *supra* note 316, at 969-70.

[324] Diver, *Optimal Precision*, *supra* note 317, at 73-74.

agency's subcategorization of their industry. Yet, investing in clarity can result in long-run savings as the agency does not need to invest as much in gathering information as individual cases arise.[325] In short, the validity of the argument that *Seminole Rock* reduces an agency's incentive to promulgate clear regulations is not a sufficient reason for abandoning it.

Moreover, the expected standard of review for its post-promulgation interpretations is not the only source of an agency's incentives with respect to clarity. As noted above, a number of factors internal to the agency, such as the desire to reduce management and enforcement costs and to insulate decisions against change by future administrations, provide incentives to promulgate clear rules.[326] Likewise, agencies have other incentives toward vagueness, such as the limits of an agency's budget and the desire to avoid a public pronouncement on a controversial issue. An agency promulgating a rule, therefore, faces a host of complementary and conflicting incentives with respect to clarity. Even if *Seminole Rock* provides a strong incentive toward vagueness, this is an insufficient basis from which to conclude that, in sum, agencies have too great an incentive to promulgate rules that are less than optimally clear. Nor does that claim provide a sufficient reason to conclude that replacing *Seminole Rock* with *Skidmore* would result in an optimal mix of incentives.[327]

Additionally, it must be recognized that the switch to *Skidmore* would entail its own costs with respect to both an agency's ability to promulgate clear rules and the resolution of the meaning of regulations. First, *Skidmore* is likely to reduce the incentive of regulated entities to assist agencies in resolving regulatory ambiguities during the notice-and-comment process. Second, *Skidmore* would significantly delay the

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[325] *See also* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 585-86 (1992) ("Whether the ideal time to acquire and disseminate information is *ex ante* or *ex post* depends, most importantly, on the frequency with which the information will be used."); Sunstein, *Problems*, *supra* note 316, at 1015-16 (same).

[326] *See supra* text accompanying note 254.

[327] For example, on the assumption — which appears to underlie both Anthony's and Manning's analyses — that *Seminole Rock* provides an agency with its strongest incentive toward vagueness, switching to *Skidmore* might still leave agencies with suboptimal incentives, only this time in the direction of promulgating overly clear regulations likely leading to reductions in accessibility and congruence. Alternatively, agencies' incentives may be so skewed toward vagueness that the removal of *Seminole Rock* will still leave agencies with an incentive to promulgate regulations that are too vague. Depending on how reductions in incentives toward vagueness are correlated with increases in clarity in the regulations an agency promulgates, abandoning *Seminole Rock* might have no effect, some effect, or a significant effect.

final determination of the meaning of a regulation, both during the transition from *Seminole Rock* and over the longer term. After considering these costs in the following two sections,[328] I turn in the third section to the question of choosing between the two doctrines in light of the possible consequences of each.

1. *Skidmore* and the Incentives of Regulated Parties

Manning's criticism of *Seminole Rock* for "invert[ing] the traditional principle that courts should construe ambiguities against the drafter responsible for them" ignores that *Skidmore* fails to mirror that traditional principle and that regulations are not analogous to form contracts.[329] First, *Skidmore* tells judges to adopt a neutral attitude toward an agency's interpretation of a regulatory ambiguity,[330] not to construe ambiguities against the drafter of the legal text as, for example, the rule of lenity does.[331] Second, unlike most form contracts, a regulation has

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[328] Manning's arguments that *Skidmore* will ameliorate *Seminole Rock*'s effects with respect to political controls are unpersuasive. First, it is reasonable to assume that agencies benefit from any political deals they make with narrow interest groups. Therefore, we need a reason to think that the harms the agency will suffer from not receiving deference for its *ex post* interpretations of a vague regulation will outweigh the benefits from the deals, all else equal, if we are to have reason to think switching to *Skidmore* will reduce the incidence of agencies hiding political deals in vague language. Second, it is not clear that it will often be rational to use vagueness to mask a political deal when agency interpretations are reviewed under *Seminole Rock*. A new administration can relatively easily change its interpretation of the regulation, thereby nullifying the political deal, if not reversing it and inflicting harm on the former beneficiaries. Accordingly, this will be a successful strategy only when most of the benefits from the deal accrue in the short term and those benefits outweigh the present value of any expected future harms. Finally, as to the influence of individual legislators, it would seem that switching from *Seminole Rock* to *Skidmore* would simply advance the point at which legislators interject themselves into the process. Rather than encouraging the agency to interpret a regulation in a particular way, a so-inclined legislator could use the various tools of congressional oversight to influence the agency's actions during the promulgation of a regulation. *Cf.* Pierce, *Distinguishing*, *supra* note 125, at 550 (claiming that, as compared to interpretive rules, notice-and-comment process through which legislative rules are promulgated provides "the President and members of Congress a better opportunity to influence the rules that agencies issue").

[329] Manning, *supra* note 29, at 656-57.

[330] To the extent *Skidmore* can be understood to place the agency *qua* agency in a privileged position as compared to other interpreters, the doctrine is even further removed from the traditional principle. *See supra* note 170.

[331] *E.g.*, Holloway v. United States, 526 U.S. 1, 20 (1999) (Scalia, J., dissenting) (explaining that rule of lenity requires ambiguous criminal statutes to be construed in favor

third-party beneficiaries "who may have an interest in giving the agency the benefit of the doubt" when it comes to interpreting that regulation.[332] Finally, an agency is not free to foist a regulation upon the regulated public in a take-it-or-leave-it fashion. The APA offers interested parties the opportunity to comment on the agency's proposed regulation and requires the agency to respond to those comments, making changes to the regulation where necessary, subject to review under the hard look doctrine. Although regulated entities obviously do not possess equal drafting authority with the agency, neither are those likely to be affected by a proposed regulation shut out of the drafting process.

Regulated entities not only have the opportunity to participate in rulemaking proceedings, but they are also likely to have better or easier access than agencies to certain classes of information relevant to proposed regulations. Indeed, an agency proposing a regulation will often ask regulated entities for input on specific topics,[333] presumably because they are often the cheapest providers of that information. When potential subjects of regulation have an informational advantage over the agency, then they will be the least cost avoider of regulatory ambiguity. In other words, regulated entities may be able to discern ambiguities that escape the agency's attention or to provide the information needed for clarification at less cost.[334]

Seminole Rock gives regulated entities a strong incentive to provide such information during the notice-and-comment process. Even if the agency rejects its proposed clarification, a regulated entity is more likely to succeed in challenging the agency's response to its comments under the hard look doctrine than it is to convince a court that the agency's *ex post* interpretation does not deserve *Seminole Rock* deference. By contrast, if courts were to apply *Skidmore*, a regulated entity that is aware of an ambiguity, but is afraid that the agency will not agree with its proposed resolution, would have an incentive to refrain from bringing the ambiguity to the agency's attention in its comments.[335] When the

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of defendant).

[332] Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 n.2 (D.C. Cir. 1997).

[333] *See, e.g.*, In the Matter of Promotion of Competitive Networks in Local Telecomms. Markets, FCC 99-141, 1999 WL 459319 ¶ 85 (July 7, 1999) (seeking comment "regarding any other actions that [the FCC] should take to facilitate development of competitive networks not already being considered in another proceeding").

[334] *See* Pierce, *Distinguishing*, *supra* note 125, at 550 (stating that notice-and-comment process "enhances the quality of rules by allowing the agency to obtain a better understanding of a proposed rule's potential effects in various circumstances").

[335] Regulated entities may have other incentives that lead them to prefer vague regulations. *See* Diver, *Optimal Precision*, *supra* note 317, at 99-100 (pointing out that

ambiguity eventually becomes pertinent to application of the regulation, the regulated entity is in a much better position. Not only must the agency's *ex post* interpretation pass *Skidmore*'s persuasiveness standard rather than hard look review, but any delayed recognition of the ambiguity on the agency's part may also have prevented it from developing the type of well-reasoned, longstanding interpretation likely to prevail under *Skidmore*.[336]

Consider, in this regard, the regulatory interpretation at issue in *Mission Group Kansas, Inc. v. Riley*.[337] Recall that the Tenth Circuit refused to defer to the agency's interpretation of the regulatory phrase "any additional conditions" on the ground that "potentially affected parties were [not] given an opportunity to comment on the 'interpretation.'"[338] It is difficult to justify the court's decision to place the onus of eliciting such specific comments entirely on the agency. The agency's notice of proposed rulemaking called attention to the inclusion of the "any additional conditions" language.[339] Yet, the agency had received no

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"[i]ncumbent licensees, for instance, may have a powerful interest in maintaining especially vague or complex licensing standards as a barrier to entry by competitors").

[336] Admittedly, if a regulated entity thinks the agency is likely to accept its preferred resolution of a regulatory ambiguity, then switching to *Skidmore* should increase its incentive to bring that ambiguity to the agency's attention during the notice-and-comment process, for fear that a court will not find it the most persuasive interpretation. Nonetheless, the benefit to the regulated entity from having a favorable resolution of an ambiguity enshrined in the regulation — and thus susceptible to change only through another notice-and-comment rulemaking — is likely to provide sufficient incentive to bring that ambiguity, and its preferred resolution, to the agency's attention regardless of the standard of review for *ex post* interpretations. *Cf.* Sunstein, *Problems*, *supra* note 316, at 1013-14 ("A well-organized group is unlikely to allow itself to become at risk through rulelessness when it need not do so (unless it believes that it is even more likely to be successful with discretion-wielding bureaucrats or judges).").

[337] 146 F.3d 775 (10th Cir. 1998).

[338] *Id.* at 781-82; *see also supra* text accompanying notes 116-20 (discussing the court's decision).

[339] *See* Student Assistance General Provisions and Federal Pell Grant Program, 59 Fed. Reg. 9526, 9537 (Feb. 28, 1994) (to be codified at 34 C.F.R. pts. 668 and 690). The Secretary explained that he:

> proposes to specify that by entering into a program participation agreement the institution agrees to comply not only with statutory and regulatory requirements, but also with any special arrangement, agreement, or limitation. The proposed expansion of this provision is necessary to make it clear that if it is to participate in a Title IV, HEA program, an institution must adhere not only to those requirements listed in the statute and regulations, but to any conditions of

comments suggesting that this provision was too vague at the time it issued interim final regulations and requested further comments.[340] Nor were such comments submitted during this subsequent period.[341] The silence during this latter period is striking, for the same day the agency issued its interim regulations and called for further comment, it also issued a set of related regulations that contained a discussion of its understanding of "any additional conditions."[342] That explanation clearly foretold how the agency would later act in the circumstances presented in *Mission Group Kansas*.[343]

Although the agency's discussion of the "any additional conditions" language in the notice of proposed rulemaking did not include specific examples of its possible application, regulated entities surely were put on notice that the Secretary believed he was making a significant change to the certification procedure. Their failure to comment on the breadth of the power asserted, even after the Secretary specified one such way in which he planned to implement that power, is at least partly responsible for the retention of such broad language in the final regulation. I am not

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> provisional certification, any limitation imposed on the institution to which the institution has agreed, or any other special arrangement that the institution makes pursuant to statutory or regulatory authority under Title IV of the HEA.

