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NOTES

WHY SHOULD WE CARE ABOUT AN AGENCY'S SPECIAL INSIGHT?

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INTRODUCTION

In the modern federal administrative state, agencies enjoy judicial deference to their reasonable interpretations of ambiguous statutes and regulations.[1] In *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*,[2] the Supreme Court held that an agency's "permissible construction" of an ambiguous statute is to be "given controlling weight" so long as the construction is reasonable.[3] Similarly, the Supreme Court's holding in *Bowles v. Seminole Rock & Sand Co.*[4] gave "controlling weight" to an agency's reasonable interpretation of its own ambiguous regulation.[5] Even though the doctrine of *Chevron* deference is "functionally similar"[6] to *Seminole Rock* deference, there is an important structural difference between the two. In both the *Chevron* and *Seminole Rock* contexts, the agency serves as an interpreter of the

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1 Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1449 (2011).

2 467 U.S. 837 (1984).

3 *Id.* at 843–44.

4 325 U.S. 410 (1945).

5 *Id.* at 414. A later Supreme Court decision, *Auer v. Robbins*, 519 U.S. 452, 461 (1997), reaffirmed this principle of *Seminole Rock* deference. For consistency, this Note will refer to the doctrine as *Seminole Rock* deference.

6 John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613 (1996).

ambiguous source of substantive law, be it a statute or regulation.[7] The difference between *Chevron* deference and *Seminole Rock* deference is the process through which the ambiguous source of law comes into effect. *Chevron* concerns an agency's reasonable interpretation of an ambiguous statute.[8] Any ambiguity that exists is the product of the legislative process: both houses of Congress passed a (potentially ambiguous) bill and presented it to the President to be signed into law.[9] Even though the agency is responsible for clarifying any explicit or implicit gap in the statute, Congress still drafted the statute.[10]

Conversely, agencies are responsible for drafting regulations. In most instances, when an agency is engaged in rulemaking under section 553 of the Administrative Procedure Act (APA),[11] the agency is acting pursuant to some enabling organic statute that gives the agency power to promulgate rules.[12] The agency must publish "[g]eneral notice of proposed rule making" in the Federal Register.[13] The notice must provide "a statement of the time, place, and nature of public rule making proceedings," reference to the organic statute under which the agency is engaging in rulemaking, and "either the terms or substance" of the agency's proposed rule or a description of the sub-

7 *Chevron*, 467 U.S. at 843 ("Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the *agency's* answer is based on a permissible construction of the statute." (emphasis added)); *Seminole Rock*, 325 U.S. at 414 ("[T]he *administrative interpretation* . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." (emphasis added)).

8 *Chevron*, 467 U.S. at 843–44.

9 *See* U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . . .").

10 Morton v. Ruiz, 415 U.S. 199, 231 (1974) (noting that an agency must "fill any gap left, implicitly or explicitly, by Congress"). The *Chevron* Court relied on this proposition in reasoning to its holding. *Chevron*, 467 U.S. at 843.

11 5 U.S.C. § 553 (2006). Section 553 also contains language that describes the circumstances when an agency must go through formal rulemaking procedures. *Id.* § 553(c) ("When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply . . . ."). The Supreme Court, however, has adopted a jurisprudence that is lenient towards an agency's decision to engage in "informal rulemaking" under § 553. *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 238 (1973) (holding that phrase "after hearing" did not trigger §§ 556–57 of the Administrative Procedure Act (APA)).

12 "Agencies spend a great deal of time responding to statutory directives from Congress." Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 118 (2011); *see also id.* at 116 (stating that, when the agency issues a legislative rule "as a delegate of Congress," the regulation carries the same force of law as a statute).

13 5 U.S.C. § 553(b).

ject of the proposed rulemaking.[14] In addition to this notice requirement, an agency must also provide the public with "an opportunity to participate," and "[a]fter consideration of the relevant matter presented," must provide a "concise general statement of their basis and purpose" with the promulgated rule.[15] Congress's only involvement in this rulemaking process is passing the statute which gives the agency authority to promulgate rules; any ambiguity in the regulation is the result of agency draftsmanship.[16]

This is the important distinction between *Chevron* deference and *Seminole Rock* deference: an agency serves as both the drafter and interpreter of ambiguous regulations in *Seminole Rock*.[17] The unity of drafter and interpreter raises a number of concerns about separation of powers,[18] the procedural safeguards of the APA,[19] and the incentives of ambiguous rulemaking.[20] At the same time, this dual role gives the agency special insight into the intent of the regulation.[21] In a recent article, Matthew Stephenson and Miri Pogoriler proposed a number of possible limitations to *Seminole Rock* deference, such as withholding deference from "placeholder" interpretations,[22] interpretations that create retroactivity problems,[23] and interpretations following more informal procedures.[24] Stephenson and Pogoriler argue that these limitations are effective means of overcoming the problems that uniquely arise from *Seminole Rock* deference.[25] These doctrinal limits follow from *Seminole Rock*'s similarity to *Chevron*.[26] Much less

14 *Id.* § 553(b)(1)–(3).

15 *Id.* § 553(c).

16 *Cf.* Auer v. Robbins, 519 U.S. 452, 461 (1997) (recognizing the Secretary of Labor's interpretation of the salary basis test to be controlling because the test "is a creature of the Secretary's own regulations").

17 Stephenson & Pogoriler, *supra* note 1, at 1460 ("*Seminole Rock* deference also raises distinctive concerns that do not apply . . . in the *Chevron* context.").

18 Manning, *supra* note 6, at 640 ("*Seminole Rock* ignores another critical structural feature of the Constitution—the separation of powers.").

19 Stephenson & Pogoriler, *supra* note 1, at 1461.

20 *Id.*

21 *See* Gose v. U.S. Postal Serv., 451 F.3d 831, 837 (Fed. Cir. 2006) ("We defer even more broadly to an agency's interpretations of its own regulations than to its interpretation of statutes, because the agency, as the promulgator of the regulation, is particularly well suited to speak to its original intent in adopting the regulation.").

22 Stephenson & Pogoriler, *supra* note 1, at 1466–71.

23 *Id.* at 1481.

24 *Id.* at 1496.

25 *Id.* at 1459.

26 This is the pragmatic rationale for *Seminole Rock* deference: "a pragmatic concern about institutional competence, coupled with a legal fiction about implied congressional delegation." *Id.* at 1458.

attention is paid to potential limitations based upon the fact that the agency enjoys special insight into the meaning of its own regulations.[27]

This Note offers some additional thoughts on the outer limits of *Seminole Rock* deference. Part I discusses the three concerns associated with unchecked *Seminole Rock* deference that comprise the self-delegation problem—violation of constitutional norms, exploitation of a statutory loophole, and perverse incentives. It explores the potential for abuse they create and recommends what the limitations should look like in order to avoid this potential.[28] Part II explains the two rationales for *Seminole Rock* deference: the pragmatic and originalist rationales. It describes how the two rationales relate to each other, explains how courts use pragmatic and originalist arguments in their opinions, and recommends a new way to think about the two rationales in light of these considerations.[29] Part III traces the boundaries of *Seminole Rock* deference while taking into account how both rationales justify judicial deference to an agency's reasonable interpretation of its own regulation. This Note will indicate which of Stephenson and Pogoriler's proposed limitations are strengthened by considering the originalist rationale[30] and which of Stephenson and Pogoriler's proposed limitations are unaffected by considering the originalist rationale.[31] Finally, this Note will argue for the adoption of a limitation that flows from the originalist rationale: a consistency limitation.[32]

I. THE SELF-DELEGATION PROBLEM

Deference under *Seminole Rock* creates a problem that has no analog in the *Chevron* context: if an agency knows it will receive deference for its own interpretation of a regulation, it can "delegate" to itself the

27 This is the basic articulation of the originalist rationale for *Seminole Rock* deference, which Stephenson and Pogoriler argue is not as important to the doctrine as the pragmatic rationale. *Id.* at 1457 ("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."). However, "[t]he death of the originalist rationale should not be exaggerated, as originalist reasoning does sometimes appear in modern cases." *Id.* at 1457–58. Both rationales will be discussed in more detail below. *See infra* Part II.

