Seminole Rock's Domain

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Introduction

In carrying out their duties, federal administrative agencies must often interpret statutes and regulations that are not entirely clear. Sometimes an agency's interpretation of an ambiguous legal text may not seem like the best or most natural interpretation of that text. Nonetheless, a staple of modern federal administrative law doctrine is the principle of judicial deference to administrative interpretations of both congressional statutes and agency regulations. The seminal case on judicial deference to reasonable agency statutory interpretations is, of course, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[1] In the context of administrative interpretations of the agency's own regulations, the leading authority is the Supreme Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.*,[2] which held that an agency's construction of its own regulation should be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[3] More recent Supreme Court cases—including *Thomas Jefferson University v. Shalala*[4] and *Auer v. Robbins*[5]—have reaffirmed the *Seminole Rock* principle of judicial deference to an agency's reasonable construction of its own regulations.

Although *Chevron* deference and *Seminole Rock* deference are closely related, there has been much more thorough exploration of the theoretical underpinnings and practical consequences of *Chevron*. This has not eliminated doubt or disagreement about the nature, validity, or wisdom of *Chevron* deference, but a consensus has gradually

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1 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *Chevron* held that if the relevant statute is silent or ambiguous on the question at issue, the reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency." *Id.* at 844.

2 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

3 *Id.* at 414.

4 Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994).

5 Auer v. Robbins, 519 U.S. 452 (1997).

emerged that *Chevron* is grounded in a presumption (likely a legal fiction) about congressional intent. That presumption is in turn grounded in a set of pragmatic considerations—most notably expertise, accountability, and uniformity—that are thought to favor administrative over judicial construction.[6] Furthermore, in part because of the self-conscious and sophisticated reflection on *Chevron*'s justifications, courts and commentators have become increasingly attentive to questions regarding the proper scope and limits of what Professors Merrill and Hickman have described as "*Chevron*'s domain."[7] Although *Chevron* was widely seen as replacing an open-ended, multifactor inquiry with a more rule-like framework,[8] a strain in the doctrine and commentary has long suggested that the case for *Chevron* deference is not equally strong in all contexts, and indeed such deference might sometimes be inappropriate.[9]

This view reached its apotheosis in *United States v. Mead Corp.*,[10] in which the Supreme Court held that some agency statutory interpretations—particularly those contained in interpretive rules, informal orders, or other pronouncements issued without extensive procedures—were presumptively *not* entitled to *Chevron* deference.[11] Such interpretations fall outside *Chevron*'s domain, and therefore receive at most a measure of judicial respect, pursuant to the Court's 1944 decision in *Skidmore v. Swift & Co.*[12] Although *Mead* and much subse-

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6 At least three members of the current Supreme Court have explicitly endorsed this account of *Chevron*. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2379–80 (2001); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517. Prominent scholars have also endorsed this understanding as providing the best account of the *Chevron* doctrine. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2086 (1990).

7 Merrill & Hickman, *supra* note 6. This cluster of related issues is also sometimes referred to as "*Chevron* Step Zero." *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

8 *See* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 14–15 (1990); Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1019 (2005); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1243, 1257–58 (2007); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623–25 (1996).

9 *See* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 17–23, 25–26 (1996); Anthony, *supra* note 8, at 1–4, 12–14, 31–42, 55–58; Merrill & Hickman, *supra* note 6, at 889–920.

10 United States v. Mead Corp., 533 U.S. 218 (2001).

11 *Id.* at 227, 235–38.

12 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

quent commentary emphasized procedural formality as the key consideration marking the boundaries of *Chevron*'s domain, other strands of the doctrine have suggested that something less than full *Chevron* deference might be appropriate when, for example, several agencies share interpretive authority over the same statute,[13] when an agency's interpretation of a statutory provision has been inconsistent over time,[14] or when the interpretive question is unusually fundamental or important.[15] The academic literature is rife with proposals for further refinements to *Chevron*'s domain,[16] as well as defenses and criticisms of the limits the Court has already developed.[17]

By contrast, courts and commentators have paid less attention to analogous questions regarding *Seminole Rock*'s domain. Indeed, *Seminole Rock* has attracted less attention and discussion than *Chevron* in general, and the discussion that does exist has tended to focus on wholesale critiques or defenses of *Seminole Rock*,[18] rather than questions regarding possible limits on the set of administrative inter-

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13 *See, e.g.*, Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1253 (D.C. Cir. 2003); Rapaport v. U.S. Dep't of the Treasury, Office of Thrift Supervision, 59 F.3d. 212, 216–17 (D.C. Cir. 1995).

14 *See, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 698 (1991); INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987). *But see, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005); Rust v. Sullivan, 500 U.S. 173, 186–87 (1991).

15 *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 534–35 (2007); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994); *see also* Anthony, *supra* note 8, at 9–12; Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference As a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 594–95 (2008).

16 *See, e.g.*, Anthony, *supra* note 8; David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549 (2009); Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1198–1201 (2009); Moncrieff, *supra* note 15; Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 584–85, 610–11 (2006).

17 *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002); Merrill & Hickman, *supra* note 6, at 858–60; Pierce, *supra* note 16, at 563; Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 533–34 (2006); Adrian Vermeule, Introduction, Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 347 (2003).

18 *See, e.g.*, Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 112 (2000); Anthony, *supra* note 9, at 6; Manning, *supra* note 8; Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 832–33, 838 (2001).

pretations that qualify for such deference. Yet this is starting to change: emerging strands of both the academic literature and the caselaw have begun to take seriously, and to grapple with, questions regarding *Seminole Rock*'s proper scope.[19] This trend has accelerated in the wake of *Mead*. Indeed, post-*Mead* circuit court cases have sent mixed signals regarding the effect of that decision on *Seminole Rock* deference.[20] This Article builds on prior work by posing—and suggesting some preliminary answers to—the question of whether there ought to be limits to *Seminole Rock*'s domain, comparable (though perhaps not identical) to the limits that have been advocated, and in some cases recognized, for *Chevron*'s domain.

We have three objectives in this Article: the first is descriptive, the second analytic, and the third prescriptive. Our descriptive objective is to provide a succinct summary of the state of the current doctrine regarding the limits—or lack thereof—on *Seminole Rock*'s domain. Our analytic objective is to develop a taxonomy of the considerations that courts might plausibly use to develop midlevel doctri-

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19 *See, e.g.*, Pierce, *supra* note 16, at 604–08.

20 *Compare* United States v. Lachman, 387 F.3d 42, 54 (1st Cir. 2004) (citing United States v. Mead Corp., 533 U.S. 218 (2001)) (requiring interpretive statements to be both public and formal in order to receive *Seminole Rock* deference), Mercy Catholic Med. Ctr. v. Thompson, 380 F.3d 142, 154–55 (3d Cir. 2004) (applying *Mead* and *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000), to invalidate an agency's informally promulgated interpretation of a regulation), Keys v. Barnhart, 347 F.3d 990, 993 (7th Cir. 2003) (stating in dicta that there is likely "little left" of *Seminole Rock* after *Mead*), Arriaga v. Fla. Pac. Farms, L.L.C., 305 F.3d 1228, 1238 (11th Cir. 2002) (giving *Skidmore* rather than *Seminole Rock* deference to agency opinion letters interpreting regulations), *and* U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137, 1142 (7th Cir. 2001) (holding that *Mead* requires application of *Skidmore* rather than *Seminole Rock* deference to informal interpretations of existing agency regulations), *with* Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1272 (10th Cir. 2007) (explaining that after *Christensen*, "[i]nformal interpretations . . . merit deference where they interpret an ambiguous regulation," but not when they interpret an ambiguous statute), Excel Corp. v. USDA, 397 F.3d 1285, 1296 (10th Cir. 2005) (holding that a court must "defer to both formal and informal agency interpretations of an ambiguous regulation" (internal quotation marks omitted)), Humanoids Grp. v. Rogan, 375 F.3d 301, 306 (4th Cir. 2004) (holding that *Christensen*'s distinction between the level of deference due to formal and informal agency interpretations applies only to statutory interpretations, not regulatory interpretations), Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 644 (6th Cir. 2004) (concluding that "*Seminole Rock* deference appears to have survived *Mead*"), Zurich Am. Ins. Co. v. Whittier Props. Inc., 356 F.3d 1132, 1137 (9th Cir. 2004) (post-*Mead* case citing *Auer* as the basis for deferring to an agency's amicus brief which stated the agency's interpretation of a regulation), Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 780 n.7 (2d Cir. 2002) (holding that *Christensen* did not alter the conclusion that the court should grant *Seminole Rock* deference to an agency policy letter interpreting an agency regulation), Am. Express Co. v. United States, 262 F.3d 1376, 1382–83 (Fed. Cir. 2001) (stating that *Mead* did not alter *Seminole Rock*), *and* Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n, 212 F.3d 1301, 1304 (D.C. Cir. 2000) (limiting *Christensen* to cases involving agency interpretation of statutes, not agency interpretation of regulations).

nal rules or presumptions that would limit *Seminole Rock*'s domain, and to assess the costs and benefits of these different doctrinal possibilities. Our prescriptive objective is to advocate—tentatively—a subset of these possible rules. Of these three objectives, the analytic objective is paramount. More important than any particular doctrinal change, is the development of a more sophisticated framework for thinking about issues of *Seminole Rock*'s domain, so that these issues and problems can be confronted squarely and explicitly.

The Article is organized as follows: Part I sketches the evolution of the *Seminole Rock* doctrine, focusing on the gradual (and uneven) transformation in the doctrine's principal rationale from an emphasis on an agency's supposed special insight into the original understanding of its regulations, to a more pragmatic justification that closely resembles the prevailing rationale for *Chevron* (both in its pragmatism and in its invocation of a legal fiction about congressional intent). Part II discusses how *Seminole Rock*, coupled with the Administrative Procedure Act's ("APA")[21] exemption of interpretive rules from notice-and-comment requirements, creates serious conceptual and practical difficulties for administrative law doctrine. In particular, broad judicial deference to an agency's interpretation of its own regulations may enable an agency to enact binding rules without subjecting itself either to meaningful procedural safeguards or to rigorous judicial scrutiny. At the same time, wholesale rejection of *Seminole Rock* would be quite disruptive, and would likely have serious disadvantages, including loss of regulatory flexibility and efficiency. Thus, Part III—the heart of the Article—explores ways that administrative law doctrine might circumscribe *Seminole Rock*'s domain, even while the core of the doctrine remains intact. Some of the possible limits on *Seminole Rock* are well grounded in the extant caselaw. Others would entail extensions or nonobvious modifications of the doctrine, while still others would require overruling or cabining existing precedent. With respect to each of these possible limits on *Seminole Rock*'s domain, we strive to present both an evenhanded assessment of costs and benefits, as well as our own sense of which doctrinal limits ought to be adopted or preserved, and which ought to be avoided, abandoned, or modified. A brief conclusion offers some final thoughts and suggests directions for future work on this topic.

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21 Administrative Procedure Act (APA), 5 U.S.C. §§ 551–596, 701–706 (2006).

I. *SEMINOLE ROCK*'S JUSTIFICATIONS: FROM ORIGINALISM TO PRAGMATISM

Commentators have complained that *Chevron* is insufficiently clear about its underlying rationale,[22] but compared to *Seminole Rock*, *Chevron* is a model of thorough and transparent judicial reasoning. The *Seminole Rock* Court offered no explanation whatsoever—nor even a citation to any other authority—for its conclusion that a reviewing court must uphold an administrative interpretation of a regulation that is not clearly erroneous or inconsistent with the regulation.[23] Subsequent judicial decisions invoking *Seminole Rock*, though also not always paragons of clarity, have provided somewhat more explanation. In particular, these cases have suggested two main reasons why such strong judicial deference to an agency's interpretation of its own regulations might be appropriate.

The first rationale emphasizes the idea that the agency, as the entity that originally drafted and enacted the regulation in question, has special insight into its meaning.[24] This originalist rationale for *Seminole Rock* rests on two assumptions: first, that the agency's current view is likely to accurately capture the agency's original intent or understanding of the regulation's text at the moment of enactment; and, second, that this original intent or understanding ought to control subsequent interpretation, even when other indicia (including the text) tend to point in another direction, or when an alternative interpretation would better fit current circumstances. Both of these assumptions are questionable, yet much of the early caselaw discussing *Seminole Rock* seemed to rest on an originalist rationale,[25] and this justification still occasionally makes an appearance in more recent decisions.[26] It is worth highlighting that the originalist justification for *Seminole Rock* is inapplicable in the *Chevron* context because in that setting, the interpreter (the agency) did not enact the ambiguous text in question (the statute).[27] For this reason, some have concluded that

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22 *See* Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1281–83.

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

24 *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 153 (1991); Bruh v. Bessemer Venture Partners III L.P., 464 F.3d 202, 208 (2d Cir. 2006); Gose v. U.S. Postal Serv., 451 F.3d 831, 837 (Fed. Cir. 2006); Cathedral Candle Co. v. ITC, 400 F.3d 1352, 1363–64 (Fed. Cir. 2005); *see also* Manning, *supra* note 8, at 630–31.

25 *See* F. Uri & Co. v. Bowles, 152 F.2d 713, 718 (9th Cir. 1945); Porter v. Tankar Gas, Inc., 68 F. Supp. 103, 108, 110 (D. Minn. 1946).

26 *See supra* note 24.

27 *See* Manning, *supra* note 8, at 630. Some scholars and judges—including Justice Ste-

Seminole Rock deference ought to be even more robust than *Chevron* deference.[28]

This originalist rationale, if accepted, would have a number of important ramifications for the scope of the doctrine (that is, for *Seminole Rock*'s domain). First, and most obviously, originalist reasoning would suggest that *Seminole Rock* deference might not be appropriate for agency interpretations that are announced long after the promulgation of the regulation in question.[29] Moreover, *Seminole Rock* deference might be particularly inappropriate when the agency's interpretation has been inconsistent over time, both because the more recent interpretation provides less insight into the original understanding than the earlier interpretation, and because interpretive inconsistency suggests that the agency never had a clear understanding of the regulation's meaning.[30] A strong version of the originalist rationale might even imply that a reviewing court should defer to a contemporaneous administrative interpretation even if the court finds the agency's later construction of the regulation more textually plausible.[31] Some variants on the originalist rationale might also suggest

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vens, the author of the *Chevron* opinion—have nonetheless suggested analogous logic in the *Chevron* context as an additional reason to defer to an agency's interpretation of a congressional statute, and to give relatively greater deference to interpretations announced roughly contemporaneously with the enactment of the statutory text. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1826 (2009) (Stevens, J., dissenting). But, by and large, *Chevron* does not rest on this sort of originalist reasoning.

28 *See* Udall v. Tallman, 380 U.S. 1, 16–17 (1965); *Gose*, 451 F.3d at 837; *Cathedral Candle Co.*, 400 F.3d at 1363–64; Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. E. Associated Coal Corp., 54 F.3d 141, 147 (3d Cir. 1995).

29 *See* Advanta USA, Inc. v. Chao, 350 F.3d 726, 731 (8th Cir. 2003); *Porter*, 68 F. Supp. at 108; *cf.* Paragon Health Network, Inc. v. Thompson, 251 F.3d 1141, 1146–47 (7th Cir. 2001) (concluding, based on the court's rejection of the originalist rationale, that contemporaneity was not required).

30 *See* Lal v. INS, 255 F.3d 998, 1005 (9th Cir. 2001); *see also* Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 293 (2000) ("[C]ourts that . . . express wariness about inconsistent interpretations may look to the agency's original expression of intent as the more reliable contemporaneous explanation of a regulation.").