Id.

[340] *See* Student Assistance General Provisions; Federal Family Education Loan Programs; Federal Pell Grant Program, 59 Fed. Reg. 22,348, 22,370-77 (Apr. 29, 1994) (to be codified at 34 C.F.R. pts. 668, 682, and 690) (discussing various comments submitted on pertinent regulatory provisions, but lacking any discussion of "any additional conditions" requirement).

[341] *See* Institutional Eligibility; Student Assistance General Provisions; Federal Family Education Loan Programs, 59 Fed. Reg. 61,142 (Nov. 29, 1994) (to be codified at 34 C.F.R. pts. 600, 668, and 682); *see also* Student Assistance General Provisions; Federal Family Education Loan Programs; Federal Pell Grant Program, 59 Fed. Reg. 34,964 (July 7, 1994) (to be codified at 34 C.F.R. pts. 668, 682, and 690) (extending comment period).

[342] Institutional Eligibility Under the Higher Education Act of 1965, as Amended, 59 Fed. Reg. 22,324 (Apr. 29, 1994) (to be codified at 34 C.F.R. pt. 600).

[343] *See id.* at 22,334 (stating that, when school changes from for-profit to non-profit status, regulation "warrants adopting as those conditions of the required provisional certification those restrictions that would have applied to the institution had it remained a for-profit entity"). In view of this timing, it is hard to credit the Tenth Circuit's conclusion that entities potentially subject to the regulation could not reasonably have anticipated that it would be interpreted as it was and therefore that they did not have a meaningful opportunity to comment. *See Mission Group Kan.*, 146 F.3d at 781-82. The conclusion is even more baffling in light of the court's express recognition that, in applying the regulation to Mission Group Kansas, "the Secretary appears to have done no more than follow his own interpretation of the Department's regulations, an interpretation clearly stated in the Federal Register." *Id.* at 780. Perhaps the court did not notice that regulated entities still had an opportunity to comment on the proposed regulation when the Secretary's "clearly stated" interpretation appeared in the Federal Register.

suggesting that regulated entities withheld comment for strategic reasons. Not only were the courts likely to apply *Seminole Rock*, but the Tenth Circuit's requirement that the agency have offered an indication during the rulemaking process of how it would later decide to apply a vague provision was also unprecedented. Nonetheless, the court's decision to withhold *Seminole Rock* deference made the regulated entities' failure to bring this ambiguity to the agency's attention, and to press it for clarification, relatively costless. *Skidmore* similarly imposes few costs on a regulated entity for declining to share with the agency its informational advantages, and therefore gives it little incentive to do so.[344]

2. Transition Costs and Delay Under *Skidmore*

Manning recognizes that one benefit of *Seminole Rock* is that those subject to a vague regulation know that courts are likely to uphold an agency's interpretation of it and, therefore, can act in reliance on that interpretation. When certainty is important, especially in those cases in which having a rule is more important than having any particular rule, "delaying the conclusive interpretation of a regulation may have substantial social costs."[345] And, when certainty cannot be achieved prior to a Supreme Court decision, Manning acknowledges that the delay may be lengthy.[346] Although he argues that, all things considered, *Skidmore* is likely to decrease uncertainty about regulatory meaning, there are reasons to think that Manning underestimates the certainty that would result from abandoning *Seminole Rock*. Uncertainty is exacerbated both by an agency's authority to refuse to acquiesce in a contrary lower court decision and by the likelihood that the switch to *Skidmore* will disturb what had been settled interpretive questions. Moreover, Manning's suggested method of ameliorating the costs of this uncertainty seems incompatible with *Skidmore*.

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[344] A switch from *Seminole Rock* to *Skidmore* has similar implications for the incentives of regulatory beneficiaries to offer information during the notice-and-comment process.

[345] Manning, *supra* note 29, at 694-95; *see* Kaplow, *supra* note 325, at 612-13.

[346] Manning, *supra* note 29, at 695; *cf.* DAVIS & PIERCE, *supra* note 6, § 6.10, at 211 (describing *Seminole Rock* as "the only approach that can yield predictability and national uniformity with respect to the legal standards applicable to a system of benefits or regulation").

First, regardless whether a lower court reviews an agency's interpretation under *Seminole Rock* or *Skidmore*, the agency is normally not required to conform to a decision rejecting its interpretation of a regulation.[347] Indeed, an agency can refrain from acquiescing in a judicial decision even when it is reasonably sure that the dissatisfied party will seek review in a court that has previously rejected its interpretation.[348] This obstinacy on the part of the agency can lead to circuit splits on important questions of regulatory interpretation. Even Manning recognizes that switching to *Skidmore* is likely to increase the incidence of such splits, because *Skidmore* increases the chance that a court will reject an agency's interpretation.[349] He suggests, however, that the resulting increase in disuniformity is not a particularly pressing concern given the ability of an agency to amend its regulation and, thereby, to eliminate conflict among the circuits.[350]

Whether such an amendment is likely, however, depends on how the agency balances the costs of the notice-and-comment procedures needed to amend the regulation against the benefits of avoiding repeated losses in courts that have ruled against it.[351] Amendment is least likely to occur when the agency punishes regulatory violations through litigation and has control over the venue in which it initiates enforcement actions. An agency that can funnel most of its litigation to circuits that have agreed

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[347] *See* Atchison, Topeka & Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 446-47 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring) (noting holding in *United States v. Mendoza*, 464 U.S. 154 (1984), that "the executive branch need not follow a circuit's interpretation"); *see generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (discussing constitutional and policy issues of nonacquiescence).

[348] *Cf.* Vincent Indus. Plastics, Inc. v. NLRB, 209 F.3d 727, 739 (D.C. Cir. 2000) (describing agency's "stubborn refusal to accept this circuit's position on affirmative bargaining orders").

[349] Manning, *supra* note 29, at 695 n.392. As more agency interpretations are rejected, there are more occasions for nonacquiescence and, therefore, greater chance that an agency will press its rejected interpretation in other circuits, resulting in an increased likelihood of circuit splits.

[350] *Id.*

[351] This is an oversimplified description of both the costs and benefits. For example, enshrining the agency's interpretation in the regulation will have the benefit of increasing the difficulty a subsequent administration will have in changing this policy. On the other hand, the more difficult it is for the agency to shape its amendment to reach only those cases affected by the court's interpretation, the greater the cost in terms of reducing the regulation's congruence. To the extent the agency was aware of the ambiguity in its regulation at the time of its promulgation, these costs and benefits, as well as others, were presumably part of the calculus that led the agency not to resolve that ambiguity at that time.

with its interpretation will have little need for amendment. By contrast, as the ability of regulated entities to seek review in circuits that have already rejected an agency's interpretation increases, so does the likelihood of amendment. For example, many regulatory statutes permit appeal to the D.C. Circuit in addition to the circuit or circuits in which the party seeking review transacts business.[352] If the D.C. Circuit has rejected the agency's position, savvy litigants will almost always choose to appeal to that circuit.[353]

Another factor affecting the likelihood of amendment is the value the agency places on having its rules applied uniformly throughout the nation. When the costs of disuniformity are high and the agency strongly prefers its interpretation over that chosen by the court, amendment will be more likely.[354] In many cases, however, the benefits of amendment are unlikely to outweigh the costs until a majority of the circuits have rejected the agency's position. As a result, the agency will likely amend the regulation, if ever, only after a substantial period of time has passed.

Second, abandoning *Seminole Rock* will do more than delay final resolution of the meaning of regulations promulgated in the future; it will also unsettle the meaning of almost every facially ambiguous regulation now in force. Switching to *Skidmore* would offer the regulated public the opportunity to challenge even longstanding and judicially accepted agency interpretations on the ground that the interpretation, although reasonable, is not the most persuasive. A prior judicial decision upholding an agency's interpretation, whether by the Supreme

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[352] *See* Estreicher & Revesz, *supra* note 347, at 687.

[353] A party might appeal elsewhere if, for example, it has access to review in a circuit that previously ruled against the agency on an issue more central to its preferred outcome. Note that while venue choice will normally have the greatest impact if it is the D.C. Circuit that has rejected the agency's interpretation, it will still be of importance if one of the numbered circuits has rejected the interpretation and the regulation mainly affects national actors, who can seek review in any of those circuits.

[354] Otherwise, the agency is likely to acquiesce in the judicial interpretation of its regulation. *See* Atchison, Topeka & Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 446 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring) (noting that Federal Railroad Administration acquiesced in decision of first circuit court to reject its interpretation of Hours of Service Act on ground that "a single national rule is superior given the integrated nature of the national railroad system"). Acquiescence is not always a foolproof solution; the court in *Atchison, Topeka* rejected the interpretation in which the agency had acquiesced. *Atchison, Topeka*, 44 F.3d at 442-45.

Court or a lower court, should not bar such a challenge unless the court previously held that the agency's interpretation comported with the unambiguous meaning of the regulation.[355] Some agency interpretations, of course, would continue to be upheld after the switch to *Skidmore*. For others, the agency would elect to repromulgate the interpretations as amendments. Substantial uncertainty would result in the interim, however, as the agency and regulated entities speculate as to which interpretations are vulnerable to rejection under *Skidmore* and the agency determines which of those are worth repromulgating.

Manning responds that much of this uncertainty would be alleviated if the Supreme Court were to refuse to enforce an ambiguous regulation until the agency offers a definitive interpretation, in the form of an interpretive rule published in the Federal Register.[356] Such a policy, he continues, "might well encourage the adoption of interpretative rules as a way of providing public notice of the agency's position."[357] Yet, the point of the requirement that regulated entities have notice of the agency's interpretation is to mitigate the hardship that results from judicial acceptance of a non-obvious interpretation.[358] Once courts review agency interpretations under *Skidmore* and cease to accept unpersuasive interpretations, it is hard to see why the agency's having issued an informal interpretation, whether published in the Federal Register or elsewhere, should matter in this regard. If the agency's interpretation is the most persuasive one, then in almost all cases it would have been "ascertainably certain" to the regulated party.[359] In such cases, there seems little reason to excuse a regulated entity's noncompliance on the ground that the agency issued its interpretation too late or in the wrong form. On the other hand, if the reviewing court finds the agency's interpretation unpersuasive, then it will reject the interpretation under *Skidmore* and in almost every case reverse the

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[355] Pierce, *Reconciling*, *supra* note 53, at 2259-62. In such cases, however, *Seminole Rock* would have played no role in the initial decision.