28 *See infra* Part I.

29 *See infra* Part II.

30 *See infra* Section III.A.

31 *See infra* Section III.B.

32 *See infra* Section III.C.

power to clarify a regulation at a later time.[33] Conversely, when Congress drafts legislation, it cannot empower itself to control how the statute is interpreted or enforced.[34] Nor can Congress "reinterpret" a statute that has been enacted into law unless it passes another statute to modify the previous statutory language.[35] Therefore, *Chevron* deference does not have the "self-delegation" problem that *Seminole Rock* deference does. This raises a number of concerns about *Seminole Rock*'s broad application.[36] Unbridled *Seminole Rock* deference, which empowers an agency to self-delegate, contravenes separation of powers norms, exploits a loophole within the Administrative Procedure Act,[37] and incentivizes behavior that is detrimental to good governance.

First, separation of powers was one of the most important norms embodied within the Constitution. As James Madison stated in *The Federalist Papers*:

> No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than [separation of powers]. The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[38]

To prevent the consolidation of powers within a single entity, the drafters of the Constitution vested distinct powers among the coordinate branches of government.[39] The Constitution also contemplates certain circumstances where a branch appears to act in a way which crosses the lines drawn by the Vesting Clauses; these instances are textually-prescribed checks that functionally blend the powers of the federal government. For instance, the President is given the power to

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33 Stephenson & Pogoriler, *supra* note 1, at 1464.

34 *Cf.* Bowsher v. Synar, 478 U.S. 714, 734 (1986) (holding that congressional control over an official entrusted with executing the law is unconstitutional).

35 *See* INS v. Chadha, 462 U.S. 919, 958 (1983) (holding that the legislative veto violated the Bicameralism and Presentment Clauses of the Constitution).

36 Stephenson & Pogoriler, *supra* note 1, at 1459–66.

37 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

38 THE FEDERALIST No. 47, at 244 (James Madison) (Garry Wills ed., 1982), *cited in* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

39 U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

veto legislation under Article I.[40] Because this veto can only be overcome by a two-thirds vote in each house, the presidential veto is functionally equivalent to a one-third vote in each house of Congress.[41] Thus, the structure of the Constitution reflects the Founders' intent to create strict boundaries between the branches of government because of the fear of the consolidation of power.[42]

Agencies are capable of exercising all three powers recognized in the Vesting Clauses,[43] although agency actions are usually subject to an independent check from the non-executive branches.[44] Even though legislative and enforcement powers are combined within agency rulemaking, the principle of separation of powers is maintained because agency action is subject to judicial review.[45] Where a reviewing court defers to the agency's interpretation of a statute under *Chevron*, the separation of powers norm persists because of "step one" in the *Chevron* analysis: if Congress has clearly and directly spoken on the issue within the statute, then Congress, not the agency, controls the interpretation.[46] In both instances, a separate branch of government maintains a check over agency action. However, *Seminole Rock* deference retains neither the judicial nor legislative check: in the *Seminole Rock* context, the agency—not Congress—makes the law, and

40 *Id.* art. I, § 7.

41 Manning, *supra* note 6, at 641 n.148.

42 *See* THE FEDERALIST No. 47, *supra* note 38, at 244.

43 Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492–93 (1987) ("These agencies adopt rules having the shape and impact of statutes, mold governmental policy through enforcement decisions and other initiatives, and decide cases in ways that determine the rights of private parties.").

44 Beyond the fact that the legislative branch controls agencies through appropriations, *see* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 114–15 (5th ed. 2009), the fact that legislative delegation of authority is a prerequisite for *Chevron* deference can be seen as a limitation on agencies. United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("[Courts] have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."). Additionally, the APA contains express language that permits judicial review of agency action. 5 U.S.C. § 706 (2006) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

45 *See* 5 U.S.C. § 706.

46 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

the agency—not the Court—controls the interpretation of the law.[47] The idea that a single government entity is responsible for both drafting and interpreting a source of substantive law would be abhorrent to the Founding Fathers.

Second, Stephenson and Pogoriler identified a separate facet of the self-delegation problem concerning the lack of notice and comment procedures applicable to an agency's interpretation of its own regulation. As discussed above, agency rulemaking is typically subject to a number of procedural constraints—namely, the requirement of providing notice of proposed rulemaking and an opportunity to comment.[48] Interpretive rules, however, are not subject to APA procedural safeguards.[49] Typically, a court will show an agency less deference under *Skidmore v. Swift & Co.* when working through less procedurally rigorous avenues.[50] As Stephenson and Pogoriler observe:

> 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

47 Manning, *supra* note 6, at 639.

48 *See supra* notes 11–15.

49 5 U.S.C. § 553(b)(A) ("[T]his subsection does not apply—to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.").

50 *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944). Under *Skidmore*, a reviewing court does not consider the agency interpretation controlling. *Id.* at 140. Rather, the court will look to the agency interpretation as "guidance," with the degree of its persuasiveness being based upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give [the agency] power to persuade, if lacking power to control." *Id.* However, *Skidmore* was a pre-*Chevron* case, and its utility post-*Chevron* has been called into question. In his dissent in *United States v. Mead Corp.*, Justice Scalia objected to the "resurrect[ion]" of "the pre-*Chevron* doctrine of *Skidmore* deference." 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). Justice Scalia argued that the majority's holding changed *Chevron* from a bright-line test into one that balances the "totality of the circumstances." *Id.* Justice Scalia also noted that *Skidmore* "does not, like *Chevron*, leave the matter within the control of the Executive Branch for the future" because the agency would not be free to take a position contrary to the court at a later time as it would under *Chevron*. *Id.* at 247. Finally, Justice Scalia noted that the "anachronistic" *Skidmore* standard is out of place in an era when administrative law is "pervasive," and that it is an "empty truism . . . [that a] judge should take into account the well-considered views of expert observers." *Id.* at 250. Despite these protestations, the majority opinion held that "*Chevron* left *Skidmore* intact" and the less deferential standard is still good law today. *Id.* at 237 (majority opinion).

> will have to defend their interpretations under the less deferential *Skidmore* standard.[51]

Under *Seminole Rock*, however, the agency's interpretation of its own regulation receives deference from a reviewing court,[52] creating the following loophole within the APA: "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."[53]

This loophole creates the opportunity for bad governance. Congress delegates authority to agencies because of their technical expertise that assists in policymaking decisions.[54] When an agency circumvents the procedures for notice and comment rulemaking, it also circumvents the steps of the rulemaking process that positively affect the substance of the agency's decision.[55] The loophole also has the potential to negatively impact the judicial branch. If an agency disguised all of its policymaking as interpretation for purposes of obtaining *Seminole Rock* deference, a court would not be able to properly engage in thorough judicial review of the agency action as it would when undertaking arbitrary and capricious review.[56] This undermines a reviewing court's "duty . . . to say what the law is."[57]

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51 Stephenson & Pogoriler, *supra* note 1, at 1464.