31 *See* Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront, 193 F.3d 730, 733, 737 (3d Cir. 1999) (rejecting the Department of Justice's interpretation of a regulation under the Americans with Disabilities Act, despite a finding that the interpretation was both "plausible" and "a rule [that] certainly has much to recommend it," because the history of the regulation indicated a different original understanding); *cf.* Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1273 (10th Cir. 2007) (rejecting agency's current interpretation because, inter alia, it conflicted with indicia of the agency's intent at the time the regulation was enacted); *Advanta*, 350 F.3d at 730–31 (rejecting agency's current interpretation in favor of its interpretation at the time of enactment).

that less deference is due when the agency that interprets the regulation is not the agency that drafted or promulgated the regulation.

In addition to suggesting a range of factors that *should* affect the applicability of *Seminole Rock* deference, the originalist rationale also suggests that a number of other factors *should not* have any such effect. For instance, on the originalist account of *Seminole Rock*, it should not matter whether the agency announces its interpretation of the regulation in a formal order, in a nonbinding interpretive rule, in a litigation brief, or in any other form. Unless there are reasons to suppose that the agency is likely to be more honest in one of these contexts compared to another, all of them should provide similar insight into the agency's original understanding of its regulation.[32] Likewise, the substantive importance of the interpretive issue would seem to be of little relevance if the rationale for *Seminole Rock* deference is the agency's special insight into the regulation's original meaning.

A separate and distinct rationale for *Seminole Rock* deference emphasizes not the agency's alleged special insight into the original meaning of the regulation, but rather a set of pragmatic considerations quite similar to those typically invoked to justify *Chevron*. Chief among these is an interest in institutional competence. Given the technical complexity of many regulatory schemes and the interdependence of different individual regulatory provisions, it may make sense for generalist courts to let the expert agencies resolve any gaps, conflicts, or ambiguities in these schemes, so long as the responsible agency's resolution is reasonable and consistent with the regulatory text.[33] Similarly, regulatory interpretation, like statutory interpretation, may implicate political value choices, which might be more appropriately resolved by agencies—as part of the politically

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32 *See* Auer v. Robbins, 519 U.S. 452, 462 (1997) ("There is simply no reason to suspect that the interpretation [contained in an amicus brief filed by the agency] does not reflect the agency's fair and considered judgment on the matter in question."); *see also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007); Reizenstein v. Shinseki, 583 F.3d 1331, 1335 (Fed. Cir. 2009); Smith v. Nicholson, 451 F.3d 1344, 1350–51 (Fed. Cir. 2006); Humanoids Grp. v. Rogan, 375 F.3d 301, 307 (4th Cir. 2004); Zurich Am. Ins. Co. v. Whittier Props. Inc., 356 F.3d 1132, 1137 (9th Cir. 2004); Bigelow v. Dep't of Def., 217 F.3d 875, 878 (D.C. Cir. 2000).

33 *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) ("[*Seminole Rock*] deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require[s] significant expertise.'" (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991))); *see also* Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 201 (4th Cir. 2009); Amerada Hess Pipeline Corp. v. FERC, 117 F.3d 596, 604 (D.C. Cir. 1997); Pac. Coast Med. Enters. v. Harris, 633 F.2d 123, 131 (9th Cir. 1980); Jicarilla Apache Tribe v. FERC, 578 F.2d 289, 292 (10th Cir. 1978).

accountable executive branch—than by politically insulated judges.[34] However, these pragmatic arguments, standing alone, cannot justify *Seminole Rock*, insofar as blanket deference to an agency's interpretation of a legal text would seem to contravene the judiciary's obligation to "say what the law is."[35] Thus courts invoking this pragmatic rationale for *Seminole Rock* generally deploy—either implicitly or explicitly—a legal fiction about congressional intent analogous to the legal fiction used to justify *Chevron*: the presumption that when Congress delegated the agency the authority to make rules with the force of law, it implicitly delegated to the agency the authority to clarify those rules with subsequent (reasonable) interpretations that should themselves be treated by courts as authoritative.[36]

As between these two justifications for *Seminole Rock* deference, the pragmatic justification is ascendant, while the originalist rationale has been in decline. When modern courts say anything explicit about the justification for *Seminole Rock* (which, admittedly, is rare), they are more likely to invoke some combination of pragmatic considerations and statements about likely congressional intent (often coupled with a reference to *Chevron* as an analog) than they are to invoke the agency's privileged insight as the original drafter.[37] Moreover, many of the conclusions about *Seminole Rock*'s domain that would seem to flow naturally from the originalist rationale—including the notion that interpretations issued long after the regulation should receive less deference—are routinely dismissed by courts as irrelevant.[38] The death

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34 *See Pauley*, 501 U.S. at 696–97; *see also* Manning, *supra* note 8, at 629; Pierce, *supra* note 16, at 569–70.

35 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see* Manning, *supra* note 8, at 621; *cf.* Sunstein, *supra* note 6, at 2075 (characterizing *Chevron* as a kind of "counter-*Marbury*" for the administrative state).

36 *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) ("[W]e presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."); *see also* Bruh v. Bessemer Venture Partners III L.P., 464 F.3d 202, 208 (2d Cir. 2006); Merrill & Hickman, *supra* note 6, at 899. Scott Angstreich has advanced a variant on this theme, arguing that *Seminole Rock* deference is necessary to make *Chevron* deference meaningful. *See* Angstreich, *supra* note 18, at 112 ("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.").

37 *See Bruh*, 464 F.3d at 207; S. Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 100 (1st Cir. 2002); Paragon Health Network, Inc. v. Thompson, 251 F.3d 1141, 1146–47 (7th Cir. 2001); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 585 (D.C. Cir. 1997).

38 *See, e.g.*, United States v. Hoyts Cinemas Corp., 380 F.3d 558, 566 (1st Cir. 2004); *Paragon Health Network*, 251 F.3d at 1146–47.

of the originalist rationale should not be exaggerated, as originalist reasoning does sometimes appear in modern cases.[39] But as a general matter, it seems fair to say that the *Chevron*-like rationale for *Seminole Rock*—a pragmatic concern about institutional competence, coupled with a legal fiction about implied congressional delegation—is the dominant modern account of *Seminole Rock* deference.

The pragmatic rationale for *Seminole Rock*, however, invites a number of questions about the proper scope of the doctrine. Even if one accepts the basic premises that agencies typically have more expertise and greater political accountability than do courts, this does not automatically imply the need for a categorical, across-the-board rule that courts must uphold any reasonable agency interpretation of a regulation. The doctrine could instead adopt a more open-ended and contingent standard—something akin to *Skidmore*—that calls for courts to give weight or respect to an agency's view, with the degree of deference perhaps varying with the reviewing court's sense of how much the agency's special expertise informed its interpretive view, as well as the perceived risk that the agency is behaving inappropriately.[40] Alternatively, the doctrine could adopt a set of midlevel principles that identify certain types of agency regulatory interpretations as presumptively entitled to strong *Seminole Rock*-style deference, while granting other types of agency interpretations the equivalent of *Skidmore* respect, or perhaps subjecting them to de novo review. Such midlevel principles could themselves be relatively rule-like (formal categories that give courts little discretion) or relatively standard-like (open-ended factors that judges are supposed to consider when deciding how much deference is appropriate). Thus, the pragmatic rationale for *Seminole Rock* deference does not lead inexorably to any particular conclusions regarding the proper scope of *Seminole Rock*'s domain, any more than the analogous pragmatic rationale for *Chevron* deference resolves questions about the proper scope of *Chevron*'s domain—a fact vividly illustrated by the acrimonious debates in, and after, *Mead*, in which all sides claim fidelity to *Chevron*.[41]

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39 *See* Manning, *supra* note 8, at 630–31.

40 It is perhaps worth noting that even on the originalist account of *Seminole Rock*, deference does not automatically imply that courts should uphold any administrative interpretation that is not clearly erroneous or inconsistent with the text. Even granting that the agency has special insight into the regulation's original meaning, one might still conclude that the agency's stated view is only one piece of evidence of that meaning, and that courts should therefore consider the agency's view together with other probative evidence (such as the regulatory history).

41 *Compare* United States v. Mead Corp., 533 U.S. 218, 229–31, 236–38 (2001), *with id.* at

Indeed, the implications of the pragmatic rationale for questions regarding *Seminole Rock*'s proper domain are even less clear than the implications of the originalist rationale. The implications of the pragmatic rationale turn on the more open-ended normative question of what institutional regime would be best, rather than on the comparatively narrow empirical question of what the agency's avowed interpretation reveals about the original intent or understanding of the regulatory text. For that reason, even a preliminary exploration of possible limits on *Seminole Rock*'s domain requires consideration of the major benefits and costs of judicial deference to an agency's construction of an administrative regulation. Part II sketches these general normative issues and Part III discusses a range of plausible doctrinal limits on *Seminole Rock*.

II. THE CONSEQUENCES OF *SEMINOLE ROCK*: GOOD GOVERNANCE OR ADMINISTRATIVE AUTHORITARIANISM?

The main pragmatic arguments in favor of deferring to an agency's construction of its own regulation are clear and familiar. First and foremost, such deference may promote competent and efficient administration of complex government programs. Agencies, according to a widely held and plausible view, often possess technical expertise that courts lack—both with respect to the subject matter and how different parts of a complicated regulatory scheme fit together. Thus if there is doubt about the meaning of a regulation, the court should accept the agency's view rather than imposing its own.[42] Although it might be preferable for agencies to clarify ambiguous regulatory provisions by amending those regulations, this is often prohibitively cumbersome and time consuming.[43] Moreover, some degree of regulatory ambiguity is inevitable, requiring resolution in the course of implementation.[44] Indeed, it might sometimes be desirable for agencies to build a bit of flexibility into their rules by writing them in somewhat open-ended terms and fleshing them out as the agency gains experience with implementing the regulatory program.[45] A sec-

239–45 (Scalia, J., dissenting); *compare* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003–04 (2005) (Breyer, J., concurring), *with id.* at 1014–20 (Scalia, J., dissenting).

42 *See supra* note 33.

43 *See* Hoctor v. USDA, 82 F.3d 165, 170 (7th Cir. 1996).

44 *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 96 (1995); *see also* Walker Stone Co. v. Sec'y of Labor, 156 F.3d 1076, 1083 (10th Cir. 1998); Manning, *supra* note 8, at 616–17.

45 *See Walker Stone*, 156 F.3d at 1083; Davila-Bardales v. INS, 27 F.3d 1, 5 (1st Cir. 1994)

ond prominent justification for deferring to an agency's legal interpretation emphasizes agencies' comparatively greater political accountability relative to federal judges. Although agency officials are not themselves elected, they are employed by the executive branch and are overseen to some extent by the White House, and this may make agencies more politically responsive.[46] Agencies also are subject to congressional oversight, though scholars and judges seem divided on whether this is a good thing or a bad thing from a political accountability perspective.[47]

These pragmatic arguments for *Seminole Rock*—expertise, efficiency, flexibility, and accountability—are familiar from the *Chevron* context. Likewise, many of the standard criticisms of *Chevron* would apply, *mutatis mutandis*, to *Seminole Rock*. Yet *Seminole Rock* deference also raises distinctive concerns that do not apply (or do not apply with equal force) in the *Chevron* context. Two such concerns are particularly important. First, as Professor John Manning points out in his incisive and insightful critique of *Seminole Rock*, a crucial difference between *Chevron* and *Seminole Rock* is that the former preserves a separation of legislative and interpretive power, whereas the latter allows these powers to be combined in a single entity.[48] Even though *Chevron* involves a shift of interpretive power from the judiciary to an agency, the agency has the power to construe a text that was enacted by *Congress*. By contrast, *Seminole Rock* allows the agency to act as the primary interpreter of regulations that the agency *itself* promulgated. Although the originalist rationale for *Seminole Rock* invokes this fact as the principal reason to defer to the agency's construction, Professor Manning persuasively argues that this combination of lawmaking and law-interpreting functions is actually a reason for serious concern, one that makes *Seminole Rock* deference problematic even if one endorses *Chevron*.

Seminole Rock's endorsement of combined lawmaking and interpretive power not only sits in uncomfortable tension with basic consti-

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("Experience is often the best teacher, and agencies retain a substantial measure of freedom to refine . . . in the light of new insights and changed circumstances."); *see also* Manning, *supra* note 8, at 647, 655.

46 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984); *see also* Kagan, *supra* note 6, at 2373–74; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 94–99 (1985).

47 *See* Manning, *supra* note 8, at 651, 676–79; John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 932–38 (2001); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1265–67 (2006).

48 *See* Manning, *supra* note 8, at 639.

tutional commitments,[49] but it may also have the perverse effect of undermining agencies' incentives to adopt clear regulations.[50] Congress knows (or should know) that when it leaves gaps, conflicts, or ambiguities in a statute, those ambiguities will be resolved by some other entity—either an administrative agency (under *Chevron*) or a court (if no agency administers the statute, or if *Chevron* does not apply). This gives Congress an incentive to write clearer statutes, lest another institution—perhaps a political rival—acquire control over the statute's meaning. This does not mean that Congress will always write statutes as clearly as possible: specificity must be weighed against other values, which is why Congress often delegates authority in the first place.[51] But at least this consideration imposes a countervailing constraint. By contrast, under *Seminole Rock*, an administrative agency that writes vague regulations knows that it will be able to control their subsequent interpretation. Regulatory ambiguity, unlike statutory ambiguity, does not entail an implicit delegation to another institution, which makes such ambiguity relatively more attractive. This, in turn, leads both to regulatory unpredictability and concerns about arbitrariness.[52]

This observation is closely related to a second concern that is specific to *Seminole Rock* deference: the worry that *Seminole Rock* could enable agencies to adopt legally binding norms without *either* the ex ante constraint of meaningful procedural safeguards *or* the ex post check of rigorous judicial review. To understand this concern, it is important to put it in the context of the APA's rulemaking provisions. Under the APA, an agency that wants to adopt a "legislative rule"—a

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49 *See id.* at 631, 639–49.

50 *See* Anthony, *supra* note 9, at 12; Manning, *supra* note 8, at 647–60.

51 *See* Matthew C. Stephenson, *Statutory Interpretation by Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 286–92 (Daniel A. Ferber & Anne Joseph O'Connell eds., 2010).

52 *See* Manning, *supra* note 8, at 654–56. There are, however, countervailing considerations that may encourage an agency to draft clear regulations even if the agency can control its later interpretation. For instance, as administrations change, agencies evolve with respect to both personnel and political goals. Thus, the agency officials who draft an ambiguous regulation are, in essence, delegating interpretive power to a new entity: the agency as comprised at the time of interpretation. To decrease the chance that a subsequent administration will exercise that discretion contrary to the agency's current preferences, an agency has an incentive to draft clear regulations in order to bind subsequent administrations. *See id.* at 656. Additionally, one reason that Congress sometimes chooses to delegate (whether explicitly or via statutory ambiguity) is precisely to ensure that some other entity makes the hard choices and takes the blame. *See* Stephenson, *supra* note 51, at 289–90. Insofar as this is a substantial explanation for vagueness, self-delegations may actually pose less of a problem than do delegations to a different agent.

rule that binds with the force of law—must comply with the notice-and-comment process laid out in section 553 (or in some cases the more rigorous process laid out in sections 556–557).[53] The APA, however, exempts "interpretative rules" and "general statements of policy" from the ordinary section 553 requirements; interpretive rules and policy statements (sometimes referred to collectively as "nonlegislative rules") can be issued without any special procedures (unless such procedures are imposed by some other statute or by the agency's own regulations).[54] Courts and commentators have struggled with the distinction between legislative and nonlegislative rules.[55] The main distinction recognized in the caselaw is that legislative rules have the force and effect of law, whereas nonlegislative rules do not.[56] In other words, so long as a legislative rule has been validly promulgated, an agency may seek to enforce that rule against regulated parties; one can suffer consequences simply for violating the rule. Nonlegislative rules lack such binding legal force.[57] They either announce in advance how the agency intends to exercise some general grant of discretionary authority (in the case of policy statements) or how the agency construes some other legally valid directive (in the case of interpretive rules). One cannot suffer consequences for violating a nonlegislative rule: because it lacks legal force, there is nothing to violate. In an enforcement proceeding, the agency would have to establish that the target violated some *other* norm embodied in a binding statute or regulation.[58]

The problem with this "force of law" test, though, is that in many cases an ostensibly nonlegislative rule can have the de facto force of law, even if the agency insists that the nonlegislative rule is not in and of itself legally binding. If an agency consistently adheres to its non-

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53 5 U.S.C. §§ 553, 556–557 (2006).