[356] Manning, *supra* note 29, at 695-96. This argument is part of Manning's general response to the claim that switching to *Skidmore* will delay the resolution of the meaning of regulations. Although he does not discuss the effects of the switch on regulations the meaning of which had been settled under *Seminole Rock*, this argument could also serve as a response to my claim that these costs should count as a reason to continue adhering to *Seminole Rock*, as interpretive rules can be promulgated more quickly and easily than amendments.

[357] *Id.*

[358] *See supra* text accompanying notes 102-07.

[359] Trinity Broad. of Florida, Inc. v. FCC, 211 F.3d 618, 628 (D.C. Cir. 2000). One can imagine that a few cases will arise in which, even though the agency's interpretation is the most persuasive, the regulation is so vague that no interpretation was ascertainably certain.

agency's decision for that reason.[360] Whether the agency's interpretation was published in the Federal Register the day after the regulation was promulgated or was first presented during litigation may be relevant to its persuasiveness, but is irrelevant to the question whether the regulated entity ought to be punished for failing to comply with the regulation as interpreted.[361]

3. Empirical Uncertainty and Interpretive Choice

Whether *Seminole Rock* or *Skidmore,* all things considered, would result in agencies promulgating better rules is an empirical question that goes largely unaddressed by Anthony and Manning.[362] Selecting between the two doctrines presents what Adrian Vermeule described as a problem of "interpretive choice," one in which "the goal to be attained is specified and the difficult question is how interpreters who lack full information can choose the best path to that goal."[363] Here, the goal is inducing

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[360] An interesting situation is presented by a case in which a court rejects the agency's interpretation but holds that the most persuasive interpretation of the regulation supports the agency's conclusion that the regulation was violated. It is settled law that a court can uphold an agency action only on a ground offered by the agency. SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943). Under Manning's preferred solution, the court could not simply remand the case to the agency so that it could enforce the regulation, as interpreted by the court. As with the case in which the agency offers the most persuasive interpretation, although not in the form of a published interpretive rule, it is hard to understand why noncompliance should be excused in such circumstances.

[361] As explained above, Manning's preference for *Skidmore* is inconsistent with his view that ambiguous regulations should be construed against the promulgating agency. By contrast, this suggested means of improving certainty follows closely from that argument, as it would hold agencies responsible for any ambiguities, however inadvertent, in their regulations. Indeed, even if an agency reasonably concludes that a regulation is unambiguous, and therefore decides not to issue a clarifying interpretive rule, a court applying Manning's rule could preclude the agency's application of that regulation if it ascertains an ambiguity.

[362] Manning recognizes that clarity is not the only measure of precision and that completely clear rules likely would not be desirable. Manning, *supra* note 29, at 647. His response, however, is not to suggest that the gains from increased clarity due to *Skidmore* will outweigh any reductions in accessibility or congruence, but rather that retention of *Seminole Rock* removes "an important incentive for adopting transparent and self-limiting rules." *Id.* at 648. That *Seminole Rock* provides a stronger incentive toward vagueness than, say, an agency's budget does not demonstrate that abandoning *Seminole Rock* would lead agencies to promulgate superior rules, or even clearer rules given the incentives *Skidmore* provides to the regulated public. *See supra* text accompanying note 327 and note 327.

[363] Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76 (2000).

agencies to draft regulations that are optimal, in the sense that they are, broadly speaking, economically efficient.[364] The problem is not only that we lack ready answers to many of the empirical questions about how best to achieve that goal, but also that many of those questions are "irresolvable at acceptable cost within any reasonable time frame."[365] For example, in assessing whether to continue adhering to *Seminole Rock*, we have neither data nor plausible experiments that can reveal how the shift to *Skidmore* would alter the mix of an agency's incentives to promulgate clear regulations. We likewise have little basis for assessing how the regulated public's incentives to participate fully in the rulemaking process would change, let alone how those changed incentives would affect the regulations promulgated. Lacking easy access to such information, courts "must choose interpretive doctrines on largely empirical grounds, under conditions of severe empirical uncertainty, often without the luxury of postponing their decisions."[366] Yet, courts are relatively better informed or capable of becoming informed about some of these empirical issues, namely the effects of different interpretive rules on the costs of adjudication and judicial caseloads.[367]

Having posed the problem of interpretive choice, Vermeule suggests several strategies for making decisions in the face of empirical uncertainty.[368] One is the "all-else-equal" strategy, in which the decision maker assumes that the unknowable variables on each side cancel out and chooses based on the knowable factors.[369] This strategy is most plausible when the following two conditions are satisfied: the decision maker (1) has "a pronounced informational advantage with respect to the consideration that is given dispositive weight" and (2) is "able to discern that the consideration given dispositive weight is, in some loose

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[364] This need not be the goal for the problem of interpretive choice to arise. As Vermeule explains, no matter what your goal, "the choice of an interpretive aim . . . tells the interpreter surprisingly little about the proper contours of interpretive doctrine." *Id.* at 83.

[365] *Id.* at 100.

[366] *Id.* at 77; *see also id.* at 107-11 (explaining why experimentation is unlikely to provide empirical answers in context of interpretive doctrines).

[367] *Id.* at 111; *see also id.* at 112 ("None of these factors are perfectly known to judges. The proper comparison, however, is not to perfect knowledge, but to judges' understanding of other empirical components of interpretive choice that predictably lie far beyond their realm of competence.").

[368] He also argues that some of the common strategies for making rational choices in the face of empirical uncertainty — decision theory, consensus of experts, and allocation of burdens of proof — are unlikely to be of help in selecting among interpretive rules. *Id.* at 113-23.

[369] *Id.* at 123-25.

sense, of the same order of importance as the discarded imponderables."[370] Another strategy is random selection, which is an appropriate judicial response to uncertainty when it is important to have a clear rule and "there is little reason to think that the uncertain gains of making the very best decision will be worth the actual costs of the process itself."[371] Vermeule applies these strategies to three issues of statutory construction: whether courts should use legislative history, how they should select canons, and whether they should adopt an absolute rule of statutory stare decisis.[372]

Each of those statutory construction issues has common features with the regulatory construction question addressed here. Legislative history, for example, bears some resemblance to an agency's interpretation of its own regulation;[373] one can understand *Seminole Rock* as a canon of construction;[374] and, like an absolute rule of statutory stare decisis, one can defend *Skidmore* by reference to its expected effects upon lawmakers.[375] Accordingly, Vermeule's analysis can shed some light on how a court should choose between *Seminole Rock* and *Skidmore* given the difficulties in gathering empirical evidence about the effects of each.

First, Vermule argues that judicial consideration of legislative history necessarily entails substantial research and litigation costs. Arrayed against these certain costs are the indeterminate benefits and costs of the

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[370] *Id.* at 126. If the first condition is not satisfied, then all factors are relatively equally unknowable, making a decision based on any one factor no more rational than a decision based on any other. If the second is not satisfied, then the decision will be made on a basis that is relatively trivial compared to what is ultimately at stake. *See id.*

[371] *Id.* at 127-28.

[372] *Id.* at 128-45. His answers, respectively, are no, random selection (with a bias against abandoning established canons), and yes.

[373] *See* Noah, *Divining Regulatory Intent*, *supra* note 70, at 280-82, 310-11; Weaver, *Overview*, *supra* note 70, at 691-92, 710-16.

[374] *Cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329-35 (2000) (describing *Chevron* as canon of construction subject to trumping by other canons); Sunstein, *Law and Administration*, *supra* note 34, at 2113 (same). *But see* Merrill, *supra* note 5, at 988 (responding that treating *Chevron* in this manner "raise[s] a whole host of unanswered — and probably unanswerable — questions about which canons override *Chevron* and which are subordinate to *Chevron*").

[375] This, of course, is Anthony's and Manning's argument. For discussion of the debate about whether an absolute rule of statutory stare decisis would have salutary effects on Congress's incentives to respond to judicial decisions, see Vermeule, *supra* note 363, at 87-88.

use and disuse of legislative history in terms of reaching correct interpretations, whatever one's definition of correct.[376] The all-else-equal strategy, therefore, supports a prohibition on judicial consideration of legislative history. Turning from legislative history to administrative history, we see that *Seminole Rock* comes out ahead on this score. Although both doctrines will lead litigants to invest in researching the agency's past pronouncements,[377] the added uncertainty associated with *Skidmore* imposes substantial costs. As the claims of both doctrines to lead agencies to generate superior regulations are empirically indeterminate, the increased litigation and planning costs due to the uncertainty associated with *Skidmore* counsel against its adoption.

Second, Vermeule argues that random selection of canons of construction will usually be appropriate. The value of having clear background principles, he notes, is high and the costs of determining the correct principles are likely to overwhelm the benefits from getting them right.[378] The same analysis leads him to contend that "established canons should not be tampered with, whatever their current form."[379] These conclusions strongly support retention of *Seminole Rock*, which is a relatively well-entrenched rule of construction for regulations. Admittedly, if the Supreme Court decided tomorrow to review regulatory interpretations under *Skidmore*, that could eventually become an equally well-established rule. Until that happens, however, the costs of having changed canons of construction are likely to exceed any benefits from the switch.[380]

Third, Vermeule argues that the all-else-equal strategy, invoked in the context of legislative history, also supports an absolute rule of statutory

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[376] *Id.* at 134-39.

[377] Recall that if a litigant can demonstrate inconsistency on the part of the agency, it is more likely to defeat the agency's interpretation under both standards. By contrast, adoption of either a plain-meaning-rule or a rule that textual ambiguities are to be construed against the agency would reduce those costs because an agency's interpretive pronouncements — both pre- and post-promulgation — would be of little relevance to a court applying those rules. Similarly, a rule allowing consideration of pre-promulgation interpretations only would be less costly than *Seminole Rock* and *Skidmore*, which permit consideration of post-promulgation interpretations. Savings would accrue not only from the likely reduction in the size of the set of interpretive materials under consideration, but also from the relatively easier access to pre-promulgation materials, almost all of which will have been published in the Federal Register. Noah, *Divining Regulatory Intent*, *supra* note 70, at 307-22.

[378] Vermeule, *supra* note 363, at 140-41.

[379] *Id.* at 142.