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

53 Stephenson & Pogoriler, *supra* note 1, at 1464.

54 *See* Pauley v. BethEnergy Mines, 501 U.S. 680, 697 (1991); *see also* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 154 (1938) ("Government today no longer dares to rely for its administration upon the casual office-seeker. Into its service it now seeks to bring men of professional attainment in various fields and to make that service such that they will envisage governance as a career."). *But see* Thomas W. Merrill, *Capture Theory and the Courts 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1059–67 (1997) (describing the negative and skeptical views of agencies typical of the "capture theory" era of administrative law).

55 *See* Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 864 (2007). Increased procedures can improve the quality of rulemaking through "ventilation" of important issues, *id.* at n.55, and by allowing adversarial public scrutiny to refine the rulemaking process. *Id.* at 900.

56 Judicial review of agency policymaking—as opposed to legal conclusions—is governed by the arbitrary and capricious standard. 5 U.S.C. § 706(2)(A) (2006). To survive hard look review, an agency must show they considered relevant factors under the statute. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The agency must examine relevant data and give an adequate explanation with rational connection between facts found and choice made, *id.*, and at the very least, the agency path may be reasonably discerned, even if the decision is not one of ideal clarity. *Id.*

57 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *Chevron* and *Seminole Rock* deference square with *Marbury* through the application of a legal fiction about legislative intent. Stephenson & Pogoriler, *supra* note 1, at 1450. For example, in the

Finally, this loophole harms the public. Under the APA, the public has the opportunity to be heard when an agency engages in rulemaking, and those who are affected by an agency's action have the right to challenge the action's merits in court.[58] An agency's use of this loophole denies the public a chance to affect the agency's policymaking at its inception and severely curtails the ability to obtain meaningful judicial review of the interpretation.

Finally, unchecked *Seminole Rock* deference incentivizes behavior detrimental to good governance. Creating incentives for agencies to self-delegate compounds the problems associated with separation of powers concerns and the loophole to the procedural safeguards of the APA. As Stephenson and Pogoriler observed, deference incentivizes agencies to promulgate ambiguous rules and interpret the rules at a later time.[59] *Chevron* deference encourages Congress to promulgate clearer statutes because an agency will have the opportunity to resolve the statute's meaning if Congress fails to do so.[60] Conversely, when an agency drafts the regulation that needs interpretation, this division is not present. Therefore, an agency is free to enact an ambiguous regulation with full knowledge that it retains institutional control over the interpretation of the source of law,[61] which, in turn, may receive even greater deference from the courts than other agency action would.[62]

Chevron context, ambiguity in a statute is interpreted as Congress having no intent except to leave it to the agency to resolve. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.

58 *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 110 (1995) (O'Connor, J., dissenting).

59 Stephenson & Pogoriler, *supra* note 1, at 1461.

60 *See* Manning, *supra* note 6, at 654 ("If Congress omits to specify its policies clearly during the process of bicameralism and presentment, it does so only at the price of forfeiting its power of policy specification to a separate expositor beyond its immediate control."); *see also supra* notes 34–35 (citing case law that prohibits Congress's involvement in the execution of the law); Stephenson & Pogoriler, *supra* note 1, at 1461 (articulating why the competitive nature of the relationship between the legislative and executive branches incentivizes Congress to write clear statutes so as to prevent political rivals from determining the statute's meaning).

61 Stephenson & Pogoriler, *supra* note 1, at 1461.

62 *Compare* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) ("[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."), *with* 5 U.S.C. § 706(2)(A) (2006) ("The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). *But see* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN L.J AM. U. 1, 25 (1996) (suggesting there is no difference between review under § 706(2)(A) and the reasonableness inquiry at *Chevron* step two).

Unlimited *Seminole Rock* deference likely incentivizes the types of actions that an agency chooses to engage in. If an agency is faced with ambiguity in one of its regulations, it has two options to correct the ambiguity: it can either amend the regulation through its rulemaking procedures, or it can issue an interpretive rule that modifies how the agency will choose to interpret the regulation.[63] As discussed above, the APA does not prescribe the same procedural safeguards for interpretive rules as it does for rulemaking.[64] Therefore, it is much easier in terms of time and resources to issue a new interpretation than it is for the agency to modify the regulation via notice and comment rulemaking.[65] The fact that courts show more deference to agency actions subject to more, rather than less, procedure typically mitigates this choice.[66] But if a reviewing court defers to an agency's interpretation so long as it is reasonable, as in the *Seminole Rock* context, then the agency will choose to act through less procedurally rigorous channels.[67]

In short, when courts apply *Seminole Rock* deference categorically to any agency interpretation, it creates very real problems when agencies engage in substantive policymaking under the guise of mere interpretation. The separation of powers concern is present in *Seminole Rock* deference but not *Chevron* deference because, in the *Seminole*

63 Kozel & Pojanowski, *supra* note 12, at 117 (explaining how interpretive rules can create "a change in the legal norm" even though they do not purport to "make positive law" (quoting Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997))).

64 *See supra* notes 49–53 and accompanying text.

65 *See* Hoctor v. USDA, 82 F.3d 165, 170 (7th Cir. 1996) ("[T]he agency would be stymied in its enforcement duties if every time it brought a case on a new theory it had to pause for . . . notice and comment rulemaking.").

66 *See* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 552 (2006).

67 *See* Manning, *supra* note 6, at 655. An analogy to *United States v. Florida East Coast Railway* is also helpful. Prior to the Supreme Court's decision, every actor involved, from the Interstate Commerce Commission to the regulated railroads, thought that the organic statute required the Commission to set rates through formal rulemaking. LAWSON, *supra* note 44, at 208–18. The Supreme Court held, however, that the "after hearing" language in the organic statute was not the same as the requirement that a rule be made "on the record after opportunity for an agency hearing" in § 553(c) of the APA. United States v. Fla E. Coast Ry. Co., 410 U.S. 224, 234 (1973). In the wake of this decision, agencies do most of their rulemaking through the more informal notice and comment process contained in § 553. LAWSON, *supra* note 44, at 229 ("Indeed, since [*Florida East Coast Railroad*] was decided, no statute that does not contain the magic words 'on the record' has been found to require formal rulemaking. Apart from the few rulemaking statutes that contain an express 'on the record' requirement, formal rulemaking has virtually disappeared as a procedural category.").

Rock context, the interpreter also drafts the law that must be interpreted.[68] The loophole contained within the APA is exploited when the agency relies on its interpretive powers, rather than its rulemaking powers, to make substantive decisions.[69] The deleterious incentives encourage the misuse of interpretive power.[70] In seeking to mitigate these problems, the limitations to *Seminole Rock* deference should be designed to reward the agency for responsibly choosing to use its rulemaking procedures in promulgating new policy. These limitations can be grounded in one of the two rationales courts have used to justify *Seminole Rock* deference.

II. RATIONALES FOR *SEMINOLE ROCK* DEFERENCE REVISITED

The pragmatic rationale for *Seminole Rock* deference focuses on four inherent advantages that administrative agencies have as policymakers over the other two branches of government.[71] Agencies make superior policymakers because they possess a greater capacity to develop technical expertise, can change policy in a more efficient manner, have the institutional flexibility to enact policy in a number of different ways, and are more politically accountable to the electorate and its policy preferences.

Agencies can develop technical expertise more effectively than generalist federal judges due to their superior command over their subject matter as a specialized administrative agency.[72] Whereas federal agencies may be devoted to a special field (e.g., the Occupational Safety and Health Administration and workplace safety), federal dockets contain a diverse array of cases—often in onerous quantities.[73]

68 *See supra* notes 43–47 and accompanying text.