54 *See id.* § 553(b)(3)(A).

55 *See* Air Transp. Ass'n of Am., Inc. v. FAA, 291 F.3d 49, 55 (D.C. Cir. 2002) (describing the distinction between legislative and interpretive rules as "less than clear-cut"); Mission Grp. Kan., Inc. v. Riley, 146 F.3d 775, 781 (10th Cir. 1998) (noting that the distinction "is easier to conceptualize than apply"); Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (describing this distinction as "enshrouded in considerable smog" (internal quotation marks omitted)); *see also* Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1705 (2007); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893–94 (2004).

56 *See* N.Y.C. Emps.' Ret. Sys. v. SEC, 45 F.3d 7, 12 (2d Cir. 1995); Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993); Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

57 *See Pac. Gas & Elec. Co.*, 506 F.2d at 38.

58 *See id.*

legislative rule when imposing requirements, evaluating permit applications, levying sanctions, and the like, then the formal status of the rule may not matter much. If the agency is not required to comply with notice-and-comment requirements when promulgating such a rule, one might fear agencies will circumvent these requirements.

Courts have responded to this concern in two ways. First, they sometimes conclude that an agency pronouncement is a legislative rule, even if it lacks the force of law in a formal sense, if the pronouncement in question appears to bind the agency to an inflexible policy that exerts a substantial coercive effect on regulated parties.[59] However, although these factors may be helpful in distinguishing legislative rules from policy statements, they are of minimal use in distinguishing legislative rules from interpretive rules. As numerous judges and commentators have pointed out, an interpretive rule's flexibility and coercive effect depend principally on the legal text being interpreted.[60] Moreover, because an interpretive rule is a declaration of what some other legal command means—and often involves selecting an interpretation from a relatively constrained set of candidates—a legal interpretation may often be inflexible (in the sense that it is definitive, rather than tentative and provisional) by its nature.[61]

Thus, the "force of law" test may not always provide a meaningful restraint on agencies' ability to avoid notice and comment by promulgating interpretive rules. There is, however, a second important doctrinal constraint on agencies' incentive to exploit this exemption to avoid notice and comment: the principle that courts should subject the interpretations or policies announced in nonlegislative rules to more exacting judicial scrutiny. This principle implies, first, that when courts conduct "hard look" review under section 706 of the APA,[62] they will take a harder look when reviewing agency policies announced in nonlegislative rules (though it is not entirely clear whether courts actually do this).[63] More relevant here, this principle would seem to imply that something like the *Mead* holding is essential, notwithstanding the howls of protest in some quarters, lest agencies acquire the power to promulgate binding legal norms (by

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59 *See* Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021 (D.C. Cir. 2000); Chamber of Commerce v. U.S. Dep't of Labor, 174 F.3d 206, 211 (D.C. Cir. 1999).

60 *See* Hoctor v. USDA, 82 F.3d 165, 170 (7th Cir. 1996); *Am. Mining Cong.*, 995 F.2d at 1109–11.

61 *See Am. Mining Cong.*, 995 F.2d at 1110.

62 5 U.S.C. § 706 (2006).

63 *See* Anthony, *supra* note 9, at 23–32 (advocating this approach); Stephenson, *supra* note 17, at 552 (suggesting a rational choice account of why courts might behave this way).

interpreting statutory ambiguities) without having to subject themselves to the rigors either of demanding procedural safeguards or of meaningful judicial review.[64] In the statutory interpretation context, agencies have a choice: they can use notice-and-comment proceedings to promulgate their statutory interpretations as legislative rules, in which case they will presumptively receive *Chevron* deference, or they can opt to issue these interpretations informally as interpretive rules, in which case they will have to defend their interpretations under the less deferential *Skidmore* standard. But they have to select one or the other. This "pay me now or pay me later" principle has gradually emerged as a crucial feature of the doctrine, one that allows courts to avoid direct regulation of agency choice of policymaking form while retaining some form of meaningful check—either ex ante procedural safeguards or ex post judicial scrutiny—on administrative decisions.[65]

An unqualified version of *Seminole Rock*, however, threatens to undermine this doctrinal compromise by enabling agencies to issue binding legal norms while escaping both procedural constraints and meaningful judicial scrutiny. This evasion can occur in two related ways. First, an agency confronted with a statutory ambiguity might try to bootstrap its way into the equivalent of *Chevron* deference by promulgating a legislative rule that preserves or restates the statutory ambiguity, and then issuing an interpretive rule that purports to interpret not the *statute*, but the *regulation*. If *Seminole Rock* is applied in such cases, it would be quite easy for agencies to circumvent *Mead*. Second, unqualified *Seminole Rock* deference would imply that the "pay me now or pay me later" compromise would not apply when the agency interpreted its own regulations. Even if the legislative rule has to go through notice and comment, the agency could deliberately draft this legislative rule broadly and vaguely, and then later resolve all the controversial points by issuing interpretive rules. The APA seems to allow the agency to issue such subsequent interpretations without going through notice and comment (the agency need not "pay now"), and an unqualified *Seminole Rock* doctrine would instruct courts to uphold those follow-on interpretations so long as they satisfy a minimal reasonableness standard (the agency need not "pay later" either).

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64 *See* Robert A. Anthony & Michael Asimow, *The Court's Deferences—a Foolish Inconsistency*, 26 ADMIN. & REG. L. NEWS 10, 10 (2000); Merrill & Hickman, *supra* note 6, at 883–88, 900; Stephenson, *supra* note 17, at 553–60.

65 *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491–92 (1992); *see also Am. Mining Cong.*, 995 F.2d at 1111; Stephenson, *supra* note 17, at 552–53; Sunstein, *supra* note 7, at 225–26.

Some scholars have concluded that these and other objections to *Seminole Rock* imply that courts should abandon the doctrine altogether, replacing it either with a regime of de novo review or with something resembling *Skidmore*.[66] Courts, however, have consistently rejected that suggestion,[67] and it seems unlikely to gain much traction in the doctrine. More importantly, the case for abandoning *Seminole Rock* may be overstated. First, as noted above, there are real and important advantages to letting agencies clarify the meaning of their regulatory schemes in the process of implementation. Second, wholesale rejection of *Seminole Rock* would be a major doctrinal change, and it is not clear that such drastic action is necessary.[68] Furthermore, although the concerns about *Seminole Rock*'s effects on agency incentives should not be ignored, they should not be exaggerated either: under the current regime, agencies still engage in substantial legislative rulemaking, and these rules are often quite detailed.

The concerns discussed above do, however, suggest problems with an *unqualified* version of *Seminole Rock*—problems that could, and probably should, be addressed by more modest modifications of the doctrine. Indeed, courts have already recognized some important limits on *Seminole Rock*, and have hinted at others.[69] More generally, just as *Mead* explicitly endorsed and elaborated a longstanding inchoate sense that *Chevron* deference made more sense in some contexts than in others, it may well be that *Seminole Rock* makes more sense in some contexts than in others, and courts could translate this intuition into more concrete doctrinal limits on *Seminole Rock*'s domain while leaving the core of the doctrine intact.

If one is sympathetic to this general claim, one must then grapple with the related but distinct question of what the judicial doctrine on this issue ought to look like. The fact that the case for judicial deference to administrative interpretations is context dependent does not necessarily imply that judicial deference *doctrine* ought to be similarly context dependent. When courts craft doctrinal tests, they must be sensitive not only to how well the doctrine corresponds to some underlying normative theory of legal meaning or sound policy, but also to a number of second-order considerations about the administration and application of the doctrine, including concerns related to predict-

66 *See, e.g.*, Anthony, *supra* note 8; Manning, *supra* note 8.

67 *See supra* notes 36–37.

68 *See* Angstreich, *supra* note 18, at 127; *see also* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 142 (2000).

69 *See infra* Part III.

ability, institutional competence, decision costs, and comparative error costs.[70] Sometimes these considerations favor clear categorical rules, even though such rules may inevitably be overinclusive, underinclusive, or both. Sometimes an open-ended standard is preferable. Most often, however, the doctrinal approach is somewhere in the middle: a set of midlevel presumptions that impose more structure on the decision than an open-ended, multifactor standard would, but that entail more nuance, and more room for judicial discretion, than a categorical rule.[71] Thus, when considering possible limits on *Seminole Rock*'s domain, one must take two dimensions of the inquiry into account. The first is the extent to which the proposed limit would ameliorate the concerns associated with *Seminole Rock* without sacrificing *Seminole Rock*'s advantages. The second is whether these substantive benefits are worth the implementation costs associated with introducing a new factor into the doctrinal framework.

III. Assessing Possible Limits on *Seminole Rock*'s Domain

We now turn to an outline of possible limits on *Seminole Rock*'s domain. We consider four broad forms that such limits might take. First, we discuss the idea that *Seminole Rock* deference is inappropriate when the regulation the agency purports to interpret is merely a placeholder rule that does not sufficiently commit the agency to a particular position. Second, we explore the idea that a court should deny *Seminole Rock* deference to an agency interpretation that is issued well after the regulation itself, or that differs from the agency's own prior construction of the same regulation. Third, we consider whether the *form* in which the agency issues its regulatory interpretation should affect the level of deference. That is, we pursue the idea that something like the *Mead* principle might apply to administrative interpretations of regulations. Fourth, we address cases in which multiple agencies are potentially responsible for interpreting the same regulation, and we consider which agency (if any) ought to receive *Seminole Rock* deference in such cases. Within each of these categories, we provide a brief summary of current doctrine, consider the costs and benefits of possible limits on *Seminole Rock*'s domain, and offer our own tentative conclusions.

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70 *See* Richard H. Fallon, Jr., Foreword, *Implementing the Constitution*, 111 Harv. L. Rev. 54, 62 (1997); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. 885, 889 (2003).

71 *See* Fallon, *supra* note 70, at 103.

A. Limits on Regulatory Imprecision: An Antiplaceholder Principle

As noted in Part II, a serious concern about unqualified *Seminole Rock* deference is that, when coupled with the interpretive rule exemption from notice-and-comment procedures, agencies can evade the "pay me now or pay me later" structure of the doctrine by promulgating placeholder legislative rules that nominally go through notice and comment, but do not resolve key questions; the agency does the actual policymaking work by issuing interpretive rules that purport to interpret the placeholder rule, and by claiming both *Seminole Rock* deference and an exemption from notice and comment for these interpretive pronouncements. One way to try to impose some constraints on *Seminole Rock*'s domain is to set limits on the agency statements that courts will consider as legitimate interpretations of preexisting regulations. That is, courts may treat some ostensible interpretive rules as doing too much policymaking work to be viewed as mere interpretations of existing regulations. Indeed, this is probably the most widely noted type of limit in the extant caselaw: courts have frequently announced—and occasionally enforced—principles that deny *Seminole Rock* deference to interpretations of placeholder legislative rules.[72] This approach has appeared in several forms, which differ somewhat but share common roots in this antiplaceholder principle.

First, when invoking *Seminole Rock* deference, courts frequently warn that they will not defer to an agency interpretation when the underlying regulation is so vague as to be meaningless. Agencies may not, in the D.C. Circuit's vivid formulation, "promulgate mush" and then ask for deference when issuing interpretive rules purporting to clarify these mushy regulations.[73] If a court concludes that the initial regulation is too vague—either in general or on some specific point—for the subsequent nonlegislative rule to qualify as an interpretation, the court will treat the ostensibly nonlegislative rule as an *amendment* to the original rule, which must go through notice and comment in order to be valid.[74]

Second, the Supreme Court has made clear that an agency cannot claim *Seminole Rock* deference if the regulation being interpreted

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72 *See infra* notes 73–78 and accompanying text.

73 *See* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584, 588 (D.C. Cir. 1997); *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

74 *See* Mission Grp. Kan., Inc. v. Riley, 146 F.3d 775, 781–83 (10th Cir. 1998) (withholding *Seminole Rock* deference because the underlying regulatory language was too vague and "unrestrictive").

simply "parrot[s]" the statutory language.[75] In such cases, the Court will treat the interpretive rule not as an interpretation of the *regulation*, but rather as an interpretation of the *statute*; from this it follows that, under *Mead*, the interpretation (issued without notice and comment) is entitled only to *Skidmore* respect, not to the more deferential standard of *Chevron* or *Seminole Rock*.[76] This antiparroting principle has a similar form and function to the antimush principle; the main difference is that the statutory language parroted by the regulation might not be so vague as to be meaningless. Nonetheless, both principles are variants on the idea that courts should not grant *Seminole Rock* deference when the regulation being interpreted is a mere placeholder, either in the sense of having no discernible meaning or in the sense of replacing some degree of statutory ambiguity with an equivalent degree of regulatory ambiguity.

A third, and somewhat broader, variant on this principle is evident in cases where, notwithstanding that the regulation at issue is neither mush nor a paraphrase of the statute, the court nonetheless refuses to treat a subsequent agency pronouncement as an interpretation of the regulation because the alleged interpretive rule cannot be derived from the regulation through a process of interpretation, as opposed to (arbitrary) interstitial policymaking.[77] Again, the courts in these cases seem motivated by a concern that without some doctrinal limit on agencies' ability to invoke the interpretive rule exemption and to receive *Seminole Rock* deference, they will be able to evade the "pay me now or pay me later" bargain at the heart of the modern

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75 *See* Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

76 *See id.* at 256–58, 268; *see also* Glover v. Standard Fed. Bank, 283 F.3d 953, 962 (8th Cir. 2002) (suggesting that *Skidmore* deference, rather than *Seminole Rock* deference, is appropriate "where the agency regulation does nothing more than mirror the ambiguous language of the statute"); Cunningham v. Scibana, 259 F.3d 303, 307 n.1 (4th Cir. 2001) (stating that if the agency "simply repeated the statutory language in the regulation," a subsequent policy statement purporting to interpret that regulation is not entitled to *Seminole Rock* deference).