[380] And, because the benefits from replacing *Seminole Rock* with *Skidmore* are, in any event, speculative, one could not conclude with certainty that the long-run benefits of *Skidmore* will eventually outweigh the short-run costs of changing canons of construction.

stare decisis. He notes that the "stronger the rule of statutory stare decisis, the less frequently litigants will request an overruling and the less time that must be spent on reconsidering previously decided questions."[381] Similarly, as explained above, switching to *Skidmore* will induce litigation to overturn previously settled regulatory interpretations. As with the above considerations, this too supports the retention of *Seminole Rock*.

As Vermeule recognizes, the conclusions drawn from applying these techniques of interpretive choice "are necessarily tentative and contestable."[382] In view of the empirical difficulties surrounding questions of interpretive choice "it would be surprising if particular analyses . . . turned out to yield confident calculations; the analysis can only be as robust as the subject matter."[383] Yet, courts cannot avoid choosing an interpretive doctrine to govern their review of regulations.[384] The question, then, is on what grounds that choice should be based. The problem of providing agencies with optimal incentives when promulgating rules is multi-dimensional. We simply do not know enough — about both the ways in which interpretive doctrines interact with agencies' and regulated entities' other incentives and how changes in those incentives are likely to translate into changes in the regulations agencies promulgate — to do any more than guess about these consequences when choosing between *Skidmore* and *Seminole Rock*. By contrast, courts have far more reason to be sure about the increased uncertainty costs associated with *Skidmore*. Those costs provide a better, though not perfect, basis for retaining *Seminole Rock*.

B. Deference and Congressional Instructions

For the reasons discussed above, Anthony's and Manning's incentive-based arguments do not provide sufficient reason for replacing *Seminole Rock* with *Skidmore*. But, recall that Anthony's claim that *Seminole Rock* violates the APA is independent of those arguments. Anthony argues that, even if Congress has implicitly delegated to agencies the authority

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[381] Vermeule, *supra* note 363, at 144.

[382] *Id.* at 129.

[383] *Id.*

[384] *Id.* at 90. *Seminole Rock* and *Skidmore*, however, are not the only possible choices. *See supra* note 377 (noting three others).

to interpret their regulations, it should not be taken to have implicitly delegated the authority to render those interpretations in informal formats.[385] This refusal to infer a delegation to agencies to render authoritative interpretations in any format they select is supported by Manning's separation of powers argument. As he notes, the procedural safeguards in the APA "serve as an important substitute for the structural protections afforded in the legislative arena by bicameralism and presentment."[386] If Congress, in enacting the APA, wanted to ensure that agencies employ their lawmaking powers through procedures that provide for public notice and an opportunity for comment,[387] then there is reason to doubt that Congress also sought to endow agencies with the authority to issue binding interpretations of their regulations through procedures lacking those features. Although neither Anthony nor Manning argues that Congress could not grant agencies this power,[388] their argument is that, at least with respect to informal formats, Congress has not done so. Absent evidence of such authorization, the argument that *Seminole Rock* violates the APA appears determinative.[389]

The question for one who would defend *Seminole Rock*, then, is where to find congressional authorization to issue binding interpretations in informal formats. A student commentator has recently argued that such authorization can be found in Congress's decision to permit agencies to issue interpretive rules outside the notice-and-comment process.[390] She analogizes such interpretations to clarifying amendments enacted by Congress, contending that it is "unlikely that Congress intends courts to override an agency's clarifying interpretive rule on the grounds that the court understood the regulation differently any more than it intends courts to do the same to its own clarifying amendments."[391] Congress, however, must pass a clarifying amendment through the same Article I,

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[385] *See supra* Part III.B.1.

[386] Manning, *supra* note 29, at 660.

[387] *Id.* at 660-61.

[388] Recall that Manning does not argue that granting *Chevron*-style deference to an agency's interpretation of its own regulation actually violates the Constitution. There is good reason, moreover, to think that it does not. *See* Weaver, *The Deference Rule*, *supra* note 70, at 606-07 (noting that "the Constitution does not require a court either to determine the meaning of a regulation independently or to displace an administrative interpretation with its own interpretation").

[389] Despite, of course, the Supreme Court's apparent willingness to ignore the APA when determining the appropriate scope of deference to agency interpretations. Duffy, *supra* note 68, at 191-92, 193-99.

[390] Walker, *supra* note 238, at 1354-56.

[391] *Id.* at 1356.

section 7 procedure it used to pass the legislation being clarified. Otherwise, it has produced what is known as "post-enactment legislative history," to which a reviewing court will give little weight, not *Chevron*-style deference, when ascertaining the meaning of a statute.[392] Because informal interpretations are issued through procedures insufficient to promulgate the regulation being interpreted, they are more like post-enactment history than clarifying amendments. In light of Manning's separation of powers argument, the better conclusion is that the APA's exemption for interpretive rules reflects Congress's intent that agencies have an efficient method of informing the courts and the regulated public of their regulatory interpretations. Reviewing informal interpretations under *Skidmore* is consistent with this implicit intent.[393]

Another potential source from which to infer a delegation to resolve regulatory ambiguities through informal procedures is Congress's general delegation of rulemaking authority. After all, every notice-and-comment regulation is necessarily the product of a congressional delegation. Yet, none of the three ways in which the agency's rulemaking authority could be understood to evince Congress's intent that courts accept reasonable, but unpersuasive, informal interpretations of those regulations is ultimately convincing. First, one could contend that such interpretive authority follows as a matter of course from rulemaking authority. However, this is not the normal understanding in the lawmaking context, as Congress's authority to enact laws does not include the authority to interpret those laws.[394] Second, one could make the greater-includes-the-lesser argument that, "as the agency has the authority to amend the regulation itself, a court's refusal to defer may simply postpone application of the agency's legitimate view."[395] This argument proves too much, for Congress has specified the procedures an agency must follow in amending a regulation.[396] Moreover, such

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[392] *See, e.g.* Pub. Employees Ret. Sys., v. Betts, 492 U.S. 158, 168 (1989); Pierce v. Underwood, 487 U.S. 552, 566 (1988); Weinberger v. Rossi, 456 U.S. 25, 35 (1982).

[393] Congress's desire that agencies can efficiently inform interested parties of how they plan to act does not entail an intent that courts accept those interpretations as long as they are reasonable and even when they unpersuasive.

[394] Manning, *supra* note 29, at 638-54.

[395] FLRA v. Dep't of Treasury, 884 F.2d 1446, 1454 (D.C. Cir. 1989).

[396] 5 U.S.C. §§ 551(5), 553(b) (1994). Therefore, to the extent it amends and does not interpret the regulation, application of the agency's legitimate view ought to be postponed.

authority does not suggest a congressional intent that an agency be spared the need to employ those procedures when a court finds the agency's interpretation unpersuasive. Third, one could claim that deference follows from the combination of Congress's delegation of authority to an agency to implement a statutory scheme and the resulting expertise that agency obtains.[397] Expertise, even when it results from the application of delegated authority, only supports consideration of the agency's interpretations under the *Skidmore* standard. Something further is required to justify implying an intent on the part of Congress that informal agency interpretations receive *Chevron*-style deference.[398] Delegated authority may serve as a useful proxy for agency expertise, but as argued above it is an insufficient basis for the claim that Congress intended for courts to uphold unpersuasive applications of that expertise.

C. Shoring Up Chevron

As opposed to the sources of implicit authority discussed above, *Chevron* itself can provide a basis from which to imply the congressional authorization necessary to reconcile *Seminole Rock* with the APA.[399] My argument, however, is not that we can directly imply from statutory ambiguity a delegation to interpret both the statute and any regulations promulgated thereunder. Statutory ambiguity could serve in *Chevron* as the source of an implicit delegation of authority in large part because Congress can respond to the Court's deference rule by reducing the number of ambiguous provisions in its legislation, thereby controlling

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[397] Weaver, *The Deference Rule*, *supra* note 70, at 609-10; Weaver, *Format Requirements*, *supra* note 180, at 598-600, 603.

[398] In rejecting agency expertise as a justification for *Chevron* deference, Justice Scalia explained:

> If I had been sitting on the Supreme Court when Learned Hand was still alive, it would . . . have been, as a practical matter, desirable for me to accept his views in all of his cases under review, on the basis that he is a lot wiser than I, and more likely to get it right. But that would hardly have been theoretically valid. Even if Hand would have been *de facto* superior, I would have been *ex officio* so. So also with judicial acceptance of the agencies' views. If it is, as we have always believed, the constitutional duty of the *courts* to say what the law is, we must search for something beyond relative competence as a basis for ignoring that principle when agency action is at issue.

Scalia, *supra* note 5, at 514. His argument is equally applicable in the *Seminole Rock* context.

[399] Likewise, this implied intent suffices to overcome any contrary background premise derived from the constitutional principle of separation of powers. *See supra* text accompanying notes 295-303.

the scope of the authority.[400] By contrast, Congress normally enacts statutes with no knowledge of the ambiguous regulations that an agency will subsequently promulgate and then have to interpret. As a result, if statutory ambiguity delegates the power to interpret regulatory ambiguities, then Congress can have little control at the time it enacts a statute over the scope of the interpretive authority it is delegating.[401] Nonetheless, if *Chevron* accurately represents Congress's preferred distribution of interpretive authority between courts and agencies,[402] then we can assume further that Congress intends for agencies' reasonable interpretations of ambiguous statutes to carry the day. When those interpretations are embodied in regulations, however, the entity that controls the meaning of the regulation also has effective control over the meaning of the statute. Therefore, unless agencies' informal interpretations of such regulations receive *Seminole Rock* deference, the distribution of interpretive authority contemplated by *Chevron* will be altered, with much of that authority returned to the courts.

The following subsections flesh out this argument, using *Auer v. Robbins* to illustrate the symbiotic relationship between *Seminole Rock* and *Chevron*. The Court's decision making process in that case would have differed significantly if it had applied *Skidmore* instead of *Seminole Rock*. Specifically, the Court could not have deferred to the agency's interpretation of the statute if it had found the agency's informal interpretation of its regulation less than persuasive. Having shown through this example how *Seminole Rock* supports *Chevron*, three likely responses are considered. One opposed to continued adherence to

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[400] Given the limits of language, time, and Congress's information about a given topic, however, one could not expect Congress to eliminate all ambiguous provisions from the statutes it enacts.

[401] This distinguishes a case like *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991), as Congress was aware of the scope of the interpretive authority delegated by the statutory charge to one agency to promulgate regulations "not . . . more restrictive than" those another agency had promulgated.