69 *See supra* notes 49–53 and accompanying text.

70 *See supra* notes 59–67 and accompanying text.

71 *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION & REGULATION 379–84 (2010) (Legislature); Stephenson & Pogoriler, *supra* note 1, at 1459–60 (Judiciary).

72 Stephenson & Pogoriler, *supra* note 1, at 1459.

73 In 2012, there were a total of 370,246 cases pending across the dockets of all federal district judges over the course of a twelve-month period, or about 547 per federal district judge. *Federal Court Management Statistics, December 2012*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/district-courts-december-2012.aspx (last visited Nov. 16, 2013). This includes both civil and criminal cases, the latter of which need to be addressed in a timely manner to afford criminal defendants their constitutional protections. *See* U.S. CONST. amend. VI. Federal courts simply do not have the luxury that agencies do to contemplate complex regulatory issues. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 862 (2001) ("The extraordinary complexity of much of federal statutory law may mean that the goal of resolving statutory ambigui-

Similarly, agencies can develop expertise in a large and variable number of subject matters at a level of specificity that Congress cannot attain.[74] Compared to Congress, agencies can more easily be filled with policy experts and can directly translate policy into law without institutional hurdles.[75]

Interpreting an ambiguous regulation is the most efficient way for an agency to resolve ambiguity. An agency does not need to adhere to the same procedural hurdles that it must when it is engaged in rulemaking and adjudication.[76] Even with informal rulemaking, an agency must provide notice of proposed rulemaking and an opportunity to comment.[77] An agency must go through additional steps if the organic statute requires the agency to engage in formal rulemaking.[78] Similarly, all parties affected by formal adjudications are entitled to timely notice.[79] But regardless of how the agency chooses to act, it will act much more efficiently than legislation. Delegating power to an administrative agency is an effective method for overcoming the obstacles Congress typically faces in the legislative process.[80]

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ties in such a way as to further the purposes of the statute is increasingly becoming a task beyond the grasp of generalist judges.").

74 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (noting that one of the reasons Congress may delegate authority to an agency is Congress's recognition that "those with great expertise" in a field would be better suited to address certain policy issues); *see also* MANNING & STEPHENSON, *supra* note 71, at 381 (arguing the administrative process is superior to the legislative process at effectively using information to form policy).

75 Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 568 (2009). While legislative committees may allow individual congressmen to develop some technical expertise, the mechanics of the legislative process make it more difficult for that expertise to translate into policy outcomes. *Id.* at 567 (quoting David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 967 (1998)). Specifically, committee proposals "must first pass through the floor, which may decide to make some alterations to the committee's proposals." Epstein & O'Halloran, *supra*, at 967. While this may "give[ ] committees less incentive to gather information in the first place," agencies "are not hampered by the need to obtain congressional approval" before their expertise can become law. *Id.*

76 Hoctor v. USDA, 82 F.3d 165, 167 (7th Cir. 1996).

77 *See supra* notes 11–15 and accompanying text.

78 5 U.S.C. § 553 (2006) (allowing informal rulemaking "[e]xcept when notice or hearing is required by statute").

79 *See* 5 U.S.C. § 554.

80 Congress faces numerous obstacles in passing legislation that make the process cumbersome for developing expertise. Article I, Section 7 of the Constitution requires every bill to go through both houses before being presented to the President. U.S. CONST. art. I, § 7. These constitutional checks and balances serve to "block legis-

This efficiency also comes with flexibility. As described above, an agency has a number of different avenues for enacting policy.[81] In contrast, legislation can only pass through bicameralism and presentment.[82] This allows agencies to adapt to unforeseen issues as they arise through interpretive rules. "Experience is often the best teacher, and agencies retain a substantial measure of freedom to refine, reformulate, and even reverse their precedents in the light of new insights and changed circumstances."[83]

Agencies are also politically accountable. While the President appoints both federal judges and administrative officers, the former enjoy life tenure after appointment and never have to run for reelection to defend their office.[84] Conversely, agencies are indirectly accountable to voters through presidential elections, so certain agency positions change with presidential elections.[85] This indirect political accountability makes agencies a more "democratic" institution than the federal courts.[86] Furthermore, Congress exerts more oversight

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lative initiatives" that might otherwise prove to be sound policy. MANNING & STEPHENSON, *supra* note 71, at 24–25.

81 *See supra* notes 76–80 and accompanying text.

82 *See* INS v. Chadha, 462 U.S. 919, 955–56 (1983) ("[W]e see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action . . . . [W]hen the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms.").

83 Davila-Bardales v. INS, 27 F.3d 1, 5 (1st Cir. 1994).

84 U.S. CONST. art. III, § 1; *see also* THE FEDERALIST No. 78, at 397 (Alexander Hamilton) (Garry Willis, ed., 1982) ("If then the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices . . . .").

85 MANNING & STEPHENSON, *supra* note 71, at 383; *cf.* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 312 (1986) ("Unelected judges should leave the executive branch free to pursue, within appropriate bounds, what it perceives to be the will of the people.").

86 *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 94–99 (1985). The argument that agencies are more responsive to the will of the electorate hinges on the connection between voters and administrative agencies through the President. *Id.* at 94. Every four years, a new presidential administration is elected based upon the positions that the candidate takes during the election. *Id.* at 95. With this electoral mandate, the new administration comes into power and is expected to enact its policies through its various executive officers. *Id.* at 96 ("Indeed, one can reasonably expect that a president will be able to affect policy in a four-year term only because being elected president entails acquiring the power to exercise, direct, or influence policy discretion [through agencies]."). If new administrations did not have flexibility to pursue their policy directives because

over agencies than federal judges.[87] Judges generally are not haled before congressional committees to be interrogated about their decisions with their budgets at stake. Agencies are also more accountable to the public to the extent the APA mandates procedures that facilitate public participation in agency decision making.[88] There is no analogous law that requires judges and Congressmen to allow citizens to participate in a bench trial or a congressional vote.[89] Furthermore, no law requires congressmen to issue a formal announcement explaining why they voted for or against a bill.

Courts that invoke the pragmatic rationale for *Seminole Rock* deference allude to these four advantages of agencies: expertise, efficiency, flexibility, and accountability.[90] For instance, in *Thomas Jefferson University Hospital v. Shalala*,[91] hospitals were permitted to request reimbursement for the "net cost" of graduate medical education (GME) programs.[92] Net costs were to be calculated "by deducting, from a provider's total costs of these activities, revenues it receives from tuition."[93] When the University sought reimbursement for previ-

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statutes always mandated the proper course of action, then presidential elections "would be a mere beauty contest." *Id.* In short, agencies are expected to be responsive to voters.

87 MANNING & STEPHENSON, *supra* note 71, at 475–76 (describing congressional oversight as a way Congress can exercise control over agency behavior).

88 While judges enjoy life tenure, *see supra* note 84 and accompanying text, Congressmen and Senators must defend their seat every two or six years. U.S. CONST. art. 1, §§ 2–3; *id.* amend. XVII, cl. 1. This Note is not arguing that legislative officers are not politically accountable. Constituents are able to express their opinions on various topics to their representatives and are certainly free to elect a new representative during elections. Rather, this Note argues that agencies are politically accountable because their rulemaking procedures are required by law to permit public participation, *see* 5 U.S.C. § 553 (2006), whereas there is no comparable law that, for example, requires floor time to any interested citizen to express his views on a bill.