77 *See* Air Transp. Ass'n of Am., Inc. v. FAA, 291 F.3d 49, 55–56 (D.C. Cir. 2002); *Mission Grp. Kan.*, 146 F.3d at 782–83; Hoctor v. USDA, 82 F.3d 165, 170–71 (7th Cir. 1996); Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Mangifest, 826 F.2d 1318, 1324–25 (3d Cir. 1987). In such cases, if the agency disclaims any reliance on the subsequent statement as a binding source of law, the statement in question might still be considered a nonlegislative rule—a general statement of policy rather than an interpretive rule. But that is an important distinction. As noted above, if a general policy statement is too categorical and inflexible, the court may insist on treating it as a legislative rule. *See supra* note 59 and accompanying text. Thus if the agency's pronouncement is categorical and inflexible, the agency may need to classify the pronouncement as an interpretive rule rather than as a general policy statement if it hopes to qualify for the nonlegislative rule exemption from notice-and-comment requirements.

doctrine by enacting placeholder regulations and doing the real policymaking work in subsequent so-called interpretations.[78]

The antiplaceholder principle, in all its variations, has a great deal of intuitive appeal. After all, it directly attacks the most salient concern about *Seminole Rock*—circumvention of meaningful ex ante or ex post constraints on significant agency policy decisions—while at the same time preserving *Seminole Rock* deference for interstitial administrative interpretations that resolve the myriad smaller issues that inevitably arise when an agency implements a complex regulatory scheme. That said, the antiplaceholder principle—in all its forms—is extremely difficult to administer effectively. This principle, at bottom, requires judges both to assess how much interpretive or policymaking work is being done by the legislative rule relative to the interpretive rule, and to develop a normative standard for how much interpretive work is too much. Both of these tasks are extremely difficult and do not lend themselves to easy-to-articulate doctrinal formulations.

There may be some easy cases, as when a regulation really does say nothing at all (for example, by announcing that regulated entities must behave "appropriately"), or literally replicates, word for word, a statutory provision. But such cases are rare. The more common situation is one in which an agency with broad discretion promulgates a legislative rule that narrows that discretion somewhat, but still leaves substantial ambiguities, and a subsequent interpretive rule that narrows that discretion further by resolving some of the ambiguities in the legislative rule. In such cases, judicial attempts to differentiate those agency pronouncements that legitimately interpret prior legislative rules from those that illegitimately promulgate new policies are likely to be subjective and unpredictable. All regulations are at least somewhat open ended. What, then, counts as "mush"? Many regulations that interpret statutes do not use identical language, but do use similar language or alternate phrasings.[79] When, then, is the agency guilty of "parroting"?[80] More generally, where does interpretation end and policymaking begin?

These problems are familiar from other contexts in which courts have tried, but mostly failed, to impose requirements related to how closely a legally authoritative pronouncement must follow from a prior legal pronouncement. Most notably, the Supreme Court has

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78 *See Mission Grp. Kan.*, 146 F.3d at 782.

79 *See, e.g.*, Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm'n, 519 F.3d 1176, 1192–93 (10th Cir. 2008).

80 *Compare Gonzales*, 546 U.S. at 257, *with id.* at 278–80 (Scalia, J., dissenting).

consistently declared that Article I of the Federal Constitution[81] precludes delegation of legislative power to administrative agencies, but the Court has just as consistently failed to translate that view into any meaningful constitutional constraint on Congress's ability to grant policymaking authority to agencies.[82] The doctrine nominally requires organic statutes to contain an "intelligible principle" to guide and constrain agency discretion;[83] in practice, virtually anything—even vague "public interest" language—is enough to satisfy this requirement.[84] Despite the intuitive appeal of the idea that Congress must make the key choices while the agency can fill in the details, courts have struggled with—and seemingly given up on—the project of differentiating key choices from details of implementation.

A similar phenomenon is evident in the Court's jurisprudence on agencies' freedom to make general policy choices through adjudication rather than through rulemaking. Courts have sometimes expressed concern about agencies relying overmuch on adjudication, and some prominent judges and justices have tried to insist that certain kinds of general decisions must be made through rulemaking.[85] But the Supreme Court has consistently rejected that suggestion, in part because of the difficulty of deciding how specific a preexisting statutory or regulatory command must be before an agency can properly give it more definite content in an individualized adjudication.[86]

The antiplaceholder principle confronts a similar difficulty. Perhaps for this reason, judicial articulations and applications of the antiplaceholder principle (with only a handful of exceptions) have focused on the rare extreme cases.[87] Our sense is that, although the antiplaceholder principle is desirable, limiting this principle to extreme cases is also advisable. A more expansive version of the principle would be too difficult to apply consistently, and would therefore be too unpredictable. Thus, we think that courts have probably gotten

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81 U.S. CONST. art. I.

82 *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318–19 (2000).

83 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

84 *See Whitman*, 531 U.S. at 474.

85 *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (plurality opinion); *id.* at 777–78 (Douglas, J., dissenting); SEC v. Chenery Corp., 332 U.S. 194, 215–17 (1947) (Jackson, J., dissenting); Bell Aerospace Co. v. NLRB, 475 F.2d 485, 495–96 (2d. Cir. 1973), *aff'd in part*, *rev'd in part*, 416 U.S. 267 (1974).

86 *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 293–95 (1974); *Chenery*, 322 U.S. at 202–03.

87 *See, e.g.*, *supra* notes 73–78 and accompanying text.

the doctrine right with respect to the family of antiplaceholder principles (though we might quibble with individual applications).

That said, it is important to recognize that the more limited version of the antiplaceholder principle evident in the extant caselaw is of only modest use in constraining abuses of *Seminole Rock* deference. Courts do not always seem sufficiently sensitive to this fact; some opinions appear to suggest that the prohibition on agencies' promulgating mush means that, so long as the agency rule is not so vague as to be meaningless, applying *Seminole Rock* deference is unproblematic.[88] But this does not follow. Again, the analogy to the Article I nondelegation doctrine is instructive. Although courts have concluded that a constitutional nondelegation doctrine is unenforceable,[89] the concern about excessive delegation has inspired a range of other types of doctrinal constraints on agency freedom of action.[90] In the *Seminole Rock* context, the antiplaceholder principle is a kind of anti-self-delegation doctrine, but it too has proved mostly unenforceable except in rare extreme cases.[91] In light of that fact, it is important to consider other possible doctrinal techniques for addressing concerns about excessive self-delegation, rather than merely invoking the anti-self-delegation principle as if it rendered the problem moot. Thus, although we generally endorse the family of antiplaceholder principles evident in the current caselaw, these principles should be viewed as relatively weak, and they should not be characterized as carrying more weight than they actually do or can.[92]

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88 *See supra* notes 73–74 and accompanying text.

89 *See supra* notes 82–84 and accompanying text.

90 *See, e.g.*, Sunstein, *supra* note 82.

91 *See, e.g.*, *supra* notes 73–78 and accompanying text.

92 One other potential limitation on *Seminole Rock*'s domain, related to the antiplaceholder principle, may be worth touching upon here as well: the possibility that some interpretive issues are simply too important for courts to defer to the agency. Such a possibility has an analog in the *Chevron* context, as some courts and scholars have suggested the possibility of a "major questions" exception to *Chevron*. *See* Moncrieff, *supra* note 15; Sunstein, *supra* note 7, at 231–34. In the *Chevron* context, the idea is that for such major questions, it is implausible that Congress would have wanted to delegate interpretive (and therefore lawmaking) authority to the agency rather than to the judiciary. The analogous argument in the *Seminole Rock* context would be that for sufficiently major questions of regulatory interpretation, it is implausible that Congress would have wanted to delegate to the agency, rather than to the judiciary, the power to resolve regulatory ambiguities.

This Article does not treat this issue in depth, both because the arguments for this limitation on deference would seem to be roughly the same in both contexts (and therefore a discussion would not add much to the current literature on the topic, even though the extant literature focuses on *Chevron*), and because questions of regulatory interpretation rarely rise to the level of "major" questions without also implicating one of the other antiplaceholder principles discussed above (meaning that further discussion would likely be redundant). To put this latter

B. Limitations Related to Timing and Consistency

Recall that under an originalist understanding of *Seminole Rock*, noncontemporaneous interpretations are presumptively less entitled to deference, and noncontemporaneous interpretations that are inconsistent with prior interpretations have even less of a claim to deference.[93] Under the more pragmatic, *Chevron*-esque rationale for *Seminole Rock*, these conclusions do not necessarily follow. On a pragmatic account of *Seminole Rock*, should it matter whether an agency's interpretation of a regulation was issued shortly after the regulation itself, as opposed to years or decades later? Should it matter whether the agency has consistently adhered to the same interpretation of the regulatory text?

Consider first the issue of contemporaneous versus noncontemporaneous agency interpretations of a regulation. Again, an originalist rationale would treat this distinction as highly significant, as a contemporaneous interpretation is (arguably) more likely to reflect the agency's original intent at the moment of enactment. By contrast, under the pragmatic rationale—which stresses comparative expertise and accountability—the fact that an interpretation is issued well after the enactment of the regulation is probably not a reason to withhold deference, just as a noncontemporaneous agency interpretation of a statute is generally not thought to be outside of *Chevron*'s domain.[94] Indeed, consistent with the ascendance of the pragmatic rationale for *Seminole Rock*, most modern cases reject the notion that an agency's interpretation of its own regulation is due less deference simply because it was issued well after the regulation itself,[95] and those cases that do suggest a problem with noncontemporaneous interpretations seem to rely on the increasingly atavistic originalist rationale.[96]

One might go even further and suggest that in light of the main arguments for and against *Seminole Rock*, a regulatory interpretation

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point another way, in most imaginable cases in which a court might invoke a "major questions" exception to *Seminole Rock*, the court could frame essentially the same argument in terms of the original regulation failing adequately to address the major issue (promulgating mush) or addressing it only by copying the statutory language (parroting). The advantages and disadvantages of a "major questions" limit on *Seminole Rock* would therefore parallel the earlier arguments.

93 *See supra* notes 29–31 and accompanying text.

94 *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996).

95 *See, e.g.*, Paragon Health Network, Inc. v. Thompson, 251 F.3d 1141, 1146–47 (7th Cir. 2001).

96 *See* Advanta USA, Inc. v. Chao, 350 F.3d 726, 728 (8th Cir. 2003); Porter v. Tankar Gas, Inc., 68 F. Supp. 103, 108 (D. Minn. 1946); *cf. Paragon*, 251 F.3d at 1146–47.

issued very shortly after the regulation itself should be *less* entitled to deference than an interpretation issued many years later. The rationale for this counterintuitive conclusion goes as follows. The main objection to *Seminole Rock*, discussed in Part II, focuses on the self-delegation problem: the concern is that agencies will take advantage of the combination of *Seminole Rock* deference and the APA's interpretive rule exemption by enacting vague, open-ended legislative rules that the agency can then translate into real obligations through subsequent interpretations. A significant time lag between the enactment of the legislative rule and the interpretive rule may mitigate the severity of the self-delegation concern, for two reasons.

First, the time lag suggests that the agency was not gaming the system by deliberately avoiding coverage of a controversial issue in the regulation itself. It is much more plausible, in the case of a long time lag, that the interpretive rule was issued in response to a genuinely new issue or problem that was not foreseen when the agency drafted the legislative rule. Second, an agency's incentive to delegate to itself is stronger in the short term than the long term because agency preferences tend to change over time—especially, though not exclusively, following changes in partisan control of the White House. Characterizing a vague agency rule as an act of self-delegation may be misleading when the subsequent interpretation takes place years later by an agency headed by administrators of a different political party; indeed, the agency enacting the regulation may be just as concerned about delegating to its successors as Congress may be about delegating to an agency.[97]

For these reasons, we do not think that a later agency interpretation should be any less entitled to *Seminole Rock* deference than a contemporaneous interpretation, and we agree with the thrust of most of the recent caselaw that treats this difference in timing as irrelevant.[98] As for the possibility of giving *less* deference to interpretations that are issued very shortly after the regulation itself, we think that such a possibility—though lacking any support in the extant caselaw—is certainly plausible. Indeed, it seems more plausible than the originalist practice of giving more deference to contemporaneous interpretations than to later interpretations.

Nonetheless, explicitly incorporating that sort of consideration into the doctrine would likely create severe administrability problems. Deciding which interpretations were promulgated too close in time to

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[97] *See supra* note 52.

[98] *See supra* notes 37–38 and accompanying text.

the original legislative rule to merit ordinary *Seminole Rock* deference would require highly subjective judgment calls, and although one could deal with this by adopting a clear cut-off rule (say, a fixed number of months or an intervening presidential election), that approach would likely seem excessively arbitrary. Moreover, one should not neglect the possibility that even agencies that act in good faith may have sound reasons for promulgating a large number of interpretive rules shortly after a legislative rule is enacted, as the adoption and initial implementation of a new rule may naturally generate a large number of questions that require immediate clarification, even if the agency tried conscientiously to make the rule itself thorough and comprehensive.[99] It might be unwise to discourage agencies from providing such clarifications promptly. For these reasons, our tentative conclusion is that the doctrine should continue to treat the timing of the issuance of the agency's interpretive rule as irrelevant to the level of judicial deference. Near-contemporaneous regulatory interpretations certainly should not be entitled to any more deference than later interpretations, and they probably should not get any less deference either.

The relevance of interpretive inconsistency to *Seminole Rock* deference under the pragmatic rationale presents a more difficult problem. The doctrine on this point is unsettled, which is probably unsurprising given that the Supreme Court has also sent mixed signals about whether an agency is entitled to *Chevron* deference when the agency's interpretation of the same statutory provision changes over time. *Chevron* itself seems to say that inconsistency is not a reason to withhold full *Chevron* deference from the prevailing interpretation.[100] The most recent Supreme Court case on the subject, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, embraced that position.[101] Yet a persistent strain in the Supreme Court caselaw since *Chevron* has suggested that less deference is due to inconsistent interpretations,[102] and there are even some post-*Brand X* circuit court cases that continue to adopt that view.[103] In the *Seminole Rock* con-

99 *See* Strauss, *supra* note 18, at 805–06.

100 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863 (1984); *accord* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997).

101 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

102 *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417–18 (1993); Pauley v. BethEnergy Mines, Inc., 501 U.S 680, 698 (1991); INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987).

103 *See* Franklin v. Kellogg Co., 619 F.3d 604 (6th Cir. 2010); Natural Res. Def. Council v. EPA, 526 F.3d 591 (9th Cir. 2008); *see also* Marmolejo-Campos v. Holder, 558 F.3d 903, 919–20,

text, courts have likewise sent mixed signals on the relevance of interpretive inconsistency.[104] One can observe in the doctrine two related but distinct versions of this skepticism toward inconsistent regulatory interpretations, one weaker and one stronger.

The weaker version, applied in many circuit court cases[105] and endorsed in at least some Supreme Court opinions,[106] suggests that when an agency changes its interpretation of an ambiguous regulatory provision, the court should employ a less deferential standard of review—perhaps de novo review, or perhaps something closer to *Skidmore*. The stronger version—originally developed by the D.C. Circuit[107] and later adopted in other circuits as well[108]—treats the agency's original interpretation of its ambiguous regulation as having fixed the regulation's meaning, such that any later inconsistent interpretation is actually an *amendment* to the regulation, which is invalid unless it goes through notice and comment. This is so even if the agency's later interpretation would have been upheld under *Seminole Rock* if the agency had adopted it in the first instance.[109] The agency thus gets "one bite at the apple." It can claim *Seminole Rock* deference for its first interpretation, but not for subsequent interpretations of the same provision. Are either of these limits on *Seminole Rock*'s domain justified?

Begin with the strong version. Although our focus, and the thrust of most of the modern caselaw, is on the *Chevron*-like pragmatic rationale for *Seminole Rock* deference, it seems that the D.C. Circuit's strong version of the "one bite" principle is grounded in one or both of two theories that are inconsistent with that pragmatic rationale. The first possible theory is the originalist theory of *Seminole Rock*—the idea that the earliest interpretation is most likely to reflect the intent of the agency when it promulgated the regulation, and that later interpretations are not really evidence of the regulation's original in-

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920 n.2 (9th Cir. 2009) (asserting that although *Brand X* makes clear that the *Chevron* framework applies even to inconsistent agency interpretations, inconsistency is a factor that may indicate the agency's interpretation is unreasonable).