[402] And Congress's failure in the past sixteen years to have taken action to alter that distribution is some evidence that the Supreme Court got it right. *See* Merrill, *supra* note 5, at 995. *But see* Noah, *Enabling Acts*, *supra* note 51, at 1498-99 (arguing that "the subsequent behavior of the legislative branch in supervising agencies — ranging from formal oversight and consideration of appropriations requests to informal casework by individual members on behalf of constituents — cuts against the notion that Congress grants unreviewable powers of statutory interpretation").

Seminole Rock might first claim that the key to the *Auer* example is the assumption that the Court rejects the agency's regulatory interpretation, not that the Court does so under *Skidmore*. Although this response rightly notes that *Seminole Rock* does not ensure judicial acceptance of an agency's interpretation, switching to *Skidmore* would increase dramatically the number of cases in which a court substitutes its interpretation for the agency's, thereby rendering *Chevron* inapplicable. Second one might argue that *Skidmore* does not reverse *Chevron*'s allocation of interpretive authority because an agency can override a judicial construction of one of its regulations by amending that regulation, and courts will grant *Chevron* deference to the new regulation. Although true, as far as it goes, this argument overestimates the efficacy of regulatory amendments as a means of ensuring that vague statutes are, as *Chevron* instructs, interpreted by agencies. Finally, Manning has argued that, far from shoring up *Chevron*, *Seminole Rock* actually "undercuts *Chevron*'s objective of enhancing the political accountability of agency policymaking."[403] Because this claim is built on Manning's incentive-based arguments, it ultimately offers no more reason to abandon *Seminole Rock* than did those arguments. In addition, there are ways to reduce the incentive *Seminole Rock* provides to agencies to draft vague regulations without abandoning the doctrine.

1. An Example: *Auer v. Robbins*

As noted at the outset of this article, in *Auer* the Supreme Court reaffirmed that an informal regulatory interpretation is not undeserving of *Seminole Rock* deference merely because of the format in which it appears. For purposes of this example, however, assume that the Court held in *Auer* that it would review informal regulatory interpretations under *Skidmore*.[404] The relevant section of the FLSA exempts from the

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[403] Manning, *supra* note 29, at 680.

[404] This avoids any complications from the possibility that the statute or the regulation would have been drafted differently had Congress and the agency known that courts would review *ex post* regulatory interpretations under *Skidmore*. This suggests a further, though highly speculative, reason for retaining *Seminole Rock*. Richard Pierce has described *Chevron* as "the only viable mechanism to enforce the nondelegation doctrine that is both effective and justiciable" because "the Court could predict with confidence that Congress would react to *Chevron* by maximizing the number of policy decisions it makes through the legislative process." Pierce, *Reconciling*, *supra* note 53, at 2231-32; *see also id.* at 2232 (arguing that Congress has enacted more detailed statutes following *Chevron*). Switching to *Skidmore* might induce Congress to return to its pre-*Chevron* practices, as it increases the likelihood that a court, rather than an agency, will have effective authority to interpret a statutory ambiguity.

statute's minimum wage and maximum hour requirements "any employee employed in a bona fide executive, administrative, or professional capacity."[405] That section also explicitly authorizes the Secretary of Labor to define those terms by regulation.[406] The Secretary promulgated a number of regulations defining those terms[407] and required, among other things, that an employee be paid on a "salary basis" to fall within the statutory exemption.[408] The Secretary then defined "salary basis" to include an employee who "regularly receives each pay period . . . a predetermined amount . . . , which amount is not subject to reduction because of variations in the quality or quantity of the work performed."[409]

A recurring question in applying the regulation involved determining when public employees are not paid on a salary basis because they are "subject to" reductions in pay. In answering this question, the circuit courts had arrived at three different conclusions. Six circuits had decided that an employee was "subject to" impermissible deductions whenever her employer had a policy that would permit such a deduction, regardless whether any such deductions had ever occurred under the policy.[410] Three others had reached the opposite conclusion, holding that an employee was "subject to" impermissible deductions only when her employer had a history of making such deductions.[411]

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[405] 29 U.S.C. § 213(a)(1) (1994).

[406] *See id.* (specifying "as such terms are defined and delimited from time to time by regulations of the Secretary").

[407] 29 C.F.R. pt. 541 (1999).

[408] *Id.* §§ 541.1(f), 541.2(e)(1), 541.3(e).

[409] *Id.* § 541.118(a).

[410] *See* Yourman v. Dinkins, 84 F.3d 655, 656 (2d Cir. 1996) (per curiam); Carpenter v. City & County of Denver, 82 F.3d 353, 359 (10th Cir. 1996); Bankston v. Illinois, 60 F.3d 1249, 1253 (7th Cir. 1995); Kinney v. Dist. of Columbia, 994 F.2d 6, 11 (D.C. Cir. 1993); Abshire v. County of Kern, 908 F.2d 483, 487 (9th Cir. 1990). In addition, the Third Circuit had held similarly, in an opinion that was vacated following the Supreme Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); during the pendency of the rehearing, the Supreme Court decided *Auer*, which left the Third Circuit without need to arrive at its own interpretation of "subject to." *See* Balgowan v. New Jersey, No. 95-5276, 1996 WL 255930, at *5-*6 (3d Cir. May 16, 1996); Balgowan v. New Jersey, 115 F.3d 214, 216, 218-19 (3d Cir. 1997).

[411] McDonnell v. City of Omaha, 999 F.2d 293, 296 (8th Cir. 1993); York v. City of Wichita Falls, 944 F.2d 236, 242 (5th Cir. 1991); Atlanta Prof'l Firefighters Union Local 134 v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991).

One other circuit had attempted to split the difference, deciding that an unambiguous policy subjected an employee to impermissible deductions regardless whether any employee had suffered such deductions, but that an ambiguous policy did so only if there was a record that the employer had made deductions under the policy.[412]

Auer arose in the context of this dispute over the meaning of "subject to." Police sergeants and a police lieutenant, who claimed they were not paid on a salary basis, filed suit for overtime pay under the FLSA.[413] The Eighth Circuit, one of the three that had interpreted the regulation to require actual deductions, held that the officers were paid on a salary basis because they could not demonstrate that improper deductions had occurred.[414] The officers sought review in the Supreme Court, which requested that the Secretary of Labor state his interpretation of the regulation.[415] In his briefs, the Secretary explained that, to find an otherwise salaried employee is not paid on a salary basis, improper deductions either "must actually be made in practice, or there must be a significant likelihood that, if an employee violates the pertinent work rules, the employee will be disciplined in a manner inconsistent with the salary basis rule."[416]

The Supreme Court, therefore, was faced with four competing interpretations of the relevant regulatory provision. Under *Seminole*

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[412] Mich. Ass'n of Governmental Employees v. Mich. Dep't of Corr., 992 F.2d 82, 86 (6th Cir. 1993). Interestingly, none of the courts interpreting the regulation applied *Seminole Rock* deference; thus the assumption underlying this example is not completely counterfactual. Of the ten circuits to address the issue, only one attempted to discern the agency's interpretation of "subject to." *McDonnell*, 999 F.2d at 296-97. That court, however, appears to have applied *Skidmore* deference. *See id.* at 297-98 (finding "persuasive" interpretation it derived from Department of Labor opinion letters). A partial explanation for the lack of discussion of deference is that the agency had not offered either a formal or an informal interpretation of "subject to" since promulgation of the phrase in 1949. *See* Brief of Amicus Curiae United States at 14, Auer v. Robbins, 519 U.S. 452 (1997) (No. 95-897) (arguing against granting of certiorari because judicial interpretations of "subject to" were all reached "without the benefit of a clear statement by the Department of Labor on the correct reading of its regulations"). It is nonetheless surprising that not one of the courts said something like the following: normally we defer to an agency's reasonable interpretation of its regulations, but here the agency has not offered any interpretation pertinent to this issue. *See, e.g.*, *In re* Sealed Case, 181 F.3d 128, 135 (D.C. Cir. 1999) (en banc).

[413] Auer v. Robbins, 519 U.S. 452, 455 (1997).

[414] Auer v. Robbins, 65 F.3d 702, 710-11 (8th Cir. 1995).

[415] *See* Brief of Amicus Curiae United States at 1, Auer v. Robbins, 519 U.S. 452 (1997) (No. 95-897); *see also id.* at 14 (noting that Secretary had not previously set forth interpretation of contested provision).

[416] Brief of Amicus Curiae United States Supporting Affirmance at 21, *Auer* (No. 95-897); *accord* Brief of Amicus Curiae United States at 9-10, *Auer* (No. 95-897).

Rock, its task was relatively easy. Finding that the "critical phrase 'subject to' comfortably bears the meaning the Secretary assigns," the Court's analysis was essentially at an end.[417] Under *Skidmore*, however, matters would have been much different. The Secretary's interpretation is not obviously more persuasive than those of the various courts of appeals. Indeed, that none of the courts of appeals arrived at the Secretary's interpretation is some evidence that it is not the most persuasive interpretation.[418] Additionally, the Secretary provided little in the way of reasoning to support an interpretation that was offered for the first time in the more than fifty years since the "subject to" qualification became part of the definition of "salary basis."[419] Because "subject to" is susceptible of all four meanings, actually subject to, practically subject to, unambiguously subject to, and theoretically subject to, the Court would have to select the alternative that it found most persuasive in light of the text of the regulation and the policies served by the salary basis test.

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[417] *Auer*, 519 U.S. at 461. The Court was presented with two additional arguments against applying *Seminole Rock* in this case. As noted at the outset of this article, the Court rejected the officers' argument that no deference was due the Secretary's interpretation because it first appeared in a brief. *Id.* at 462. In addition, the Court was unpersuaded by the argument that the Secretary's interpretation violated the canon that exemptions to the FLSA should be construed narrowly. *Id.* at 462-63.

[418] One could argue that the Secretary's interpretation is identical to that reached by the Sixth Circuit. *See* Mich. Ass'n of Governmental Employees v. Mich. Dep't of Corr., 992 F.2d 82, 86 (6th Cir. 1993) (interpreting regulation to require actual deductions only if meaning of policy claimed to permit deductions was ambiguous). They differ, however, because the Sixth Circuit thought the "actual policy, rather than whether the policy has ever been administered," was the proper initial focus, *id.*, while the Secretary contended that "the most important evidence bearing on whether a class of employees is 'subject to' improper deductions would concern the extent to which such deductions have actually occurred." Brief of Amicus Curiae United States Supporting Affirmance at 22, *Auer* (No. 95-897).