89 To be sure, there is room for limited layperson participation in the judicial and legislative process. Juries are "selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. § 1861 (2006). Constituents may petition their Congressman or Senator to advocate that a certain bill should be adopted. But nothing guarantees that a specific person *must* be selected to a jury or that the congressman *must* hear the constituent's opinion. By contrast, the APA guarantees certain rights of public participation in the administrative process. *See, e.g.*, 5 U.S.C. § 553(b)(1) (requiring that the general notice of proposed rulemaking include "a statement of the time, place, and nature of *public* rule making proceedings" (emphasis added)); 5 U.S.C. § 553(c) ("[T]he agency shall give interested persons an opportunity to participate in the rule making [process] . . . .").

90 Stephenson & Pogoriler, *supra* note 1, at 1460.

91 512 U.S. 504 (1994).

92 *Id.* at 507.

93 42 C.F.R. § 413.85(g) (1993).

ously unclaimed GME costs, the Secretary of Health and Human Services upheld the initial denial.[94] Citing language from 42 C.F.R. § 413.85(c),[95] the Secretary concluded that the non-salary GME costs would be "impermissible" as a redistribution of costs from the educational to the patient care unit of the University.[96] In deferring to the Secretary's interpretation of the "anti-redistribution clause," the majority prefaced its argument with an indication that deference to the agency's interpretation is "all the more warranted" because the regulation in question involved "a complex and highly technical regulatory program" that "require[d] significant expertise" in administering the program.[97]

Thomas Jefferson is an illustrative example of how reviewing courts will invoke a pragmatic reason for deferring to an agency's reasonable interpretation of its own regulation. Other Supreme Court and federal courts of appeals cases justify *Seminole Rock* deference using similar pragmatic language.[98] Each of these arguments for why courts should defer to the agency's reasonable interpretation can be raised in the context of *Chevron*.[99] Missing from an agency's interpretation

94 *Thomas Jefferson*, 512 U.S. at 510–12.

95 The regulation provides in full:

> Although the intent of the program is to share in the support of educational activities customarily or traditionally carried on by providers in conjunction with their operations, it is not intended that this program should participate in increased costs resulting from *redistribution of costs from educational institutions or units to patient care institutions or units.*

42 C.F.R. § 413.85(c) (emphasis added).

96 *Thomas Jefferson*, 512 U.S. at 510–11.

97 *Id.* at 511–12 (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991)) (internal quotations omitted).

98 *See* Ohio Valley Envtl. Coal v Aracoma Coal, 556 F.3d 177, 201 (4th Cir. 2009) ("In matters involving complex predictions based on special expertise, 'a reviewing court must generally be at its most deferential.'" (quoting Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103 (1983))); Amerada Hess Pipeline Corp. v. Fed. Energy Reg. Comm'n, 117 F.3d 596, 604 (D.C. Cir. 1997) (giving deference to agency's own interpretation); Pac. Coast Med. Enters. v. Harris, 633 F.2d 123, 131 (9th Cir. 1980) (same); Jicarilla Apache Tribe v. Fed. Energy Reg. Comm'n, 578 F.2d 289, 292 (10th Cir. 1978) (same); *see also* Shalala v. Guernsey Mem'l. Hosp., 514 U.S. 87, 96 (1996) (noting the flexibility the Secretary enjoys under the APA); Hoctor v. USDA, 82 F.3d 165, 170 (7th Cir. 1996) (arguing that notice and comment rulemaking is an inefficient way to resolve inevitable ambiguity that appears in statutes).

99 *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so . . . ."); *see also id.* at 866 ("'Our Constitution vests such responsibilities in the political branches.'" (quoting TVA v. Hill, 437 U.S. 153, 195 (1978))); Cass R. Sunstein, *Law*

of a statute, however, is that the agency does not possess "special insight" into the original intent of the drafter.[100] In the *Chevron* context, the drafter of the ambiguous source of law is located in a separate branch of government from the interpreter: Congress is separate from the executive branch. In the *Seminole Rock* context, the drafter and the interpreter are located within the same branch of government and, in most cases, within the same agency.[101]

This "duality" of legislative and interpretive power is not lost on courts.[102] Courts invoke the originalist rationale when invoking the agency's dual role as drafter and interpreter as a reason why courts should defer to an agency's reasonable interpretation of its own regulation. The typical originalist argument emphasizes the fact that the agency that wrote a regulation has "special insight" into the "original intent" of the regulation, and that the original intent of the regulation should control its interpretation.[103] Courts following this reasoning will defer to an agency's interpretation when the court determines that the interpretation reflects the agency's "special insight" into the regulation's meaning—such as when the agency's interpretation is made shortly after the regulation is promulgated, or when the interpretation represents a consistently held view of the agency.[104] The originalist rationale, however, has not been as robustly explored by the courts as the pragmatic rationale has.[105] As noted by Scott H. Angstreich, *Udall v. Tallman*[106] was the first instance that the Supreme Court offered this type of explanation.[107] The *Udall* Court stated "def-

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and Administration After Chevron, 90 COLUM. L. REV. 2071, 2089 & nn.87–88 (1990) (arguing that "a degree of flexibility" is "quite healthy" because it allows agencies to apply broad statutes in a "wide variety of contexts" as opposed to being bound by overly specific statutes).

100 Stephenson & Pogoriler, *supra* note 1, at 1453.

101 *See* Manning, *supra* note 6, at 639.

102 Kozel & Pojanowski, *supra* note 12, at 121.

103 Stephenson & Pogoriler, *supra* note 1, at 1454.

104 *See id.* Stephenson and Pogoriler indicate that *Seminole Rock* deference may be inappropriate for inconsistent interpretations for two reasons. First, deference may be inappropriate because the new, inconsistent interpretation does not provide insight into the regulation. *Id* at 1455. Second, deference may be inappropriate because inconsistency implies that the agency never had a clear understanding of the regulation's meaning. *Id.*

105 *See, e.g.*, F. Uri & Co. v. Bowles, 152 F.2d 713, 718 (9th Cir. 1945) (citing to *Seminole Rock* after providing a perfunctory statement declaring that interpretations concurrently issued with regulations "determine the meaning of the words of the statute").

106 380 U.S. 1 (1964).

107 Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 93 (2000).

erence is even more clearly in order" when the construction in question is a regulation that the interpreting agency is responsible for administering.[108] Some courts have even suggested this reasoning compels stronger deference in the *Seminole Rock* context than in the *Chevron* context.[109] Many courts, however, have explicitly rejected originalist reasoning.[110] This fact, coupled with the often conclusory reasoning used by courts invoking the originalist rationale,[111] suggests that the pragmatic rationale is the "dominant modern account of *Seminole Rock* deference."[112]

But courts still acknowledge that the originalist rationale is sound reasoning for why an agency interpretation is entitled to *Seminole Rock* deference.[113] *Bruh v. Bessemer Venture Partners* is especially illustrative. The *Bruh* court first justified *Seminole Rock* deference by analogizing to *Chevron*: "Like the deference owed under *Chevron* . . . to an agency's reasonable construction of a statute it administers, *Seminole Rock* deference is justified both by the agency's special expertise in the subject

108 *Udall*, 380 U.S. at 16.

109 Cathedral Candle Co. v. U.S. Intern. Trade Comm'n, 400 F.3d 1352, 1363–64 (Fed. Cir. 2005) ("Deference to an agency's interpretation of its own regulations is broader than deference to the agency's construction of a statute, because in the latter case the agency is addressing Congress's intentions, while in the former it is addressing its own."); *accord* Gose v. U.S. Postal Serv., 451 F.3d 831, 837 (Fed. Cir. 2006); Office of Workers' Comp., U.S. Dep't of Labor v. E. Associated Coal Corp., 54 F.3d 141, 147 (3d Cir. 1995).