104 *Compare* S. Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 102 (1st Cir. 2002), *with Paralyzed Veterans*, 117 F.3d at 586–87.

105 *See* Advanta USA, Inc. v. Chao, 350 F.3d 726, 730–31 (8th Cir. 2003); Cmty. Hosp. of the Monterey Peninsula v. Thompson, 323 F.3d 782, 792 (9th Cir. 2003); *S. Shore Hosp., Inc.*, 308 F.3d at 102.

106 *See, e.g.*, *Thomas Jefferson Univ.*, 512 U.S. at 515.

107 *See* Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999); Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94–95 (D.C. Cir. 1997); *Paralyzed Veterans*, 117 F.3d at 586.

108 *See* Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 629 (5th Cir. 2001).

109 *See supra* notes 29–31 and accompanying text.

tent, but rather an indication that the agency has decided to change the regulation.[110] The second possible theory for the strong "one bite" rule is a particular philosophical understanding of legal ambiguity and its resolution. On that view, although a legal text may originally be unclear, once an authoritative interpreter determines the text's meaning, that meaning is settled by the act of interpretation.[111]

There is another possible understanding of ambiguity and interpretation, however. On this alternate view, an ambiguous text does *not* have a single correct meaning; rather, an ambiguous text opens up a zone of policy discretion. Under this view, the interpreter is in fact making a discretionary policy judgment, and the fact that the interpreter makes a particular judgment does not mean that the text is no longer ambiguous. Rather, the text remains ambiguous, and the interpretation is merely provisional. The *Chevron* line of cases, and *Brand X* in particular, embraces that latter account: agency (or judicial) interpretations of ambiguous statutes do not settle the statute's meaning. Rather, the interpretation merely reflects the selection of one possible choice out of the discretionary range created by the statutory ambiguity.[112] Thus the conceptual foundations of the D.C. Circuit's strong "one bite" rule are rather tenuous: the rule seems to rest either on a conception of interpretation that clashes with prevailing understandings of *Chevron* or on a waning originalist rationale for *Seminole Rock*.

What of the weaker version: the idea that an inconsistent agency interpretation may still be upheld, but is entitled to something less than full *Seminole Rock* deference? When invoking this principle, courts often simply assert that interpretive inconsistency is a reason to withhold deference without explaining why.[113] When they do offer an explanation, it usually takes one of two forms. First, as was true with the strong "one bite" principle, courts sometimes revert to originalist reasoning, notwithstanding their rejection of the originalist rationale's implications in other contexts.[114] Second, courts sometimes rely, with-

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110 *See* Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n, 212 F.3d 1301, 1304–05 (D.C. Cir. 2000); F. Uri & Co. v. Bowles, 152 F.2d 713, 715–19 (9th Cir. 1945).

111 *See supra* notes 107–08 and accompanying text.

112 *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, 983–84 (2005). *See generally* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272 (2002); E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1 (2005); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

113 *See supra* notes 102–03.

114 *See* Advanta USA, Inc. v. Chao, 350 F.3d 726, 730–31 (8th Cir. 2003).

out much explanation, on the caselaw from the analogous *Chevron* context and cite Supreme Court precedents in which the Court indicated that full *Chevron* deference is inappropriate when an agency's interpretation of the same statutory provision has changed over time.[115] This is problematic, however—not so much because the context is different (though it may be), but because these Supreme Court precedents withholding deference to inconsistent agency statutory interpretations have been rejected (sometimes in quite strong terms) by subsequent decisions, most notably *Brand X*.[116] If the case for withholding *Seminole Rock* deference from inconsistent regulatory interpretations rests on the analogous authority of cases treating inconsistent statutory interpretations as unworthy of full *Chevron* deference, but those latter statutory cases have been superseded by more recent decisions that reaffirm the irrelevance of interpretive inconsistency in the statutory context, then it would seem that the doctrinal foundations for such a limit on *Seminole Rock*'s domain have been undermined.

Thus there are serious problems with the conventional explanations offered by courts for both the strong and weak versions of the principle that inconsistent regulatory interpretations are outside of *Seminole Rock*'s domain. Yet the great virtue (and vice) of the "implied or fictitious congressional intent" rationale for both *Chevron* and *Seminole Rock* is its flexibility. If there are good reasons to place subsequent inconsistent interpretations outside *Seminole Rock*'s domain, then one can always assert that this limitation was implicit in Congress's delegation of regulatory power to the agency: it is what Congress (implicitly) wanted, or would have wanted if it had considered the matter, or at least what we should stipulate Congress wanted until it says otherwise.[117] The only way to make the choice, under this pragmatic rationale, is to consider the likely effects of the different rules, and to determine which is normatively most attractive. Unfortunately, assessing the likely consequences of a consistency-based

115 *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994) (stating that a regulatory interpretation that conflicts with a prior interpretation is "entitled to considerably less deference than a consistently held agency view" (internal quotation marks omitted)); Cmty. Hosp. of the Monterey Peninsula v. Thompson, 323 F.3d 782, 792 (9th Cir. 2003); S. Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 102 (1st Cir. 2002).

116 *See Brand X*, 545 U.S. at 982–83 ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

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

limit on *Seminole Rock*'s domain is extremely difficult, and a normative evaluation of these consequences is more difficult still.

On the one hand, a rule that gives less deference to subsequent inconsistent interpretations would mitigate an agency's incentive to leave key issues permanently undecided. Although an agency could buy itself some additional flexibility by leaving an issue unsettled in the original legislative rule, that flexibility dissolves once the agency addresses the question. This has the further desirable effect of making agency rules, and their application, more predictable. Additionally, the possibility that agency preferences may change over time may give agencies an incentive to identify and resolve interpretive ambiguities earlier rather than later, which may itself be beneficial. It is also possible that granting less deference to subsequent, inconsistent interpretations gives the agency an incentive to make its initial interpretation somewhat more (ideologically) moderate, which can be desirable under certain assumptions about majoritarian preferences.[118]

On the other hand, deferring less to a subsequent inconsistent interpretation may give the first interpreter an undue advantage. Indeed, if the main concern about *Seminole Rock* deference is the self-delegation problem,[119] then the first interpreter is the one we should be most worried about. If subsequent interpretations get the same level of *Seminole Rock* deference as the initial interpretation, then the officials who draft the regulation know that although they can resolve regulatory ambiguities in a way that they like, once the agency leadership changes, these interpretations may be changed in ways that promulgating agency officials dislike. That intertemporal variation in agency preferences, when coupled with deference even to inconsistent interpretations, may give the promulgating agency a stronger incentive to issue a clearer legislative rule. And, of course, giving less deference to subsequent inconsistent interpretations may undermine some of the pragmatic advantages associated with *Seminole Rock*, in particular the ability to respond flexibly to new information and changing circumstances, as well as responsiveness to the political preferences of current electoral majorities.

Although the question is close, these latter considerations persuade us that the consistency of an agency's regulatory interpretation ought to be irrelevant to the applicability of *Seminole Rock* deference. Although giving only limited deference to subsequent inconsistent in-

118 *See* Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD. 85, 86 (2011).

119 *See supra* notes 49–52 and accompanying text.

terpretations may seem like an attractive way to preserve the core of *Seminole Rock* while addressing the self-delegation concern, in fact this approach may have the opposite effect—denying *Seminole Rock* deference in those cases where it is arguably most appropriate (when an agency wants to revise its interpretation in response to new circumstances) while strengthening rather than weakening the rulemaking agency's incentive to self-delegate (by removing, or at least weakening, concerns about delegating power to a future political rival). This latter concern, of course, does not exist (at least not in the same way) in the *Chevron* context, though most of the other considerations in both directions do. This implies that the pragmatic argument for deferring less to a subsequent inconsistent interpretation would be stronger in the *Chevron* context than in the *Seminole Rock* context. It is thus somewhat ironic—perhaps even perverse—that although the Supreme Court seems to have finally rejected the idea that inconsistency matters for *Chevron*, the Court and numerous courts of appeal have continued to suggest that inconsistency may undercut the case for *Seminole Rock*.

Yet a third issue regarding the timing and consistency of an agency's interpretation of its regulation has to do with retroactivity. What if an agency seeks to penalize a regulated entity on the basis of a regulatory interpretation that, although plausible, is not obviously the best or most natural interpretation of the regulatory text, or that contradicts the agency's own prior interpretation of the regulation? This retroactivity issue also may arise when an agency seeks to impose a sanction on the basis of a *statutory* interpretation. In that context, courts apply a balancing test in which factors such as the nature of the sanction, whether the agency is contradicting its own prior interpretation, and the strength of the agency's interest in applying the interpretation retroactively are all considered as factors in the more general inquiry into whether the agency's decision to apply its interpretation retroactively is arbitrary and capricious.[120] Some lower courts have suggested, however, that the test for retroactivity may be more stringent in the context of regulatory (as opposed to statutory) interpretation.[121] These decisions have indicated that even if an agency's

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120 *See* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947); Dist. Lodge 64, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 949 F.2d 441, 447 (D.C. Cir. 1991); Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972).

121 *See, e.g.*, Ga. Pac. Corp. v. Occupational Safety & Health Review Comm'n, 25 F.3d 999, 1005–06 (11th Cir. 1994); Rollins Envtl. Servs. (NJ) Inc. v. EPA, 937 F.2d 649, 652–54 (D.C. Cir. 1991); Satellite Broad. Co. v. FCC, 824 F.2d 1, 3–4 (D.C. Cir. 1987); Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1558 (D.C. Cir. 1987); Kropp Forge Co. v. Sec'y of Labor, 657 F. 2d 119,

regulatory interpretation is entitled to *Seminole Rock* deference, that interpretation may not be invoked to impose a civil penalty or to cut off a party's right if the underlying legislative rule was sufficiently ambiguous and the subsequent interpretation was sufficiently novel and unexpected.[122] Extrapolating a bit on the reasoning of these decisions, one might postulate a rule that says courts should apply something less than *Seminole Rock* deference (either de novo review or something like *Skidmore* respect) when an agency seeks to impose a penalty or to cut off a party's right, unless the regulatory interpretation had been announced previously.

This more stringent retroactivity limitation on *Seminole Rock*'s domain has much to recommend it. Although it does not do much about the self-delegation concern, it does address the distinct and related concern that *Seminole Rock* may undermine fair notice (especially if *Seminole Rock* exacerbates agencies' incentives to write vague regulations). Such a rule would likely give agencies stronger incentives to announce more of their regulatory interpretations ahead of time—in guidance manuals or ruling letters—rather than waiting until individual enforcement actions.

That said, there are at least two main drawbacks to enforcing a more stringent retroactivity limit in the regulatory interpretation context than in the statutory interpretation context. First, as in the statutory context, agencies may not be able to anticipate all the conduct that should fall within the scope of regulatory language, and prohibiting them from applying their regulatory interpretations retroactively may enable too many regulatory targets to exploit loopholes or ambiguities in regulatory language. This is essentially the same concern that has led courts to use a balancing test, rather than a strict prohibition, when evaluating retroactive application of statutory interpretations.[123] Second, a strict prohibition on retroactivity may give regulated parties an incentive to act quickly, without consulting the agency, on the logic that advance consultation may subject the regulated party to more constraints.[124]

123–24 (7th Cir. 1981); Dravo Corp. v. Occupational Safety & Health Review Comm'n, 613 F.2d 1227, 1232 (3d Cir. 1980); Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n, 528 F.2d 645, 649–50 (5th Cir. 1976); Radio Athens, Inc. v. FCC, 401 F.2d 398, 404 (D.C. Cir. 1968); *see also* Manning, *supra* note 8, at 670 & n.281.

122 *See, e.g.*, *Ga. Pac. Corp.*, 25 F.3d at 1005–06.

123 *See Chenery*, 332 U.S. at 203.

124 *See* Yehonatan Givati, The Optimal Structure of Administrative Policymaking: Rulemaking, Adjudication, Licensing and Advance Ruling 2 (2011) (unpublished manuscript) (on file with author).

These drawbacks are real, but our tentative view is that it makes sense to withhold *Seminole Rock* deference in those cases where, due to the lack of advance notice, deferring to the agency's interpretation would give rise to a retroactivity problem. Although it is true that Congress sometimes empowers agencies to act through adjudication, under only vague and open-ended statutory criteria, the calculus should be somewhat different when the agency is, in effect, delegating authority to itself. Where Congress has established a system in which the agency lacks the power to act until it first promulgates a valid set of legislative rules, it is usually reasonable to suppose that Congress intends for those rules (and their interpretation) to be knowable in advance. And a more stringent antiretroactivity principle gives agencies a stronger incentive to draft clearer regulations in the first place—addressing a self-delegation concern that, as noted earlier, does not exist (at least not in the same way) in the statutory interpretation context.

Thus, at least with respect to timing issues, we think that the current doctrine generally adopts the right approach, though not entirely or consistently so. We would advocate few timing-related constraints on *Seminole Rock*'s domain: courts should probably not treat as significant whether the agency interpretation was announced soon or long after the underlying legislative rule, or whether the agency's interpretation is consistent with its own prior interpretations. Indeed, although the originalist rationale for *Seminole Rock* implied that *Seminole Rock* might not be appropriate for noncontemporaneous or inconsistent interpretations, under the pragmatic rationale for *Seminole Rock* we suggest that contemporaneous interpretations are, if anything, *less* worthy of deference. Furthermore, the case for deferring to inconsistent agency interpretations is probably *stronger* in the *Seminole Rock* context than in the *Chevron* context. In our view, the only timing-related limitation on *Seminole Rock*'s domain that courts ought to retain, or even strengthen, is the limitation on retroactive application of nonobvious regulatory interpretations. This limitation not only addresses the fair notice concern but also mitigates the incentive that *Seminole Rock* tends to create for agencies to promulgate vague regulations.

C. Form Limitations: A Mead *Doctrine for* Seminole Rock*?*

As the caselaw on judicial review of administrative statutory interpretation has long recognized—and as *Mead* emphasized—agencies promulgate their views of statutory meaning in a wide variety of

forms. Sometimes an agency will declare its interpretation of a statute in the text of a legislative rule, promulgated pursuant to notice-and-comment procedures (or something more).[125] Sometimes an agency will announce its construction of a statute when issuing an order following a formal administrative adjudication, with the full panoply of procedural safeguards associated with that process.[126] In other cases, an agency will indicate its views regarding the meaning of a statutory provision in a less formal adjudicative proceeding, with fewer safeguards.[127] An agency may also state its position on the meaning of a statute in an interpretive rule, perhaps a general guidance document[128] or a letter or memorandum directed to a particular party.[129] Sometimes agency interpretations announced in adjudicative orders or nonbinding interpretive statements are carefully vetted and endorsed by senior agency officials; other times, these interpretive positions are announced by lower-level officials, with minimal (or purely pro forma) review by the agency leadership.[130] And there are also cases in which an agency does not announce its statutory construction until the issue arises in litigation, at which point the agency may set forth its interpretive view in a brief, either as a party in interest or as an amicus curiae.[131]

Mead not only recognized this procedural variety, but embraced the longstanding—though controversial—position that the procedural form in which an agency promulgates its statutory construction matters for the level of judicial deference. Though *Mead* eschewed hard-and-fast rules,[132] it established a strong presumption that agency statu-

125 *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (reviewing a notice-and-comment rule that interpreted a provision of the Clean Air Act).

126 *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (reviewing an agency order, issued pursuant to a formal adjudication, that interpreted a provision of the Immigration and Nationality Act).