[419] Admittedly, both of these criticisms are somewhat unfair. One could argue that the agency did little more than assert that its interpretation "best further[ed] the purpose of the exemption" because it expected review under *Seminole Rock*, and that it would have done more had it anticipated *Skidmore* review. Brief of Amicus Curiae United States Supporting Affirmance at 21, *Auer* (No. 95-897); *see also id.* at 22-24 (arguing that discussion of actual deductions in remainder of regulation supports its interpretation). Additionally, even though "subject to" has been part of the agency's definition of "salary basis" since 1944, the controversy over the meaning of "subject to" did not arise until the 1980s. *See id.* at 2-6 (detailing history of salary basis test). Yet, as noted above, if the courts replaced *Seminole Rock* with *Skidmore*, cases would likely arise in which the agency never had an opportunity to put forward the type of longstanding, thoroughly reasoned justification for its interpretation that *Skidmore* requires. *See supra* text accompanying note 336.

Perhaps the Court would have been persuaded by the agency's contention that its position offered the most realistic assessment of whether an employer treats a given group of employees as salaried.[420] Or, it might have decided that the best interpretation of the regulation was that it imposed a bright-line rule, such as that provided by the actually subject to interpretation. The point, however, is that under *Skidmore* it is the Court, and not the agency, that is ultimately making the policy decisions. But the Court's authority would extend beyond determining the meaning of the regulation, for the regulation must also comport with the statute. Here, recall that the statute expressly delegates to the agency the authority to define the scope of the statutory exemption. Although *Chevron* instructs courts to defer to regulations promulgated pursuant to such a delegation, the Court would not have been in a position to defer if it rejected the agency's interpretation of "subject to."

To see this, imagine that the officers had argued that it is unreasonable to interpret the FLSA to exempt employees who are theoretically, though not actually or practically, subject to improper deductions. If the Court, applying *Skidmore*, found that the agency's "practically subject to" interpretation was the most persuasive, then it would have little problem rejecting the officers' claim that such an interpretation is unreasonable. The statute essentially grants the agency *carte blanche* to define the exemption.[421] Almost any interpretation compatible with the text of the regulation would be a reasonable interpretation of the statute. For that reason, if the Court found that "actually subject to" was the most persuasive interpretation, it could dispose of the officers' claim just as easily. Yet it would strain credulity for the Court to contend that, in so doing, it was deferring to *the agency's* reasonable interpretation of the statute. The Court, having found the agency's interpretation of its regulation unpersuasive, would simply have lacked an agency resolution of the policy issues to which to grant *Chevron* deference.[422] Thus, in

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[420] *See* Brief of Amicus Curiae United States Supporting Affirmance at 21, *Auer* (No. 95-897).

[421] 29 U.S.C. § 213(a)(1) (1994).

[422] In this case, the regulation was susceptible of multiple meanings and there were no grounds for believing that the agency had previously thought any differently — or that it had previously thought at all — about the regulation's meaning. In other cases, however, it will not be implausible for a court that has rejected an agency's interpretation of a regulation to claim nevertheless to be deferring to the agency's interpretation of a statute. For example, if a regulation has a clear meaning and the agency, during litigation, has offered an interpretation inconsistent with that meaning, then a court might conclude that the agency is attempting to gain the benefits of amending its regulation without going

determining that the regulation is best interpreted to reach only those actually subject to deductions, the Court would have also determined that the statute is best interpreted in that manner.

Although this inability to apply *Chevron* will be most apparent when a litigant challenges the validity of a regulation, as interpreted, the claim that *Skidmore* undermines *Chevron* does not depend on such a challenge being raised. Assume the Court held that the agency's regulation was most persuasively interpreted to reach only those "actually subject to" impermissible deductions, but that no party had claimed that the regulation, so interpreted, violated the FLSA. The Court would, therefore, have had no occasion to test the regulation against the statute or to attempt to apply *Chevron* deference despite lacking an agency interpretation to which to defer. Nonetheless, the Court would, in effect, have interpreted the statute. Following its decision, the agency's regulations would be understood to define the FLSA to exempt those executive, administrative, and professional employees whose salary is *not actually subject to* deductions based on the quality or quantity of their work. Yet the italicized policy decision would be wholly judicial in origin. Thus, even if the regulation, so interpreted, was never claimed to violate the statute, the Court's interpretation of the regulation would be the functional equivalent of a notice-and-comment regulation codifying that same policy decision.

2. Substituting Judicial for Agency Interpretations

A relatively obvious response is that it is not the choice between *Skidmore* and *Seminole Rock* that matters, but rather the outcome of the application of whichever doctrine is chosen. That is, the inability to defer to an agency's interpretation of a statute under *Chevron* results simply from a court's rejection of the agency's interpretation of its regulation and not from a decision that the interpretation is unpersuasive rather than unreasonable. Because *Seminole Rock* does not offer blind acceptance to an agency's regulatory interpretations, both doctrines can place a court in the position of having to interpret a

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through the proper procedures. Because an agency is bound by its legislative rules until it amends them, there would be nothing strange about a court deferring to an interpretation of a statute implied by an unambiguous, validly promulgated regulation even though the agency now wishes the regulation meant something else.

regulation itself and, then, of having to interpret an ambiguous statute itself, without an agency interpretation to which to grant *Chevron* deference. On this view, *Seminole Rock* is not sufficiently different from *Skidmore* for the assumption that Congress prefers the former, in light of its relationship to *Chevron*, to be plausible.

Although the observation that neither doctrine will prevent courts from rejecting agency regulatory interpretations is unassailable, the difference between the two doctrines with respect to altering *Chevron*'s distribution of authority to interpret statutes is far from trivial. First, a court applying *Seminole Rock* is likely to reject far fewer agency interpretations than a court applying *Skidmore*. As noted above, although the choice of doctrine will not be outcome determinative if the agency's interpretation is either unreasonable or the most persuasive, it will control a large number of cases.[423] Second, a court that has refused to defer to an interpretation under *Seminole Rock* is not in the same position as a court that has concluded, under *Skidmore*, that the agency has not offered the most persuasive interpretation. Following the example of the Supreme Court's recent applications of *Chevron*, a court applying *Seminole Rock* should either remand a case so the agency can have a second chance to adopt a reasonable interpretation[424] or should settle on an interpretation for that case only, leaving the agency free to adopt a reasonable interpretation subsequently, which would receive deference.[425] As long as a court, after refusing to defer under *Seminole Rock*, does not render a definitive interpretation of a regulation, *Chevron* is not undermined because authority to interpret the regulation — and, through that, the statute — remains with the agency.

By contrast, *Skidmore* places ultimate responsibility for interpreting regulations on the judiciary. Therefore, when an agency has failed to adopt a persuasive interpretation of the regulation at issue in a case, a court usually will have no reason to wait for the agency to do so.[426] Once the court construes the regulation, it usually will lack an agency interpretation embodied in a regulation to which to grant *Chevron*

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[423] *See supra* text accompanying note 181 and note 181.

[424] *See* Nat'l Fed'n of Fed. Employees Local 1309 v. Dep't of the Interior, 526 U.S. 86, 100 (1999); *supra* note 49.

[425] *See* Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355, 367-69 & n.14 (1994); *supra* note 49.

[426] A court could have reason to refrain from interpreting a regulation in a case in which the court was not convinced that it had sufficient information from which to arrive at the most persuasive interpretation, and it could resolve the case by rejecting the agency's interpretation without settling on the proper interpretation.

deference. Prior to the Court's decision in *Christensen*, an agency had a number of avenues to present its interpretation of the statute to a court. After having its interpretation of a regulation rejected under *Skidmore*, an agency could argue, in its briefs in that case or through other informal formats prior to the institution of another case, that the regulation, as interpreted by the court, did not violate the statute. Those interpretations would receive *Chevron* deference in a majority of the circuits and, more often than not, in the Supreme Court. Now, however, such informal interpretations will not receive *Chevron* deference.[427] A court, therefore, will often have no agency statutory interpretation to which to defer unless the agency has the fortuitous opportunity to apply the regulation in a formal adjudication or chooses to amend the regulation.

In sum, although neither *Seminole Rock* nor *Skidmore* will eliminate the possibility that a court will interpret an ambiguous regulation itself, they differ in ways that make the former substantially more protective of *Chevron* than the latter. A court applying *Skidmore* will be likely to reject a greater number of agency interpretations than a court applying *Seminole Rock*. And, even in cases in which both courts would reject an agency's interpretation, the court applying *Skidmore* will also be more likely than the court applying *Seminole Rock* to interpret the regulation itself. By doing so, that court will normally not be in a position to rely on *Chevron* when faced with a challenge to the regulation, as interpreted. Unable to defer, the court will have to interpret the ambiguous statute itself. Therefore, abandoning *Seminole Rock* would significantly reduce the situations in which *Chevron* is applicable, thus increasing the

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[427] One might respond that, if *Christensen* exacerbates the consequences of replacing *Seminole Rock* with *Skidmore*, the proper response is not to maintain *Seminole Rock*, but rather to abandon *Christensen*. Yet *Christensen* is not at the root of *Skidmore*'s undermining of *Chevron*. Prior to the Court's decision, an agency might not have had the opportunity to present its statutory interpretation informally — if, for example, it could not foresee the court's interpretation of the regulation and the court had to decide whether the regulation, as interpreted, violated the statute in the very case in which it interpreted the regulation. In addition, although this is not the place for such a discussion, the rule adopted in *Christensen* is highly defensible. *See* Anthony, *Agency Interpretations*, *supra* note 3, at 25-63; Funk, *supra* note 6, at 16-17; Brief of Amicus Curiae Professor Thomas W. Merrill at 16-20, United States v. Mead Corp., 120 S. Ct. 2193 (2000) (No. 99-1434). *But see* Herz, *supra* note 5, at 214-15 (critiquing Anthony's argument); Weaver, *The Deference Rule*, *supra* note 70, at 610-18 (same).

instances in which courts, rather than agencies, interpret ambiguous statutes.

3. Amendment as an Incomplete Solution

A second response is that the *Auer* example adopts too narrow a time frame. A Supreme Court decision rejecting the agency's interpretation under *Skidmore* and interpreting the regulation might result in the Court having interpreted the statute. But the agency, this response runs, can always override that decision by amending the regulation to include the interpretation the Court had rejected. A reviewing court would then grant *Chevron* deference to the interpretation contained in the amended regulation. In this way, the agency, a politically accountable actor, has ultimate responsibility for interpreting statutory ambiguities, as *Chevron* directs, and any judicial usurpation of that responsibility is only temporary.