110 In *Paragon Health Network, Inc. v. Thompson*, 251 F.3d 1141 (7th Cir. 2001), the court affirmed the pragmatic rationale: "The rationale for *Seminole Rock* deference is similar to that for [*Chevron*]." *Id.* at 1146. Simultaneously, the court rejected originalist reasoning, stating "no demonstration that the agency officials had special insight into the intentions behind the passage of the regulation is required." *Id.* at 1147; *see also* United States v. Hoyts Cinemas Corp., 380 F.3d 558, 566 (1st Cir. 2004) (noting that, when drafters do not consider an issue, judges will look elsewhere for the meaning).

111 Lyng v. Payne, 476 U.S. 926, 939 (1986) (citing to *Udall* for the "established proposition that an agency's construction of its own regulations is entitled to substantial deference" without further explanation); F. Uri & Co. v. Bowles, 152 F.2d 713, 718 (9th Cir. 1945).

112 Stephenson & Pogoriler, *supra* note 1, at 1458 (noting that courts are more likely to justify *Seminole Rock* deference on pragmatic rather than originalist grounds).

113 *See* Martin v. Occupational Safety and 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."); Mullins Coal Co. v. Office of Workers' Comp. Programs, Dep't of Labor, 484 U.S. 135, 159 (1987) ("In the end, the Secretary's view is not only eminently reasonable but also is strongly supported by the fact that Labor wrote the regulation."); Bruh v. Bessemer Venture Partners III, 464 F.3d 202, 208 (2d Cir. 2006).

matter . . . and by its relative political accountability."[114] The court went on, however, to suggest that "[a]gencies have an additional advantage in interpreting their own regulations."[115] Invoking *Martin v. OSHA*, the court suggested that, because the agency is responsible for both promulgating the rule and resolving any ambiguity through interpretation, "it is in a superior position 'to reconstruct the purpose of the regulations in question.'"[116] Not only does this illustrate that courts are still willing to rationalize *Seminole Rock* deference on originalist grounds, it also suggests that the two rationales can be invoked simultaneously and in a complimentary manner.

Perhaps then, it is best to think of the pragmatic and originalist rationales not as alternative rationales for *Seminole Rock* deference, but as two complimentary rationales that work together to fully represent the advantages and detriments of deferring to an agency's interpretation of its own regulation. To be sure, the pragmatic rationale for *Seminole Rock* deference is the "ascendant" theory explaining why courts should defer to an agency's reasonable interpretation of a statute.[117] Furthermore, because the pragmatic rationale has been more thoroughly explored, courts in subsequent cases will have more precedent to rely upon in their invocation of the pragmatic rationale.[118] But as the above discussion suggests, it is not the only rationale that courts invoke.[119] Courts still use originalist arguments to justify *Seminole Rock* deference.[120] In some cases, a court will invoke both rationales together.[121] And if courts are still keen to invoke the originalist rationale as a reason why an agency's interpretation is entitled to *Seminole Rock* deference, then it follows that prescribed limits to *Seminole Rock* deference should also account for the originalist rationale, even if in a limited capacity.

Furthermore, the pragmatic and originalist rationales both comport with different views of interpretation. Interpretation can mean "the process of determining what something, [especially] the law or a legal document, means."[122] This definition is more consistent with

114 *Bruh*, 464 F.3d at 207.

115 *Id.* at 208.

116 *Id.* (quoting *Martin*, 499 U.S. at 152).

117 Stephenson & Pogoriler, *supra* note 1, at 1457; *see also* Angstreich, *supra* note 107, at 93 (suggesting that the Supreme Court's recent approach to *Seminole Rock* deference is to justify deference on pragmatic grounds).

118 *Compare supra* note 98, *with supra* note 105.

119 Stephenson & Pogoriler, *supra* note 1, at 1457–58 ("The death of the originalist rationale should not be exaggerated . . . .").

120 *See supra* note 113.

121 *Bruh*, 464 F.3d at 207–08.

122 BLACK'S LAW DICTIONARY 377 (3d pocket ed. 2006)

the pragmatic rationale for *Seminole Rock* deference because its emphasis on process reflects the notion that agencies have certain advantages that make them the superior entity for engaging in the process of interpreting regulations.[123] Interpretation can also mean "the understanding one has about the meaning of something."[124] This definition of interpretation is more in line with the originalist rationale for *Seminole Rock* deference, with its emphasis on the idea that agencies have a "special insight" into an interpretation's meaning.[125] If both rationales capture different meanings of interpretation, it is reasonable to infer that the two rationales are differently suited for resolving different ambiguity problems a court faces.

Based on the discussion above, the pragmatic rationale should remain the dominant rationale that courts employ to justify their deference to an agency's reasonable interpretation of its own regulation. The preference within the courts to invoke pragmatic rationales for *Seminole Rock* deference, especially in modern cases, suggests that placing the major emphasis on the pragmatic rather than the originalist rationale will do less to disturb precedent.[126] Additionally, the pragmatic rationale's robustness offers advantages in applicability because courts are able to rely upon the comparatively more thorough reasoning employed by other courts in the past. The stated advantages of agencies as policymakers that comprise the pragmatic rationale—expertise, efficiency, flexibility, and accountability—can be applied to a broader range of regulatory ambiguities than the originalist rationale can.[127] Within this framework, the originalist rationale can fur-

123 Stephenson & Pogoriler, *supra* note 1, at 1456–57

124 BLACK'S LAW DICTIONARY, *supra* note 122, at 377.

125 Stephenson & Pogoriler, *supra* note 1, at 1454.

126 *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012). The *SmithKline* Court noted the practice of showing deference "to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages," such as avoiding conflict within the Circuits in judicial decisions involving the interpretations, and "impart[ing] . . . certainty and predictability to the administrative process." *Id.* at 2168 & n.17 (quoting Talk America, Inc v. Mich. Bell Tel. Co, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., dissenting) (internal quotation marks omitted)). While the Court declined to show deference for the interpretation, *id.* at 2168, the language is suggestive of the fact that the Supreme Court's current view on *Seminole Rock* deference is closer to the pragmatic rationale.

127 As Stephenson and Pogoriler suggested in their proposed limitations to *Seminole Rock* deference, the primary ramification of the originalist rationale is that deference should be shown to interpretations that are issued roughly contemporaneously with the interpreted regulation. Stephenson & Pogoriler, *supra* note 1, at 1455. This would lead to infrequent application by courts because the circumstances when a court could properly show deference to the interpretation would only arise when the rulemaking agency also had the foresight to issue a contemporaneous interpretation

ther focus the court's attention on which interpretations deserve *Seminole Rock* deference—namely, those interpretations that reflect an agency's interpretation of an ambiguous regulation, rather than a disguised effort to make substantive policy change.

III. INCORPORATING THE ORIGINALIST RATIONALE INTO THE BOUNDARIES OF *SEMINOLE ROCK*'S DOMAIN

This Note will now analyze how the limits to *Seminole Rock* deference as proposed by Stephenson and Pogoriler are affected when the originalist rationale is also invoked. From this starting point, the Note will examine how the incorporation of the originalist rationale into the limits of *Seminole Rock* deference affects the doctrine in three different ways. First, Section A will identify instances when the originalist rationale supports the limits that Stephenson and Pogoriler propose and, in some circumstances, strengthens the argument for incorporating those limits into *Seminole Rock* deference.[128] Section B will identify instances when the originalist rationale should not affect the limits proposed by Stephenson and Pogoriler because of countervailing factors that outweigh the implications of the originalist rationale.[129] Finally, Section C will advocate for an additional limitation that is primarily rooted in the originalist rationale but was rejected by Stephenson and Pogoriler.[130]

A. Limitations Supported by the Originalist Rationale

The first limitation proposed by Stephenson and Pogoriler is to restrict *Seminole Rock* deference where courts invoke an "antiplaceholder" principle in cases where the agency "promulgat[es] placeholder legislative rules that nominally go through notice and comment, but do not resolve key questions . . . [and] does the actual policymaking work by issuing interpretive rules that purport to interpret the placeholder rule."[131] Antiplaceholder cases can take three different forms.