127 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001) (reviewing a Customs Service ruling letter on the proper tariff classification of certain imported goods); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653–56 (1990) (reviewing an order, issued pursuant to an informal adjudication, that interpreted the Employee Retirement Income Security Act).

128 *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (reviewing a general agency statement on the proper interpretation of Title VII of the 1964 Civil Rights Act).

129 *See, e.g.*, Christensen v. Harris Cnty., 529 U.S. 576 (2000) (reviewing a Department of Labor opinion letter on the meaning of a provision in the Fair Labor Standards Act).

130 *See, e.g.*, Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 181–82 (3d Cir. 1995) (reviewing an interpretation of the Social Security Act promulgated by the Director of the Medicaid Bureau of the Health Care Financing Administration); *see also Mead*, 533 U.S. at 233 (noting that thousands of Customs Service ruling letters are issued each year by relatively low-level officials at forty-six different ports of entry).

131 *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 209 (1988).

132 *See Mead*, 533 U.S. at 227.

tory interpretations announced in certain forms—particularly notice-and-comment rulemaking and formal adjudication—are presumptively entitled to *Chevron* deference, whereas interpretations announced in other forms—such as informal orders, interpretive rules, and litigation briefs—presumptively are not.[133] *Mead* rationalized this set of presumptions by reference to the "presumed congressional intent" rationale for *Chevron*.[134] Scholarly commentary has defended and criticized *Mead*'s emphasis on procedural formality as the touchstone for *Chevron* deference,[135] and both the commentary and the caselaw have suggested other procedural or quasi-procedural factors (such as timing and hierarchy) that courts ought to consider when deciding whether to apply *Chevron*.[136]

Perhaps surprisingly, less attention has been paid to the fact that agency interpretations of regulations may also appear in a wide variety of forms. Of course, in contrast to statutory interpretation, an agency would never issue an interpretation of its own regulations in a legislative rule. If it did, then the agency's pronouncement would be an amendment of the regulation, rather than a mere interpretation. But other than that difference, administrative interpretations of regulations exhibit as much variety with respect to policymaking form as do administrative interpretations of statutes. Agencies announce regulatory interpretations in orders following full-blown formal adjudications,[137] as well as charging documents in enforcement actions heard by courts or other agencies.[138] Agencies also announce regulatory interpretations in orders following informal adjudications, with few attendant procedural safeguards.[139] Furthermore, agencies often issue

133 *See id.* at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."); *id.* at 218, 227, 229–31.

134 *See id.* at 228–31.

135 *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 823–26 (2010); Bressman, *supra* note 16, at 563; Bressman, *supra* note 17, at 1487–88; Merrill, *supra* note 17, at 813–14; Pierce, *supra* note 16, at 583; Stephenson, *supra* note 17, at 533–34; Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2603 (2006); Vermeule, *supra* note 17, at 349.

136 *See, e.g.*, Barron & Kagan, *supra* note 16, at 234–57; Bressman, *supra* note 16, at 576–80; Merrill & Hickman, *supra* note 6, at 858–60.

137 *See, e.g.*, Humanoids Grp. v. Rogan, 375 F.3d 301, 305 (4th Cir. 2004).

138 *See, e.g.*, Trinity Marine Nashville, Inc. v. Occupational Safety & Health Review Comm'n, 275 F.3d 423, 429 (5th Cir. 2001).

139 *See, e.g.*, Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 447 (4th Cir. 2003); Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 625 (5th Cir. 2001).

their interpretations of their regulations via interpretive rules. Sometimes these take the form of published guidance manuals that provide broad and general statements about how the agency intends to implement its regulations.[140] In other cases, these interpretive statements appear as letters to interested parties,[141] ad hoc memoranda or announcements,[142] or speeches by agency officials.[143] There are also numerous instances in which an agency does not announce its views on the meaning of its regulation until the issue arises in litigation, at which point the agency makes its position known in a brief to the court.[144]

In light of this variation in procedural form, it seems reasonable to ask whether *Mead*'s rationale might also extend to *Seminole Rock*. After all, *Mead* suggests that it is presumptively implausible that Congress meant to delegate to agencies the power to determine the meaning of unclear statutory provisions in procedurally informal contexts.[145] Might one apply the same logic to *Seminole Rock*, and conclude that although it is *usually* sensible to presume that a congressional delegation to an agency of the power to make rules implicitly includes a delegation of the power to issue definitive interpretations of those rules, this presumption is appropriate only when these interpretations are issued in certain forms, but not others? Admittedly, the current caselaw does not appear to endorse any such principle. Although a handful of circuit court cases in the immediate aftermath of *Mead* suggested that *Mead* had undermined the basis for *Seminole Rock*,[146] subsequent cases—including several Supreme Court decisions[147]—have continued to invoke *Seminole Rock* without attention to the form in which the agency promulgated its regulatory interpreta-

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140 *See, e.g.*, Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 581–82 (D.C. Cir. 1997).

141 *See, e.g.*, Beaver Plant Operations, Inc. v. Herman, 223 F.3d 25, 28 (1st Cir. 2000).

142 *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007).

143 *See, e.g.*, United States v. Lachman, 387 F.3d 42, 54–55 (1st Cir. 2004).

144 *See, e.g.*, Fed. Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008).

145 *See supra* notes 133–34 and accompanying text.

146 *See, e.g.*, Mercy Catholic Med. Ctr. v. Thompson, 380 F.3d 142, 154–55 (3d Cir. 2004); Keys v. Barnhart, 347 F.3d 990, 993 (7th Cir. 2003); U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137, 1142 (7th Cir. 2001).

147 *See* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2469–73 (2009) (citing *Auer* in giving complete deference to interpretation contained in internal agency memorandum and agency practice); *Long Island Care at Home*, 551 U.S. at 171 (giving *Seminole Rock* deference to agency interpretation contained only in intra-agency memorandum); *cf. Holowecki*, 552 U.S. at 399–400 (implying that *Seminole Rock* deference is appropriate for amicus brief and internal directives, as long as regulation does not parrot the statute).

tion.[148] Nonetheless, the caselaw on the interaction between *Mead* and *Seminole Rock* is still quite sparse, especially at the Supreme Court level, and it is possible that the doctrine might develop in such a way that *Mead*-like constraints on *Seminole Rock*'s domain emerge. Would such a development be welcome?

In exploring this question, it may be helpful to consider four separate dimensions of the policymaking form in which an agency chooses to announce its regulatory interpretation. The first dimension, and the one that most closely tracks *Mead*, is the degree of procedural formality that accompanied the agency's promulgation of its interpretation. The second dimension is the place in the administrative hierarchy from which the interpretation issued: Was the decision announced by the agency head, or some other senior agency official? Or was the interpretation issued by a lower-level official, and only ratified later (perhaps after the commencement of litigation) by the agency's leadership? The third dimension of policymaking form is the timing and context of the interpretive declaration—in particular, whether the interpretation was issued in the context of litigation (as a brief), or prior to litigation. The fourth dimension is the degree of particularity or generality of the interpretation: Is the interpretation aimed at a very specific application or transaction? Or is it a more general interpretation of a regulation, which might apply to a large set of parties in a variety of contexts?

Consider first the dimension of procedural formality. *Mead* and associated cases in the *Chevron* context have suggested that greater procedural formality ought to be associated with greater judicial deference. Although that conclusion is certainly contestable, if we accept it (at least provisionally), how might it apply in the *Seminole Rock* context? As noted above, the question of *Seminole Rock* deference to a notice-and-comment rule would never arise. Nonetheless, some regulatory interpretations are accompanied by more formal process than are others. In particular, some regulatory interpretations are issued in orders following formal adjudications, which entail extensive hearing and participation rights as well as significant constraints on the

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148 *See* Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1272 (10th Cir. 2007); Excel Corp. v. USDA, 397 F.3d 1285, 1296 (10th Cir. 2005); Humanoids Grp. v. Rogan, 375 F.3d 301, 307 (4th Cir. 2004); Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 644 (6th Cir. 2004); Zurich Am. Ins. Co. v. Whittier Props. Inc., 356 F.3d 1132, 1137 (9th Cir. 2004); Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 780 n.7 (2d Cir. 2002); Chalenor v. Univ. of N.D., 291 F.3d 1042, 1046–47 (8th Cir. 2002); Am. Express Co. v. United States, 262 F.3d 1376, 1382–83 (Fed. Cir. 2001); Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n, 212 F.3d 1301, 1304 (D.C. Cir. 2000).

agency's decisionmaking process.[149] One might therefore limit strong *Seminole Rock* deference to orders issued following formal adjudications, while conferring a lesser degree of deference—akin to *Skidmore*—to interpretations contained in informal orders or interpretive rules.

Such a regime would be broadly consistent with *Mead* and would go some way toward addressing the self-delegation problem: although agencies might still have an incentive to enact open-ended regulations that the agency can clarify later, at least the agency could not issue an authoritative clarification without first going through a more elaborate hearing process that both imposes decision costs on the agency and provides more formalized mechanisms for interested parties to lodge objections and to challenge the factual suppositions that may undergird the agency's interpretive choice. The agency, then, would again face a "pay me now or pay me later" situation when deciding on the optimal level of precision in the initial legislative rule.

This approach might also redress one of the difficulties associated with *Mead* itself: the concern that *Mead*, coupled with *Seminole Rock* deference to interpretive rules, gives agencies stronger incentives to rush out skeletal notice-and-comment rules that the agency can then "clarify" in subsequent interpretive rules. In his *Mead* dissent, Justice Scalia raised this possibility as a reason to reject *Mead*,[150] but perhaps it is more a reason to reject *Seminole Rock* for interpretive rules, as opposed to formal adjudications.

Restricting *Seminole Rock* deference to interpretations issued in formal adjudications, while granting only *Skidmore* respect to interpretations contained in interpretive rules or informal orders, does raise some complicated questions about how such a rule would affect the incentives of agencies and regulated parties, as well as about how courts should deal with the fact that an agency may sometimes advance the same interpretation in different forms at different times. To illustrate the possible complications and difficulties, consider the following stylized timeline of the interaction between an agency and a potential regulatory target:

- At time T_1, the agency adopts a legislative rule.
- At time T_2, the agency may (but need not) promulgate an interpretive rule clarifying some ambiguity in the legislative rule enacted at T_1.

149 *See* 5 U.S.C. §§ 554, 556–57 (2006).

150 United States v. Mead Corp., 533 U.S. 218, 246 (2001) (Scalia, J., dissenting).

- At time T_3, a regulated party chooses a course of conduct. If the agency announced its interpretation at T_2, the regulated party may either choose to conform to the agency's interpretation or to take some action that, although arguably consistent with the legislative rule announced at T_1, is inconsistent with the agency interpretation announced at T_2.
- At time T_4, the agency may (but need not) bring an enforcement action against the regulated party, if the agency believes that party has violated the legislative rule (as interpreted by the agency). The agency's final decision on this point, which includes the proper interpretation of the regulation, is announced after a formal adjudication. Let us suppose that the doctrine endorses the strong antiretroactivity principle, such that even if the agency's interpretation at T_4 is entitled to *Seminole Rock* deference, the agency cannot impose sanctions based on that interpretation if it failed to provide adequate notice of its view.

In this stylized setup, what would be the effect of a doctrinal rule that conferred strong *Seminole Rock* deference to the interpretation announced by the agency at T_4, but weaker *Skidmore* respect to the interpretation announced at T_2?

First, it is likely that the antiretroactivity principle would give the agency a strong incentive to announce its interpretation at T_2. If it failed to do so, then the regulatory target would likely take its most preferred action at T_3 (even if it suspects the agency would disapprove), because it is shielded from sanctions (though it may still be barred from continuing in this course of conduct). If the agency does announce its interpretation at T_2 (as an interpretive rule), and the regulatory target does not immediately challenge it but instead takes action contrary to the agency's interpretation, then the agency can bring an enforcement action. If the agency's interpretation following formal adjudication at T_4 matches the agency's interpretation at T_2, then the agency will be entitled to *Seminole Rock* deference and will be able to impose sanctions on the regulatory target without a retroactivity problem.[151] This suggests that the regulatory target would have a strong

151 Of course, the formal hearing is presumed to create at least the possibility that the agency's interpretation at T_4 will be different—and perhaps more favorable to the target—than the interpretation at T_2, or at least that the agency's anticipation of a formal hearing at T_4 influences its interpretive choice at T_2 in socially desirable ways.

incentive to challenge an unfavorable interpretation immediately after T_2, prior to taking action at T_3.[152]

If the target brings suit immediately after the agency issues an (informal) interpretation at T_2, then under the current regime the court would simply apply *Seminole Rock* to the T_2 interpretation. But suppose the reviewing court has adopted the position that regulatory interpretations that are announced as interpretive rules are reviewed under *Skidmore*, rather than *Seminole Rock*. Then what happens? There are a few possibilities to consider here.

First, if the court upholds the agency's T_2 interpretation under the lesser *Skidmore* standard of review, then the regulatory target could anticipate, a fortiori, that the court would also uphold the agency's interpretation if it were issued in an order following formal adjudication. Thus, if the court applied a lower standard of review but upheld the agency's interpretation, a rational regulatory target at T_3 would conform its conduct to the agency interpretation announced at T_2, obviating the need for administrative adjudication at T_4.

If the court strikes down the agency's T_2 interpretation, the subsequent choices of the regulatory target and the agency become less clear. Suppose the target follows the court's lead and defies the agency's interpretation, and the agency brings an enforcement action and re-endorses its earlier interpretation after a formal adjudication at T_4. It is possible that the court would uphold the agency's T_4 interpretation, despite the fact that the court had invalidated exactly the same interpretation earlier, in the litigation following T_2. That may seem like a deviation from the stare decisis principle, but in fact it is consistent with the notion that the T_4 interpretation, though identical to the T_2 interpretation in substance, is entitled to a more deferential standard of review because it was issued through a more formal process. This might lead a regulated party to conform its conduct to the agency's interpretation at T_2, despite a judicial rejection of the agency's interpretation.

On the other hand, if a court rules against an agency's interpretation at T_2, then the agency might rationally anticipate that it is likely

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152 This assumes that the target would have standing to bring such a challenge, and that the agency's interpretive rule is judicially reviewable. Although courts are often reluctant to review informal agency statements, in a scenario like that described in the hypothetical, where the interpretive rule would have an immediate practical coercive impact on an identifiable party, the dispute might well be justiciable. *See, e.g.*, Oregon v. Ashcroft, 368 F.3d 1118, 1120–21 (9th Cir. 2004), *aff'd*, Gonzales v. Oregon, 546 U.S. 243 (2006); Am. Postal Workers Union v. U.S. Postal Serv., 707 F.2d 548, 560 (D.C. Cir. 1983); Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 701–02 (D.C. Cir. 1971).

to lose again at T_4, even under a more deferential standard of review. Because administrative adjudication and litigation are costly, the agency might therefore modify its interpretation. In this case, the judicial ruling on the T_2 interpretation functions mostly as a signal of what the court would do if the agency adopted the same, or very similar, interpretation at T_4.

Perhaps the most sensible thing a court could do in this situation would be to state explicitly, in the T_2 decision, whether the agency's interpretation would fail under *both* the *Skidmore* standard *and* the *Seminole Rock* standard, or whether the interpretation, though unacceptable under *Skidmore*, might possibly survive if the agency repromulgated it after a formal adjudicative hearing that provided more thorough administrative ventilation of the issues and opportunities for adversarial contestation. But, for a variety of reasons, courts may be reluctant to opine on how the case would have come out under a different standard of review.