Yet the same response, it must be noted, could be made to the claim that *Chevron* leads to greater political accountability for decisions interpreting vague statutes. If courts did not defer to any agency statutory interpretations, or reviewed them all under *Skidmore*, which is essentially the same thing, then Congress could overrule a judicial decision that rejected an agency's interpretation of a statute. Thus, a politically accountable actor would ultimately be responsible for resolving statutory ambiguities. Nonetheless, it seems clear that *Chevron*, by giving agencies the authority to interpret vague statutes in the period between congressional actions, increased political accountability for such decisions notwithstanding Congress's enduring authority to amend its statutes.

Even though agencies have comparable authority to amend their regulations, the time between such amendments is similarly material to questions of political accountability for policy decisions and *Chevron*'s distribution of interpretive authority. Optimal regulations, like optimal statutes, will almost always be vague with respect to some of their applications.[428] As two commentators recently explained: "crafting a rule that simultaneously provides meaningful guidance to private sector actors and accommodates the myriad circumstances it will encounter over the course of its lifetime is a Herculean task, one that most rule writers fail."[429] Therefore, even when an agency complies with

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[428] *See* Pierce, *Distinguishing*, *supra* note 125, at 553.

[429] David B. Spence & Lekha Gopalakrishnan, *Bargaining Theory and Regulatory Reform: The Political Logic of Inefficient Regulation*, 53 VAND. L. REV. 599, 608-09 & n.37 (2000).

Christensen and sets out its interpretation of an ambiguous statute in a regulation, some post-promulgation interpretation of that regulation will almost always be required. Such interpretations, as the Supreme Court has recognized, involve the making of further policy decisions.[430] The question, then, is how to allocate interpretive responsibility between courts and agencies for making those decisions as they arise.

Although amendment is an option for an agency after a court rejects its interpretation of a regulation, such amendments are unlikely to occur rapidly.[431] The period in which judicial policy decisions will govern the meaning of the regulation, and thus the statute, can be quite lengthy. Even when an agency is spurred to amend a regulation in response to one or more judicial decisions rejecting its interpretation, its policy decision may still not prevail. First, those courts that had previously rejected the agency's interpretation of the regulation may hold that the amendment did not suffice to change the regulation's meaning.[432] Second, even if the amendment successfully reverses the contrary judicial decisions, the amendment is unlikely to be free of ambiguity in all of its applications. Accordingly, following an amendment of a regulation, policy decisions will still have to be made in implementing the revised regulation. Under *Skidmore*, those decisions are judicial ones, and the judicial resolutions may persist for relatively long and potentially indefinite periods. An agency's power of amendment, therefore, does no more to increase political accountability for interpretations of regulations than, in the *Chevron* context, does Congress's analogous power to amend statutes.[433] In both situations,

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[430] *See, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

[431] *See supra* text accompanying notes 346-52 (rejecting Manning's argument that likelihood that *Skidmore* will increase incidence of circuit splits is not pressing concern given agencies' ability to amend their regulations); *see also* Pierce, *Distinguishing*, *supra* note 125, at 551 (noting that APA rulemaking procedure itself significantly contributes to delay between agency's perception of need for rule and issuance of that rule).

[432] *Cf.* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 11-17 (1994) (describing two congressional amendments to Age Discrimination in Employment Act that were needed to overturn Supreme Court's interpretation of term in that statute).

[433] Likewise, pointing out that Congress can amend a statute in order to overturn an agency's informal interpretation of its regulation would be a weak response to Manning's argument that the Constitution contemplates a separation between the drafter of a rule and its interpreter.

review of an agency's interpretation of an ambiguous legal rule under *Skidmore* gives courts effective authority to make the policy decisions that *Chevron* allocated to agencies.

4. Political Accountability

Manning offers a third objection to the claim that *Seminole Rock* is superior to *Skidmore* in giving effect to *Chevron*'s allocation of interpretive authority. He argues that *Seminole Rock*, "by facilitating the agency's adoption of imprecise, vague, or even misleading regulations, . . . helps an agency insulate itself from broader political accountability for its decisions."[434] Thus, although *Chevron* sought to place interpretive authority in the hands of accountable agencies, rather than the less accountable judiciary, *Seminole Rock* enables agencies to make policy decisions in a relatively less accountable fashion, via informal interpretation of their notice-and-comment regulations.[435] Moreover, Manning contends that, by increasing the number of policy decisions made during the notice-and-comment process, *Skidmore* would increase political accountability, as agencies substituted more accountable for less accountable forms of policymaking.[436]

Whether *Seminole Rock* or *Skidmore* will result in greater political accountability for decisions regarding the interpretation of ambiguous statutes and regulations is an empirical question, for which we lack determinate answers. This should not be surprising, because the claim that *Skidmore* better serves "*Chevron*'s objective of enhancing the political accountability of agency policymaking"[437] builds on the empirically indeterminate argument that *Skidmore* provides agencies with superior incentives for clarity at the rulemaking stage. If agency regulations are no clearer under *Skidmore* than under *Seminole Rock*, then switching to *Seminole Rock* would undermine political accountability. As explained earlier, under *Skidmore* unaccountable courts would more often interpret regulations and, in turn, have effective authority to interpret ambiguous statutes. It is only if regulations are less ambiguous after the switch that

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[434] Manning, *supra* note 29, at 680.

[435] *Cf.* Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 84, n.3 (1999) (Thomas, J., dissenting) (criticizing agency for having "had ample opportunity to address this problem but ha[ving] failed to do so in a formal regulation"); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 563 (7th Cir. 1999) (refusing to defer to interpretation put forward in brief of "an agency that has, and has exercised, rulemaking powers yet has unaccountably failed to address a fundamental issue on which the brief takes a radical stance").

[436] Manning, *supra* note 29, at 685.

[437] *Id.* at 680.

any claim to an increase in political accountability can be made, with the argument being that agencies substituted formal *ex ante* resolutions of regulatory ambiguity for informal *ex post* interpretations.[438] Yet even if the switch to *Skidmore* did increase the clarity of regulations, that would not suffice to show that abandoning *Seminole Rock* would improve political accountability. Courts would have authority to interpret those regulatory provisions that are not made clearer following the switch, and political accountability would be reduced to the extent that judicial interpretations of regulations become judicial interpretations of ambiguous statutes. Indeed, only if *Skidmore* leads to a relatively large increase in the clarity of regulations could we expect to find a net increase in political accountability.

There are a number of reasons to doubt that this condition would be satisfied. First, although the replacement of *Seminole Rock* with *Skidmore* would apply prospectively, the meaning of many previously promulgated regulations will become unsettled.[439] An agency seeking to maintain the enforceability of its regulatory interpretations following this switch would have to predict the likelihood of its various informal interpretations being rejected under *Skidmore* and have to weigh the various costs and benefits of repromulgating those regulations formally. Although it might be relatively obvious that some interpretations are in jeopardy, such as those the Supreme Court had grudgingly accepted, agencies are unlikely to make these predictions with a great deal of accuracy overall. Even when an agency finds an interpretation that is unlikely to survive review under *Skidmore*, it still might not be worthwhile, all things considered, for the agency to undertake the effort to codify its preferred interpretation by amending its regulation. In sum, it would be heroic to assume that a result of the switch to *Skidmore* will be a significant improvement in the clarity of previously promulgated regulations.

Second, even if we ignore previously promulgated regulations, or adopt the heroic assumption, there is little reason to suspect that

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[438] Of course, an agency could decrease regulatory ambiguity in a second way, by narrowing the scope of the regulation. That is, rather than clarify an ambiguous regulatory provision, the agency could simply repeal it or decide not to promulgate it. Such a decision, if taken through notice and comment, would still be relatively more accountable than the informal interpretation it replaced.

[439] *See supra* text accompanying note 354.

agencies will be significantly better at reducing the need for interpretation of newly promulgated regulations. As noted earlier, *Skidmore* is likely to reduce the incentive of the regulated public to advise agencies of ambiguities during the notice-and-comment process.[440] In addition, even a substantial increase in the amount agencies invest in promulgating clear regulations will be insufficient to eliminate ambiguities that arise as regulations are applied to unforeseeable circumstances. With respect to those foreseeable ambiguities that an agency might be led to eliminate if review of *ex post* interpretations were governed by *Skidmore*, incentives due to other sources, such as a limited budget or the fear of creating an inadvertent loophole,[441] may leave the agency willing to retain the ambiguity. Indeed, there is little reason to think that switching to *Skidmore* would have a large enough effect on regulatory clarity to outweigh the losses in political accountability from the undermining of *Chevron*. This result could arise only if most ambiguities remain in regulations because agencies, having become aware during the notice-and-comment process that proposed regulations contain ambiguities, decide not to revise those regulations to state clearly their preferred policies because they calculate that *Seminole Rock* will enable them to do so more cheaply through informal interpretation.

Finally, there are three ways in which accountability, as measured by the substitution of formal for informal regulatory interpretations, can be increased within the *Seminole Rock* framework, further decreasing the likelihood that replacing it with *Skidmore* would result in a net gain in political accountability. First, following Anthony's suggestion, courts should acknowledge explicitly that a precondition to *Seminole Rock* deference is that the agency's informal regulatory interpretation falls within the exemption from notice-and-comment rulemaking the APA provides for interpretive rules.[442] Admittedly, it is not an easy task to determine which documents that are not flatly inconsistent with, or unreasonable interpretations of, the regulation they purport to interpret are actually amendments, and therefore improperly promulgated. Nonetheless, narrowing the range of interpretations that an agency can

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[440] *See supra* text accompanying notes 333-44.

[441] *Cf.* Sunstein, *Problems*, *supra* note 316, at 995 ("Conduct that is harmful, and that would be banned in an optimal system, will be allowed under most imaginable rules, because it is hard to design rules that ban all conduct that ought to be prohibited.").