First, courts are unwilling to show deference to an agency's interpretation of a regulation that is "so vague as to be meaningless."[132] In

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of its own regulation. On the other hand, Stephenson and Pogoriler's *Mead*-like limitation suggests that courts could properly apply *Seminole Rock* deference to any interpretation issued as a part of formal proceedings. *See id.* at 1504.

128 *See infra* Section III.A.

129 *See infra* Section III.B.

130 *See infra* Section III.C.

131 Stephenson & Pogoriler, *supra* note 1, at 1467.

132 *Id.*

one such case in the D.C. Circuit, the Department of Justice issued an interpretation, through the publication of a technical manual, which stated that "lines of sight" language from one of its regulations required that individuals in wheelchair seating would also be able to see over standing spectators in sports venues.[133] On appeal, the owners of the MCI Center challenged the district court's conclusion that the Department's interpretation that required 78–88% of wheelchair seating to have a line of sight over standing spectators for the venue's various configurations was binding upon the case.[134] The appellants further argued that this interpretation substantively changed the definition in the technical manual without having gone through the procedures of notice and comment rulemaking.[135] The *Paralyzed Veterans* court rejected this argument. While noting that "it is quite difficult to draw a line between substantive and interpretive rules,"[136] the court observed that the distinction will depend upon how close the agency's interpretation is to the language of the initial regulation.[137] Thus, "[i]f the statute or rule to be interpreted is itself very general . . . and the 'interpretation' really provides all the guidance, then the latter will more likely be a substantive regulation."[138] In *Paralyzed Veterans*, the court held that this principle required affirming the Department's interpretation because "the government's position is driven by the actual meaning it ascribes to the phrase 'lines of sight comparable'" and concluded the interpretation was not "sufficiently distinct or additive" to be considered a new regulation instead of an interpretation of the regulation at issue.[139] Had the *Paralyzed Veterans* court found the interpretation distinct or additive, it is likely it would have concluded the technical manual was just serving as a placeholder.

A second instance when courts have invoked the antiplaceholder principle is when the court determines that the regulation the agency interpreted merely parrots the statutory language, and thus, the agency is engaged in substantive policymaking through its interpretation.[140] In *Gonzalez v. Oregon*,[141] the Attorney General issued an interpretive rule that the use of certain medicines employed by Oregon

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

134 *Id.* at 582.

135 *Id.*

136 *Id.* at 587.

137 *Id.* at 588.

138 *Id.* (citing United States v. Picciotto, 875 F.2d 345, 348 (D.C. Cir 1989)).

139 *Id.*

140 Stephenson & Pogoriler, *supra* note 1, at 1467–68.

141 546 U.S. 243 (2006).

doctors for assisted suicide was not considered use for a "legitimate medical purpose."[142] The Supreme Court found that the language of the regulation the Attorney General interpreted "d[id] little more than restate the terms of the statute itself."[143] Noting the similarity between the "legitimate medical purpose" language of the regulation, 21 C.F.R. § 1306.04(a), and various portions of the Controlled Substance Act,[144] the Supreme Court concluded that "[s]ince the regulation gives no indication how to decide this issue, the Attorney General's effort to decide it now cannot be considered an interpretation of the regulation."[145] Instead, the Court analyzed whether the interpretation was entitled to *Chevron* deference as a permissible construction of the Controlled Substance Act, rather than as an interpretation of 21 C.F.R. § 1306.04(a).[146] This demonstrates that a reviewing court will, when confronted with an interpretation of a regulation that merely "parrots" the language of the organic statute, treat the interpretation of the regulation as an interpretation of a statute and review the interpretation under either *Chevron* or *Skidmore*, as applicable.[147]

The final instance of a court's employment of the antiplaceholder principle occurs when the court determines that the interpretation could not be the product of interpretation, even though the interpreted regulation is not "mush" or a parrot of the organic statute.[148] In *Office of Workers' Compensation Programs, U.S. Department of Labor v. Mangifest*,[149] an Administrative Law Judge (ALJ) found August Mangifest to be "totally disabled" under 20 C.F.R.

142 *Id.* at 249.

143 *Id.* at 257.

144 *Compare* 21 § C.F.R. 1306.04(a) (2005) ("A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."), *with* 21 U.S.C. § 812(b)(1)(B) (2006) ("current accepted medical use"), *id.* § 829(c) ("medical purpose"), *id.* § 830(b)(3)(A)(ii) ("issued for a legitimate medical purpose"), *and id.* § 802(21) ("in the course of professional practice").

145 *Gonzalez*, 546 U.S. at 257 (observing that the regulation in question either repeats statutory language or summarizes other portions).

146 *Id.* at 258–69 (concluding that the Attorney General did not have authority to promulgate the Interpretive Rule with the force of law and instead was only entitled to *Skidmore* deference).

147 Stephenson & Pogoriler, *supra* note 1, at 1469.

148 *Id.* at 1468. Stephenson and Pogoriler suggest that this instance is a "broader variant" of the antiplaceholder principle. *Id.* It appears to function as a catch-all application of the antiplaceholder principle when the interpretation is neither "mush" nor parroting the enabling statute.

149 826 F.2d 1318 (3d Cir. 1987).

§ 718.204[150] based upon the medical reports of two of Mangifest's treating physicians.[151] The Director of the Office of Workers' Compensation Programs appealed this decision, arguing that the two medical reports Mangifest relied upon were not in substantial compliance with 20 C.F.R. § 718.104.[152] Because the reports were not in substantial compliance, the Director argued the ALJ could not rely upon the inadequate reports at all, "even to tip the scales of a decision that had the support of complying evidence on both sides."[153] The *Mangifest* court rejected this argument. The court first noted that the Director's "severe" position was inconsistent with other portions of the Director's briefs, which merely argued that noncompliant reports could not be used standing alone.[154] Furthermore, it appeared as if the ALJ's findings were in compliance with the Director's less severe interpretation of the regulation. These inconsistencies, the court concluded, precluded deference to the Director's interpretation of how 20 C.F.R. § 718.104 and § 718.204 interacted.[155]

The pragmatic rationale for why courts should not defer to these types of interpretations is evident. In the cases where a court determines that the agency used the regulation as a placeholder—whether because the agency promulgated mush[156] or parroted the statutory language[157]—or that the interpretive rule should not be shown deference because it does too much policymaking,[158] the court acknowledges that the agency declined to fully use its institutional advantages in regulating in the first instance, electing instead to make policy through its less procedurally rigorous interpretive avenues. In doing so, the agency undermined the benefits associated with additional

150 "[T]otal disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment . . . ." 20 C.F.R. § 718.204(c)(4) (1987).

151 *Mangifest*, 826 F.2d at 1322–23.

152 *Id.* at 1322. The regulation required the medical report to "include the miner's medical and employment history," 20 C.F.R. § 718.104, and listed other requirements, such as noting all symptoms of respiratory disease, heart disease, and other pertinent findings not listed on the medical form provided by the Office. *Id.*

153 *Mangifest*, 826 F.2d at 1324.