Although it is difficult to sort out the likely result of these conflicting incentives, we hypothesize that it would be net beneficial to adopt a set of rules that: (1) confers *Seminole Rock* deference on regulatory interpretations issued after formal adjudication (at T_4); (2) applies something like *Skidmore* respect to interpretive rules issued without meaningful procedural safeguards (at T_2); and (3) bars the imposition of sanctions if the agency failed to provide adequate notice (by failing to announce its T_4 interpretation at T_2). In most cases, we conjecture that the agency would have an incentive to announce its interpretation at T_2, rather than waiting until T_4, so that the agency could deter conduct that it believes is contrary to the regulation. This would serve the interest in adequate notice. We further conjecture that most regulated parties would conform their conduct to the agency's T_2 interpretation. Such parties would only be inclined to contravene the agency's interpretation at T_3, or to initiate litigation prior to T_3, if they anticipated either that the agency would reach a different conclusion after full formal hearings, or that the agency might well lose under *Skidmore* and would be unwilling to bear the additional procedural costs and subsequent relitigation costs to try to secure a more favorable interpretation under *Seminole Rock*. This possibility, in turn, would give agencies a stronger incentive to write clearer legislative rules. At the same time, even if a regulated party thought that it might have a good shot at prevailing under *Skidmore*, if that party anticipates that the agency would continue to press its preferred interpretation in a formal administrative enforcement action at

T_4, and the agency would be likely to prevail on relitigation, then the regulated party might simply conform at T_3 rather than incurring (and imposing) socially wasteful administrative and judicial decision costs. This seems to create desirable incentives for agencies and regulated parties.

Of course, other results are possible. For instance, an agency might choose to forgo issuing an interpretive rule at T_2, so that the first time the court reviews the agency's interpretation, the governing standard is *Seminole Rock*, even though this might create a retroactivity problem that precludes the agency from imposing sanctions. This might occur if the agency anticipates that the court will be reluctant to uphold an interpretation issued in a formal adjudication if the court had recently rejected that same interpretation in an interpretive rule, notwithstanding the difference in the standard of review. That might, in turn, lead agencies to abstain from announcing their interpretive views in advance. Such an outcome seems undesirable. We cannot rule out this possibility, so our discussion above should be treated as a tentative hypothesis. We leave to subsequent work the task of analyzing more rigorously the incentive effects of different doctrinal regimes, but we suggest that at least some modifications to the current regime—modifications that reduce deference to less formal regulatory interpretations—might have desirable effects.

Another difficulty with the proposal to limit *Seminole Rock* deference to interpretations issued in formal orders is that not all regulatory issues are resolved by formal adjudication.[153] Indeed, many statutory schemes do not require formal adjudication under the APA.[154] Although the agency could voluntarily add additional procedural requirements even to informal adjudications, doing so may be quite costly and therefore practically infeasible or undesirable. This sort of doctrinal limit on *Seminole Rock*'s domain, then, would mean that *Skidmore* (or de novo review) would replace *Seminole Rock* as the governing standard of review in some regulatory policy areas. That result would be undesirable to the extent that it sacrifices the virtues associated with *Seminole Rock*—expertise, accountability, flexibility, and the like.

That said, this might well be a cost worth bearing. If one takes seriously the importance of the "pay me now or pay me later" doctrinal bargain as the key constraint on administrative self-delegation,

153 *See* Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 496–97 (2003).

154 *See id.*

then if Congress has not provided a "pay me now" option (in the form of a more elaborate and transparent procedural vehicle for announcing regulatory interpretations), then "pay me later" (by satisfying a somewhat more demanding standard of review) is the only game in town, and one that Congress should be presumed to have imposed on the agency. Again, this is only a tentative hypothesis, and others may weigh the costs and benefits differently, but it seems at least plausible that a doctrinal rule limiting *Seminole Rock* deference to interpretations produced by a formal adjudicative process would be desirable on net.

Let us now turn to a second dimension of the policymaking form in which an agency may announce its interpretation of a regulation: the place in the administrative hierarchy from which the interpretation issues. This consideration, like considerations of procedural formality, has its analog in the *Chevron* context: although *Mead* focused on issues of procedural formality rather than hierarchy, some scholars—most prominently Professor David Barron and now-Justice Elena Kagan—have argued that the logic of *Chevron* (particularly the political accountability rationale) implies that the seniority of the agency official who takes responsibility for the interpretive decision should be the main consideration.[155] Their argument is that *Chevron* deference is most appropriate when an interpretation is issued by senior agency leaders, or is endorsed by them prior to litigation in some prominent and public way.[156] By contrast, when an interpretation issues from lower-level officials, and is endorsed only belatedly by the senior leadership, *Skidmore* supplies the proper standard of review.[157] This view has gained little traction in the current doctrine, though it remains to be seen whether Elena Kagan's elevation to the Supreme Court will change that. For present purposes, the main question is whether something like the Barron-Kagan hierarchy principle should apply in the *Seminole Rock* context. Should agencies get *Seminole Rock* deference only if the regulatory interpretation is announced or publicly endorsed by the agency's senior leadership prior to litigation? Or should interpretations announced by lower-level agency officials also be entitled to *Seminole Rock* deference?

Whatever the merits of the Barron-Kagan proposal in the *Chevron* context, we think that the case for using the hierarchical location of the agency interpreter as a criterion for the level of deference is no

155 *See* Barron & Kagan, *supra* note 16, at 201–02.

156 *See id.* at 235–39, 259–60.

157 *See id*.

stronger, and probably somewhat weaker, in the *Seminole Rock* context. In both contexts, the strongest argument for the Barron-Kagan position is that withholding deference from interpretations issued by lower-level actors will create incentives for senior officials either to make key decisions themselves or to take ownership of—and therefore political accountability for—decisions made by subordinates.[158] That may be a sufficient justification for hierarchy to function as a limit on both *Chevron*'s domain and *Seminole Rock*'s domain, but the Barron-Kagan proposal does little to address the self-delegation problem particular to the *Seminole Rock* context. After all, if the concern is *self*-delegation, and if senior agency officials are the ones who are typically responsible for promulgating legislative rules, then withholding *Seminole Rock* deference from *other*, lower-level officials would not seem to have much of an effect on the incentives of agency leaders to promulgate open-ended regulations. If anything, self-delegation is less likely to be a problem when a lower-level official is the one who issues an interpretation of the ambiguous regulation.

Moreover, one of the chief arguments in favor of *Seminole Rock* is the impossibility of resolving in advance the myriad issues that may arise when a regulation must be applied to particular parties or transactions—issues that are more likely to be handled by lower-level officials. An interpretive question significant enough to attract the attention of a senior agency official prior to litigation is more likely to be a question that is sufficiently prominent that the agency could and should address it through a legislative rule. Thus, withholding *Seminole Rock* deference from lower-level interpretive rulings might eliminate such deference in those cases where it is most needed, while leaving unaffected those contexts in which it is most problematic.

None of this is to say that courts should reject the Barron-Kagan proposal to withhold deference from interpretations that are not promulgated or endorsed by an agency's senior leaders. It is certainly plausible that this rule would be a desirable limit on both *Chevron*'s domain and *Seminole Rock*'s domain, one that would prompt agency leaders to take responsibility for potentially controversial agency actions. Our only argument here is that, whatever the other benefits of the Barron-Kagan proposal, it does little to address the self-delegation concerns that arise in the *Seminole Rock* context.

Yet a third dimension of the policymaking form issue concerns whether courts should grant *Seminole Rock* deference to interpreta-

158 *See id*. at 242–44.

tions that appear for the first time in litigation briefs. As noted above, courts—including the Supreme Court—have frequently extended *Seminole Rock* deference to litigation briefs, usually on the originalist logic that the position contained in the brief is likely to reflect the agency's position, which in turn is likely to reflect the true intent of the regulation.[159] If we adopt a pragmatic rationale, which looks to considerations like expertise and accountability as justifications for assuming a congressional intent to delegate, but that also takes seriously *Mead*'s observation that some interpretations are not deference worthy, this position strikes us as misguided. It is now reasonably well established that an agency does not get *Chevron* deference for a statutory interpretation that appears for the first time in a litigation brief.[160] There is little reason, given the pragmatic arguments for and against *Seminole Rock*, to take a different position with respect to administrative interpretations of regulations. If one believes, plausibly, that Congress would not and should not allow an agency to authoritatively construe a statute in a post hoc litigation brief (written by agency lawyers in an adversarial context), then it is hard to articulate a good reason for assuming that Congress would nonetheless delegate to agencies the power to authoritatively construe regulations in this way. Arguments to the contrary typically draw on an implicit originalist rationale, even as the courts that make such arguments seem to reject the originalist rationale for *Seminole Rock* when considering other aspects of the doctrine.

Indeed, the arguments against deferring to a litigation brief are even more compelling in the *Seminole Rock* context than in the *Chevron* context. First, and most importantly, granting *Seminole Rock* deference to litigation briefs exacerbates the self-delegation problem by giving the agency even more freedom and incentive to promulgate open-ended rules to be clarified only later—indeed, only if and when some party litigates the issue. Second, if the agency does not advance an interpretation of the regulation at issue until litigation (perhaps litigation in which the agency is not even a party), it is much less plausible that the interpretive issue is one that the agency had no choice but to confront in the course of implementing the statute. For these reasons, we think there are powerful arguments for withholding *Seminole Rock* deference from litigation briefs, even if one rejects our ear-

159 *See supra* notes 32, 147–48 and accompanying text.

160 *See* United States v. Mead Corp., 533 U.S. 218, 228, 238 n.19 (2001); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212–13 (1988).

lier suggestion that courts should withhold *Seminole Rock* deference from interpretations announced outside of formal adjudications.

A fourth dimension of the form of an agency's regulatory interpretation is the generality or particularity of the interpretation. As noted above, sometimes agency regulatory interpretations are narrowly focused: the agency releases an opinion letter or issues an adjudicative order that deals with a very specific party, dispute, or transaction.[161] In other instances, an agency issues a regulatory interpretation with broad ramifications for a large number of parties or transactions.[162] This is most obvious in the case of the guidance manuals that agencies sometimes publish. It may also be true even of adjudicative orders: notwithstanding that such orders are ostensibly focused on the individual parties to the dispute, the agency order may state a broad interpretive principle that would clearly affect many other cases, and that would serve as an administrative precedent and authoritative announcement of the agency's position.[163] Should the generality of a regulatory interpretation affect the appropriate level of deference under *Seminole Rock*? If so, how? To make this a bit more concrete, consider a comparison between an administrative interpretation contained in a general guidance manual and an interpretation issued in an opinion letter directed at a particular party or transaction.[164] Does one or the other type of interpretive pronouncement have a greater claim to *Seminole Rock* deference? Plausible arguments are possible in both directions.

On the one hand, the more general guidance manual might have a stronger claim to judicial deference on the grounds that its generality suggests that the agency is not opportunistically adopting a particular interpretation in order to reach a desired result in a specific case. Moreover, if courts granted *Seminole Rock* deference to broadly applicable interpretations found in guidance manuals, but not to interpretations contained in ad hoc opinion letters or orders, then agencies might have a stronger incentive to issue such clarifying documents in advance, and to consider broadly the implications of a given regulatory interpretation for a range of possible cases. Thus, a doctrine that favored (through a more deferential standard of review) general over

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161 *See supra* notes 126–27, 129 and accompanying text.

162 *See supra* note 128 and accompanying text.

163 *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974), *aff'd in part*, *rev'd in part*, 416 U.S. 267 (1974).

164 By temporarily putting to one side interpretations contained in formal adjudicative orders, we can avoid confounding two factors: generality and procedural formality.

particular regulatory interpretations might be desirable for some of the same reasons that commentators, and some judges, have argued for the superiority of rulemaking over adjudication as a mode of general administrative policymaking.[165]

On the other hand, although granting more deference to general interpretive rules might redress concerns about fair notice and administrative arbitrariness, such a doctrinal distinction does little to address the self-delegation concern (except insofar as removing *Seminole Rock* deference from a subset of interpretive rules gives agencies stronger incentives to write clearer regulations up front). Indeed, if the main concern is self-delegation—and if the main argument for preserving *Seminole Rock* is the inability of agencies to anticipate all possible interpretive questions in advance—then one might reach precisely the opposite conclusion about the types of regulatory interpretations most worthy of deference. If the agency can anticipate, and frame at a high level of generality, questions of regulatory interpretation, then the assertion that the agency could not practically have incorporated the answers to these questions in the legislative rule itself may ring false. Indeed, if an agency promulgates a legislative rule, and shortly thereafter publishes a guidance manual that fills in a lot of additional detail, one might be especially suspicious that the agency was deliberately circumventing the notice-and-comment process by leaving important general issues to subsequent "clarification," rather than raising and resolving them in the rule itself. By contrast, when an agency issues an interpretation in an individual case, and that interpretation pertains to a relatively specific question about the application of the regulation in particular circumstances, then it is more plausible for the agency to claim that it could not, and did not, anticipate the issue ahead of time.

Note the parallels between these conflicting arguments and the arguments related to whether courts should give more or less deference to regulatory interpretations issued long after the promulgation of the legislative rule itself. On the one hand, incentivizing agencies to announce their interpretations early and generally may yield substantial social benefits. On the other hand, early and general interpre-

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165 *See, e.g.*, William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 103; Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308–09; David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 929 (1965).

tive rules might be especially suspicious if one is worried about self-delegation, whereas interpretive rules issued much later on, in response to a particular and perhaps unusual set of circumstances, are more plausibly characterized as the inevitable gap filling that always takes place when an agency has to implement a complex regulatory scheme, rather than the sort of decision that ought to have been incorporated into the rule itself.

As was true with respect to contemporaneous versus later regulatory interpretations, we tentatively conclude that courts should not take this factor into account when deciding how much deference is due to an agency's interpretation of a regulation. Not only do the arguments sketched above cut in opposite directions, but we tend to think that neither set of arguments, even if true, would supply a sufficiently strong reason to introduce this consideration into the doctrine in light of the decision costs that such additional complexity would entail. This is especially so given that the generality or particularity of a regulatory interpretation is a continuous rather than a dichotomous variable, and its evaluation is highly subjective.

In sum, we believe that there may be good reasons to extend *Mead*'s logic to the *Seminole Rock* context by reserving strong *Seminole Rock* deference for interpretations issued in orders following formal adjudications, while granting only *Skidmore* respect to interpretive rules and informal orders. We are even more confident that administrative interpretations contained only in litigation briefs ought not to receive *Seminole Rock* deference. We are agnostic as to whether the point in the agency hierarchy from which the opinion issues should matter, though we would tentatively conclude that this factor should have the same consequences for both *Chevron* and *Seminole Rock*. And although we acknowledge that the generality or particularity of the interpretation may affect the case for deference, we tend to think that this factor is too uncertain and too complicated to justify incorporating it into the doctrine.

D. Separation of Powers Limitations: Promoting Division of Regulatory and Interpretive Responsibility

Finally, let us consider how the *Seminole Rock* doctrine should apply in contexts where more than one agency might have the authority to interpret an agency regulation. This issue is most likely to come up in the context of so-called vertical split-enforcement regimes, in which one agency has the authority to issue regulations (and, perhaps, to initiate enforcement actions), but some other agency has the au-

thority to adjudicate (at least on a final administrative appeal) alleged violations of these regulations.[166] Such schemes are relatively rare, but when they do exist they are often quite important. For example, the Occupational Safety and Health Administration ("OSHA") within the Department of Labor has the authority to issue workplace safety regulations pursuant to the Occupational Safety and Health Act, and OSHA also has the authority to initiate enforcement actions against employers who violate these regulations.[167] However, contested enforcement actions are resolved by the Occupational Safety and Health Review Commission ("OSHRC"), an independent agency.[168] The Federal Mine Safety and Health Amendments Act established a similar structure for the specialized agencies that deal with employment conditions in mining operations (the Mine Safety and Health Administration ("MSHA") and the Federal Mine Safety and Health Review Commission ("FMSHRC")).[169] Similarly, the Federal Aviation Administration ("FAA") and Coast Guard (both executive branch agencies) establish regulations governing pilots of aircraft and seagoing vessels, respectively, and can bring disciplinary actions against pilots for violating these regulations, but pilots can appeal disciplinary sanctions to the National Transportation Safety Board ("NTSB"), an independent commission.[170] When the agency with rulemaking or enforcement authority interprets its regulation one way, but the agency with final adjudicative authority interprets the regulation differently, which agency (if either) ought to receive *Seminole Rock* deference?