[442] *See* Anthony, *Supreme Court*, *supra* note 4, at 6; *supra* text accompanying notes 249-53. Much of the blame for courts' failing to address this issue, however, can presumably be placed on litigants' decisions not to raise the issue. As the issue is not jurisdictional, a court is under no obligation to raise *sua sponte* the question whether the interpretive document was promulgated properly.

adopt informally increases the chances that an agency will need to use more accountable procedures to effect its preferred policy.[443] Widespread adoption of the D.C. Circuit's rule that an agency must use notice and comment to revise an informal interpretation would likewise lead to greater accountability in the interpretation of regulations.[444] Although commentators have rightly criticized the rule as incompatible with the APA,[445] four Justices recently disagreed and described the APA as requiring a "new rulemaking when an agency substantially modifies its interpretation of a regulation."[446]

Second, courts should continue refusing to permit an agency to enforce a regulation as interpreted against a party that has not received sufficient notice of that interpretation.[447] Although the court would defer to the agency's informal interpretation, the agency would not be able to punish most regulatory violations predating the provision of widespread notice of that interpretation.[448] Therefore, agencies would have an increased incentive to adopt interpretations through more accountable formats, which would have a greater likelihood of providing notice to regulated entities. For example, if an agency were to use a highly informal format, such as a legal brief, it would run a greater risk of being unable to enforce the regulation as interpreted.[449] In view of the often

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[443] *See* Walker, *supra* note 238, at 1357-58. Walker, however, appears too sanguine in her appraisal of the utility of this means of increasing political accountability within *Seminole Rock*. Although agencies will likely be prevented from deciding "to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations,'" a regulation can be open to a relatively wide range of interpretations without being "mush." Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 584-85 (D.C. Cir. 1997); *see also* Asimow, *supra* note 111, at 396 (arguing that, when ostensible interpretation is consistent with regulation, "there is no principled way to determine whether it amends the prior rule or merely explains, clarifies, or interprets it, and courts by necessity usually defer to an agency's characterization of its intent").

[444] *See, e.g., Paralyzed Veterans*, 117 F.3d at 586; *supra* text accompanying notes 122-24.

[445] *See supra* text accompanying notes 128-31.

[446] Geier v. Am. Honda Motor Co., 120 S. Ct. 1913, 1942 (2000) (Stevens, J., dissenting).

[447] *See supra* text accompanying notes 102-07.

[448] *But see supra* text accompanying notes 109-10 (describing some criticisms of this judicial strategy).

[449] The use of briefs to announce interpretations could be further dissuaded if a reviewing court, before deferring under *Seminole Rock*, required an agency to demonstrate that its regulatory interpretation satisfied *Auer*'s "fair and considered judgment" standard. The Fifth Circuit had taken this position prior to *Auer* and followed that decision afterwards. Sketoe v. Exxon Co., USA, 188 F.3d 596, 597 (5th Cir. 1999); Total Marine

lengthy lapse of time between promulgation of a rule and litigation offering widespread notice of an agency's informal interpretation, the number of regulatory violations that could not be redressed might be quite large.[450]

Third, courts could look to pre-promulgation materials, such as preambles, regulatory analyses, and notices of proposed rulemakings, in ascertaining the original administrative intent of an ambiguous regulation.[451] Currently, courts rarely interpret a regulation by reference to its administrative history, "without any apparent explanation for ignoring such materials," even when deciding whether the regulation has a plain meaning.[452] Consultation of such materials could not only resolve apparent regulatory ambiguities,[453] but could also provide a

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Servs., Inc. v. Director, Office of Workers' Comp. Programs, 87 F.3d 774, 777 n.2 (5th Cir. 1996). The D.C. Circuit, however, has recently held that "*Auer* does not require an agency to demonstrate affirmatively that its interpretation represents its fair and considered judgment." Bigelow v. Dep't of Def., 217 F.3d 875, 878 (D.C. Cir. 2000). In *Auer*, the Court did not explicitly discuss which party bore this burden, but implicitly placed it on the party challenging the propriety of granting *Seminole Rock* deference. *See* Auer v. Robbins, 519 U.S. 452, 462 (1997).

[450] The trade press, however, might publicize the position an agency takes prior to issuance of a judicial decision reviewing that interpretation, thereby limiting somewhat the class of entities that can claim to have lacked notice of the interpretation.

[451] Lars Noah argues that administrative history does not suffer from many of the flaws identified with the use of legislative history in interpreting statutes, and that it would remain a useful source for intentionalist interpretations even after judicial reliance on that history increased agencies' incentive to lace that history with helpful interpretations. *See* Noah, *Divining Regulatory Intent*, *supra* note 70, at 280-82, 310-11.

Both Anthony and Manning oppose the granting of *Chevron*-style deference to pre-promulgation interpretive materials. Anthony, *Agency Interpretations*, *supra* note 3, at 43; Manning, *supra* note 29, at 687-88. Deference to an interpretation contained in a regulation's administrative history does not appear to create anywhere near as great an incentive to draft vague regulations because an agency, by definition, cannot alter pre-promulgation materials post-promulgation. To the extent such materials are published in the Federal Register, notice concerns are reduced as well. However, such deference could, relative to *Skidmore*, reduce an agency's incentive to respond to a comment by changing the text of a regulation, as the agency could instead include its response in the regulation's preamble.

[452] Noah, *Divining Regulatory Intent*, *supra* note 70, at 288-89, 291-92. Noah at times appears to argue that intentionalism should replace deference to post-promulgation interpretations and, at other times, to suggest that the two could work in tandem. *Compare id.* at 282 ("[I]nstead of deferring so readily to an agency's post-promulgation interpretation, courts should prefer intentionalism . . . when asked to interpret legislative rules."), *with id.* at 322 ("[C]ourts would do well to use intentionalism . . . as a counterweight to agency tendencies toward dynamism . . . in construing their own regulations."). I think intentionalism should supplement, and not supplant, *Seminole Rock*.

[453] Unlike *Skidmore* review of an agency's interpretation of an ambiguous regulation, no similar undermining of *Chevron* would result from the use of administrative history at what could be called *Seminole Rock* step one. *See supra* text accompanying notes 89-94 (explaining

benchmark for assessing the reasonableness of an interpretation.[454] If courts were to rely on administrative history in these ways, the regulated public would have an increased incentive to comment on perceived ambiguities, thereby increasing agencies' incentive to clarify some of those ambiguities during the notice-and-comment process. Additionally, pre-promulgation materials can be used to determine which ostensible interpretations are really improperly promulgated amendments. The question whether a document interprets rather than amends a regulation "depend[s] on some notion of what meaning to ascribe to the text of the existing regulation."[455] Looking to an agency's original intent in promulgating a regulation can help prevent it from offering "contrived reinterpretations of old regulations rather than undertaking the notice-and-comment procedures necessary for adopting a genuine amendment."[456]

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that *Seminole Rock*, in practice, has first step similar to *Chevron*'s). An interpretation of an apparently ambiguous regulation that appears in pre-promulgation documents reflects an agency's policy decisions, not a court's. When a court refuses to defer to a post-promulgation interpretation that differs from an agency's pre-promulgation interpretation, on the ground that the earlier interpretation provides a context that makes clear what would otherwise be an ambiguous regulation, the court is simply preventing the agency from evading the APA's notice-and-comment requirements. Responsibility for the policy decisions involved in the interpretation of the regulation and the statute remains with the agency. *See supra* note 422.

[454] Noah, *Divining Regulatory Intent*, *supra* note 70, at 293 & nn.144-45; Weaver, *The Deference Rule*, *supra* note 70, at 615 n.155. For example, in *Paralyzed Veterans* the Department of Justice had interpreted a legislative rule to require newly built facilities to include wheelchair seating that afforded sightlines over standing spectators. When that rule was promulgated, however, the issuing agency (not the Department) stated clearly that the rule did not address the question of sightlines over standing spectators and that it planned to address that question in a future rulemaking. The Department adopted this rule as its own without commenting on the issue of sightlines over standing spectators. Paralyzed Veterans of Am., Inc. v. D.C. Arena L.P., 117 F.3d 579, 581 (D.C. Cir. 1997). Richard Pierce has recently argued that this administrative history could have led the court to conclude either that the DOJ's interpretive rule amended the regulation or that it was an unreasonable interpretation thereof. Pierce, *Distinguishing*, *supra* note 125, at 562.

[455] Noah, *Divining Regulatory Intent*, *supra* note 70, at 297.

[456] *Id.* at 299. Noah notes that regulated entities already pay close attention to administrative history in determining how to structure their activities when faced with an ambiguous regulation. *Id.* at 305. As a result, closer judicial attention to administrative history would not greatly increase the total costs of employing *Seminole Rock*. In addition, it is worth noting that one must decide whether to consult administrative history regardless whether post-promulgation interpretations are reviewed under *Skidmore* or *Seminole Rock*. As the administrative history appears relevant to the persuasiveness of a

These means of increasing an agency's incentive to issue its regulations in more accountable formats have advantages over *Skidmore*. First, because they operate within *Seminole Rock*, even when they counsel rejection of an agency's regulatory interpretation, there will be little call for a court to interpret the regulation itself. Therefore, the advantages from giving agencies reason to use more accountable formats will not be undercut by an increase in the number of cases in which a court will interpret an ambiguous statute. Second, they target the informal regulatory interpretations that are the most worrisome in terms of political accountability, such as amendments masquerading as interpretations and unforeseeable interpretations. Informal interpretations lacking these features are less likely to have come about through an agency's decision to evade notice and comment.

CONCLUSION

With its decision in *Christensen*, the Supreme Court answered one longstanding question about *Chevron*, only to bring another to the forefront: what differences between *Chevron* and *Seminole Rock* account for the apparently incompatible rules announced in *Christensen* and *Auer* for deferring to interpretive formats lacking the force of law? If there are no such differences, as four Justices have implied since *Christensen*,[457] then the Court is likely to overrule *Auer* and hold that all informal interpretations, whether of statutes or regulations, should be reviewed under *Skidmore*. Doing so would, in effect, overturn *Seminole Rock*, for agencies rarely interpret, rather than amend, their regulations in formats having the force of law. Thus, although arguments against *Seminole Rock*, such as those presented by Anthony and Manning, have yet to garner support among the Justices,[458] *Christensen* portends a reevaluation of the doctrine. Against claims that *Seminole Rock* skews agencies' incentives, violates the APA, and contravenes an important constitutional principle, the best justification for the doctrine is found in

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post-promulgation interpretation, judicial reliance on that history should result in similar costs under both doctrines. *See supra* note 377.

[457] *See* Geier v. Am. Honda Motor Co., 120 S. Ct. 1913, 1941 (2000) (Stevens, J., dissenting).

[458] Nor have they garnered support among the circuit courts, but those judges are highly constrained in their ability to decide that the Supreme Court's decision in *Seminole Rock* no longer governs their review of agency interpretations of regulations. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that [lower] courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

its interrelationship with *Chevron*. If courts conduct independent review of the meaning of a regulation that is based on an agency's interpretation of an ambiguous statute, then they will often find themselves lacking an agency interpretation to which to grant *Chevron* deference. Replacing *Seminole Rock* with *Skidmore*, therefore, would return to the judiciary much of the interpretive authority that *Chevron* transferred to administrative agencies. To protect that distribution of authority, thereby leaving agencies and not courts with responsibility for assessing the wisdom of competing policy choices, the Court should continue to apply *Seminole Rock* to interpretations of such regulations.