In *Martin v. Occupational Safety & Health Review Commission*,[171] the Supreme Court unanimously resolved this question in favor of the agency with rulemaking authority.[172] *Martin* involved the Occupational Safety and Health Act's split-enforcement regime, described above, in which OSHA has principal rulemaking, investigation, and

166 *See generally* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987).

167 *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 147–48 (1991).

168 *Id.*

169 *See, e.g.*, W. Christian Schumann, *The Allocation of Authority Under the Mine Act: Is the Authority to Decide Questions of Policy Vested in the Secretary of Labor or in the Review Commission?*, 98 W. VA. L. REV. 1063, 1065–66 (1996).

170 *See* Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1248–49 (D.C. Cir. 2003); Richard H. Fallon, Jr., *Enforcing Aviation Safety Regulations: The Case for a Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L.J. AM. U. 389, 396–98 (1991).

171 Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991).

172 *Id.* at 152–58.

enforcement power, but any complaint brought by OSHA against a firm for violations of OSHA regulations is adjudicated by OSHRC, a separate and independent regulatory commission.[173] At issue in *Martin* was the correct interpretation of an OSHA regulation that required employers in the steel industry to protect employees from hazardous fumes emitted by coke ovens.[174] OSHA interpreted the text of its regulation to require not only that the employer supply the employees with respirators and provide training in their use, but also that the employer ensure the proper fit of each employee's respirator.[175] Based on this interpretation, OSHA initiated an enforcement action against a steel company.[176] OSHRC, however, interpreted the regulation differently. According to OSHRC, the regulation at issue, when viewed in conjunction with other regulations, was best read as requiring only that the employer supply respirators and proper training, leaving the responsibility of ensuring proper fit to the employees themselves.[177]

The Supreme Court, in a unanimous opinion written by Justice Marshall, concluded that the regulation was ambiguous on this point: both OSHA's interpretation and OSHRC's interpretations were reasonable.[178] The outcome in the case therefore turned on which of the two agencies (if either) was entitled to deference under *Seminole Rock*. *Martin* concluded that OSHA's interpretation, rather than OSHRC's, was entitled to *Seminole Rock* deference. *Martin* reasoned, first, that because OSHA promulgated the standard in the first place, it would be "in a better position than is [OSHRC] to reconstruct the purpose of the regulations in question."[179] In addition to this originalist argument, *Martin* concluded that both expertise and accountability considerations favored granting *Seminole Rock* deference to OSHA's interpretation rather than to OSHRC's. With respect to expertise, *Martin* observed that, "by virtue of [OSHA's] statutory role as enforcer, [it] comes into contact with a much greater number of regulatory problems than does [OSHRC]," which makes OSHA "more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation."[180] With respect to ac-

173 *Id.* at 147–48.
174 *Id.* at 148.
175 *Id.*
176 *Id.*
177 *Id.* at 148–49.
178 *Id.* at 146.
179 *Id.* at 152.
180 *Id.* at 152–53.

countability, the *Martin* opinion, drawing in part on the legislative history of the Occupational Safety and Health Act, argued that making OSHA responsible both for formulating rules and interpreting those rules in particular applications would further political accountability by making a single agency responsible for regulatory policy choices.[181] Although *Martin* took pains to insist that its holding was narrow and context specific, subsequent courts have generally ignored this qualifier and consistently held that interpretive authority follows rulemaking power, rather than adjudicative power, when the two are divided.[182] Indeed, *Martin* seems to be a rare example where a principle that arose originally in the *Seminole Rock* context has influenced how courts have approached analogous issues in the *Chevron* context, rather than the other way around.[183]

On an originalist rationale, *Martin* makes a good deal of sense: the agency that promulgated the rule is much more likely to know what it requires than is a separate agency, which encounters the rule for the first time in a contested enforcement action. But on the pragmatic, *Chevron*-esque rationale, the case for the *Martin* rule is much less clear. Consider first the purported benefits of *Seminole Rock* deference—expertise and accountability—both of which *Martin* stresses as important reasons to confer deference on the rulemaking and enforcement agency (OSHA) rather than the adjudicating agency (OSHRC). Although it may be true that OSHA has somewhat greater expertise than OSHRC with respect to the optimal design of workplace safety rules, this advantage is likely to be much less pronounced than the advantage that an administrative agency has over a court. After all, the usual explanations for agencies' expertise advantage, vis-à-vis the judiciary, are that agencies specialize in the field and are staffed by technical experts, whereas judges are generalists who engage with the relevant issues only occasionally and intermittently.[184]

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181 *Id.* at 153–54.

182 *See, e.g.*, Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n, 528 F.3d 310, 319 (4th Cir. 2008) (citing *Martin* in the context of the split-enforcement scheme under the Federal Mine Safety and Health Act); Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Gen. Dynamics Corp., 982 F.2d 790, 794–95 (2nd Cir. 1992) (applying *Martin* in the context of the split-enforcement scheme under the Longshore and Harbor Workers' Compensation Act).

183 *See, e.g.*, *Speed Mining*, 528 F.3d at 319 (citing *Martin* in the context of statutory interpretation); *Gen. Dynamics*, 982 F.2d at 794–95 (applying *Martin* to determine which agency's statutory interpretation should prevail).

184 *See* Pension Benefit 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

This difference does not exist—at least not to the same degree—in the vertical split-enforcement context. OSHRC also specializes in workplace safety issues, and is staffed (at least in theory) by experts in the field. It may be true, as the *Martin* opinion suggests, that OSHA still has an advantage due to its larger staff and its broader experience with implementing any given rule. But even if one accepts the claim that expertise considerations favor deference to OSHA rather than OSHRC, that advantage seems relatively slight.

What about the political accountability justification for *Seminole Rock*, which *Martin* also emphasizes?[185] There are two related but distinct reasons why accountability values might arguably be better served by conferring *Seminole Rock* deference on OSHA rather than OSHRC. First, though *Martin* does not emphasize this point, OSHA is an executive branch department, and therefore is more likely to be responsive to the President and, through the President, to the electorate.[186] Second, the concentration of power over policy decisions in one agency may further political accountability by making it clearer—both to the electorate and to other political actors—which entity is responsible for policy. On this logic, if OSHA is responsible both for the promulgation of a regulation and for subsequent clarification of that regulation's meaning, we can confidently assign credit or blame to OSHA depending on our assessment of how well that regulatory requirement is working. If OSHA issues the regulation but OSHRC interprets it, then if we are dissatisfied with the impact of the regulation, we are less sure whom to blame: Did OSHA issue a misguided regulation? Did OSHRC twist or distort the regulation, giving it a meaning that OSHA never intended? We can find these things out if we investigate further, but we often will not invest the time or effort to do so, and will end up confused or uncertain about the agency most responsible for regulatory outcomes. Thus, the division of rulemaking and interpretive authority arguably creates what political scientists sometimes call a "clarity of responsibility" problem.[187]

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agency expertise is one of the principal justifications behind *Chevron* deference." (footnote omitted)).

185 *See Martin*, 499 U.S. at 153–56.

186 Although it is not logically required that a vertical split-enforcement regime have an independent commission act as the adjudicator and an executive agency act as the rulemaker and enforcer, this is true for the most important vertical split-enforcement regimes, including the occupational and transportation safety regimes noted earlier. *See supra* notes 168–70 and accompanying text.

187 *See* Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 623–24 & n.7 (2010).

Are these political accountability considerations sufficient to justify conferring *Seminole Rock* deference on OSHA rather than on OSHRC? Perhaps, but the case is much murkier than *Martin* implies, and it is almost certainly weaker than the political accountability argument for giving interpretive authority to agencies rather than courts. Consider the argument that political accountability favors deferring to the executive branch agency rather than to the independent commission. This claim is vulnerable to at least two criticisms (which are in some tension with one another). First, although OSHRC is more insulated than OSHA from presidential influence, it may (partly for that reason) be more susceptible to congressional influence. Although it was once fashionable to insist that the presidential influence was necessarily more majoritarian than congressional influence,[188] more recent research has demonstrated that this is not necessarily so.[189] Second, and perhaps more important, political accountability—in the sense of responsiveness to the preferences of the politicians currently in office—is not an unalloyed good. Indeed, sometimes the whole point of delegation to agencies is to insulate certain decisions from the vicissitudes of day-to-day politics; that is why we have (and the courts have upheld) independent agencies in the first place.[190] Such insulation can actually make policy outcomes over time *more* responsive to the preferences of a majority of the electorate (which may be less variable than the preferences of the political elites who vie for office).[191] When Congress has taken the unusual step of assigning adjudicative authority to a separate and independent commission, this is perhaps an especially good indication that political accountability is less important, in this context, than political insulation.[192]

What about the second argument, that dividing the authority to promulgate a regulation from the authority to interpret that regulation will create a "clarity of responsibility" problem? Here again, there is certainly something to the argument, but it should not be exaggerated. Most of the regulatory issues addressed in these split enforcement regimes, including the one at issue in *Martin*, do not attract

188 *See, e.g.*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 67 (1995); Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341–43 (1994).

189 *See* Nzelibe, *supra* note 47; Stephenson, *supra* note 51, at 303–04.

190 *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 685–96 (1988); Humphrey's Ex'r v. United States, 295 U.S. 602, 625–26 (1935); Kagan, *supra* note 6, at 2250–51.

191 *See* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 71–84 (2008).

192 *Cf.* Kagan, *supra* note 6, at 2327.

widespread and general public attention. The parties that follow these issues, and who may (through their advocacy, donations, or other channels) have an impact on public opinion regarding the operation of regulatory programs, are likely to be special interests (principally employers, unions, and public interest watchdogs) that are quite good at separately evaluating the decisions of OSHA and OSHRC. Thus, although *Martin* may be right that the interest in political accountability, like the interest in expertise, favors granting *Seminole Rock* deference to OSHA rather than OSHRC, this advantage is mild at best.

On the other side of the ledger, the main concern about *Seminole Rock* deference—that it concentrates lawmaking and interpretive power in a single entity, thereby giving that entity the power and incentive to engage in undesirable self-delegations—decisively favors granting *Seminole Rock* deference to OSHRC rather than to OSHA, precisely the opposite of the Supreme Court's conclusion in *Martin*. The reasoning is straightforward: if *Martin* had come out the other way, then OSHA could not circumvent procedural constraints by enacting a vague regulation and then clarifying it in subsequent (and procedurally unconstrained) interpretive rules, because any ambiguity in a legislative rule would be resolved by a different entity (OSHRC). Under such a regime, the rulemaking agency would be in the same position that Congress is in under the *Chevron* regime: some ambiguity is inevitable, and perhaps even desirable, but the consequence of ambiguity is not self-delegation but rather delegation to some other body. What makes this reverse-*Martin* rule particularly attractive is that it solves the separation of powers problem without completely jettisoning *Seminole Rock*'s advantages, particularly the advantage of delegating interpretive power to a more expert decisionmaker (such as OSHRC).

For these reasons, we suggest that *Martin* was wrongly decided. By this we do not mean that *Martin* was inconsistent with governing authorities or established principles; no authority at the time precluded *Martin* from announcing a presumption that interpretive authority follows rulemaking authority. We mean simply that the *Martin* Court was wrong to choose this presumption rather than the equally legitimate alternative presumption that interpretive authority follows adjudicative authority when the two are divided between two agencies. This alternative presumption—a reverse-*Martin* rule—would likely be only marginally worse on the expertise and accountability dimensions, but it would eliminate completely the self-delegation problem. Thus *Martin* missed an opportunity to remedy the self-dele-

gation problem that is usually inherent in *Seminole Rock*, but that can be avoided in vertical split-enforcement systems.

That said, *Martin* is a well-established precedent, so even if we are correct that it was wrong when decided, it may be difficult to do anything about it now. Difficult, but not impossible. Even short of overruling *Martin* (always a possibility, but probably not a realistic one), courts might make greater use of *Martin*'s insistence that its reasoning is limited to the split-enforcement regime established under the Occupational Safety and Health Act. It might also be possible—though perhaps a bit forced—for courts to suggest that *Mead*'s emphasis on likely congressional intent has called *Martin* into question. Such an argument might draw on the idea, suggested above, that Congress's decision to split off adjudicative authority and to lodge it with a separate agency indicates a congressional intent to deprive the rulemaking agency of the usual degree of *Seminole Rock* deference. Of course, such an argument could have been made (indeed, was made) in *Martin* itself, but perhaps a court interested in overruling *Martin* without saying so could use *Mead* as a convenient rationalization. Given our tentative conclusion that *Martin* was likely wrong, we would view such a decision as justified on policy grounds, even if the claim about changed doctrinal circumstances is somewhat disingenuous. It is of course also possible that Congress might respond by enacting a statutory provision that makes clear—either in general or with respect to a particular split-enforcement scheme—that the authority to resolve regulatory ambiguities follows the adjudicative power, not the rulemaking power. Because *Seminole Rock*, like *Chevron*, is grounded on presumptive congressional intent, it would seem there is no legal difficulty with overruling or limiting *Martin* in this way. That said, Congress has shown little inclination overall to alter *Chevron* or *Seminole Rock* by statute.[193]

CONCLUSION

Federal judges and administrative law scholars continue to wrestle with the appropriate scope of *Chevron*'s domain. Especially in the wake of *Mead*, this issue has generated more controversy, and more sophisticated scholarly commentary, than perhaps any other single doctrinal problem in administrative law. It is therefore somewhat surprising that no comparable discussion has taken place about the appropriate domain of *Seminole Rock*, *Chevron*'s vitally important but

193 *See* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2640 (2003).

sometimes neglected counterpart. Our objective in this Article has been to pull together some of the existing strands in the doctrine and scholarship, in order to move forward—and to make more prominent—the analysis of *Seminole Rock*'s domain.

We have tentatively suggested some possible limits on *Seminole Rock*, while tentatively rejecting other possibilities. We have argued, for example, that the courts should retain the antiplaceholder principle, should strengthen antiretroactivity limitations in the *Seminole Rock* context, should reserve *Seminole Rock* deference for regulatory interpretations contained in formal orders (granting *Skidmore* respect to more informal interpretations), and should presume that interpretive authority follows adjudicative authority rather than rulemaking or prosecutorial authority when they are divided. We have also suggested that the timing, consistency, and generality of regulatory interpretations should not affect the appropriate level of deference. As we stated at the outset, however, these particular prescriptive conclusions are less important, in our view, than focusing greater scholarly attention on these questions, and approaching them in a more analytically rigorous way. The comparative neglect of questions regarding *Seminole Rock*'s domain risks incoherence, unpredictability, and erosion of important safeguards against administrative arbitrariness. Our limited objective in this Article has been to bring these issues to the fore, in the hopes of prompting more, and more sophisticated, consideration of these issues by other scholars, and perhaps (though this may be wishful thinking) by the courts as well.