154 *Id.*

155 *Id.* at 1325.

156 Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997).

157 Gonzalez v. Oregon, 546 U.S. 243, 257 (2006).

158 *Mangifest*, 826 F.2d at 1325.

procedure.[159] The problem, as Stephenson and Pogoriler noted, is that these antiplaceholder limitations are more effective for resolving clear cases than for close cases:

> [T]he 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.[160]

For example, in *Plateau Mining Corp. v. Federal Mine Safety & Health Review Commission*,[161] the Tenth Circuit noted that the phrase "render harmless" from 30 U.S.C. § 863(z)(2)[162] was omitted in 30 C.F.R. § 75.334(b)(1),[163] and despite the near identical language, "the differences . . . suggest the 'expertise and experience' of the agency . . . . The omission from the regulation of the 'render harmless' language appears to be in recognition of the impossibility of rendering methane-air mixtures completely harmless."[164] Even though the court concluded deference should be given to the interpretation,[165] it could easily have concluded the opposite: that the regulation merely parroted the statutory language.

In this situation, inclusion of the originalist rationale for *Seminole Rock* deference can make the antiplaceholder principle more effective in resolving closer cases. As discussed above, the originalist rationale relies on the notion that the agency's role as both drafter and interpreter means that the agency has a "special insight" into the original regulation's meaning.[166] Applying this rationale to the antiplaceholder principle would allow a reviewing court to resolve some of the closer cases when it is unclear whether an agency has violated the limitation on placeholder legislative rules. In such circumstances, a court should defer to the agency when it trusts that the interpretation is an actual reflection of the agency's "special insight" into the regulation's meaning.

Returning to *Plateau Mining* as an example, presume that the court was on the fence about whether the interpreted regulation

159 *See supra* note 55 and accompanying text.
160 Stephenson & Pogoriler, *supra* note 1, at 1469.
161 519 F.3d 1176 (10th Cir. 2008).
162 30 U.S.C. § 863(z)(2) (2006).
163 30 C.F.R. § 75.334(b)(1) (2008).
164 *Plateau Mining Corp.*, 519 F.3d at 1193.
165 *Id.*
166 Stephenson & Pogoriler, *supra* note 1, at 1454.

served to clarify the statute or merely parroted the statutory language. In that case, originalist arguments could be used to support the conclusion that the agency had in fact used its "expertise and experience" in promulgating the regulation.[167] For instance, the agency could have argued that it wanted to lessen the statutory rigidity without negating the imperative of the original statute of protecting miners, and to that end, the agency omitted "render harmless" from the regulation, yet interpreted the regulation as still requiring maintenance of a functioning bleeder system[168] in order to further the statutory purpose. The *Plateau Mining* court came to this conclusion on its own,[169] but it is not hard to imagine that, in a regime where an agency knows it will receive deference when it can show it used its "special insight" as the drafter of the regulation, the agency would offer similar arguments to show the regulation is the product of the agency's insight despite appearing to function as a placeholder.

B. Limitations Unaffected by the Originalist Rationale

Stephenson and Pogoriler proposed withholding *Seminole Rock* deference when the application of the agency's interpretation would retroactively punish the regulated entity.[170] Additionally, Stephenson and Pogoriler proposed a limitation similar to *United States v. Mead Corp.*[171] for limiting *Seminole Rock* deference to "interpretations issued after formal adjudications."[172] Like the antiplaceholder principle, Stephenson and Pogoriler argued for adopting these limitations as a way to address implications of unchecked *Seminole Rock* deference. The retroactivity and *Mead* limitations, however, do not garner any support from the originalist rationale for *Seminole Rock* deference. For

167 *Plateau Mining Corp.*, 519 F.3d at 1193.

168 *Id.* A "bleeder system" is a ventilation system that dilutes the concentration of methane in work areas of the mine. *Id.* at 1179.

169 *See id.* at 1192–93.

170 Stephenson & Pogoriler, *supra* note 1, at 1481.

171 533 U.S. 218 (2001).

172 Stephenson & Pogoriler, *supra* note 1, at 1489. The central holding in *Mead* is that an agency's interpretation of a statute qualifies for deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–27. The *Mead* Court recognized that "express congressional authorizations to engage in the process of rulemaking or adjudication" were "a very good indicator" of congressional intent to delegate authority to the agency. *Id.* at 229. The implication is that interpretations following certain types of agency action are presumptively entitled to *Chevron* deference. By analogy, *Mead*-like limitations to *Seminole Rock* deference would also restrict deference to interpretations of regulations.

the reasons discussed below, the retroactivity and *Mead* limitations should be adopted in spite of the fact that the originalist rationale does not support the adoption of these limitations.

The retroactivity limitation is familiar from the statutory context. In *SEC v. Chenery Corp.*,[173] the Supreme Court held that agencies have the ability to choose to act through either rulemaking or adjudication procedures.[174] Rules are incapable of anticipating every possible issue in advance, and certain issues are too specialized or varied to be addressed in a general rule; thus, agencies "must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective."[175] When the choice to adjudicate creates a retroactive effect, the *Chenery* Court held the retroactive application is subject to a balancing test.[176] Therefore, when confronted with retroactivity involving the enforcement of a statutory interpretation, the reviewing court will employ a balancing test on a case-by-case basis as opposed to adopting a categorical prohibition against retroactive application of interpretations.

In the regulatory context, some courts reject this balancing test and instead prohibit the application of an interpretation when doing so would impose sanctions upon a party without sufficient notice.[177] For instance, in *Satellite Broadcasting Co. v. FCC*,[178] the D.C. Circuit refused to affirm the FCC's decision to reject the application of Satellite Broadcast Company (SBC) to operate a radio station.[179] The governing regulations suggested that SBC's application could be sent either to Washington or Gettysburg depending upon which regulation controlled.[180] The FCC denied SBC's application because, according to the FCC, SBC applied to the wrong location.[181] On appeal, the court noted that the FCC's interpretation should be deferred to if reasonable, but also considered the problem from the perspective of SBC: had the FCC interpreted its own regulations in the same way SBC did, the court would also owe that interpretation deference.[182]

173 332 U.S. 194 (1947).
174 *Id.* at 202.
175 *Id.* at 202–03.
176 *Id.* at 203 ("[S]uch retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.").
177 Stephenson & Pogoriler, *supra* note 1, at 1479 n.121 (citing examples).
178 824 F.2d 1 (D.C. Cir. 1987).
179 *Id.* at 1–2.
180 *Id.* at 2–3.
181 *Id.*
182 *Id.* at 3–4.

The court concluded that the FCC's interpretation should be deferred to, but it could not be applied to SBC.[183] To do otherwise would turn administrative law into "Russian Roulette" where regulated parties would be forced to guess at an interpretation's meaning and hope they chose correctly.[184]

The originalist rationale for *Seminole Rock* deference does not prohibit applying enforcement retroactively to a regulated entity. It does not matter when the interpretation is issued relative to the enforcement of the regulation; what matters is how soon the interpretation is issued after the regulation is promulgated.[185] For instance, suppose an agency promulgates a rule at T_1, a regulated entity can choose to act or not act at T_2, and the agency issues an interpretation at T_3, a point in time that occurs X days after T_1.[186] If courts only adhered to the originalist rationale for *Seminole Rock* deference, and the regulated entity acted at T_2, the reviewing court would not withhold deference because the interpretation was later issued at T_3. Because the primary implication of the originalist rationale is that interpretations issued contemporaneously to the regulation are entitled to more deference than those issued non-contemporaneously, all that would matter to the court is how small X is.[187] This would be true whether the regulated entity chose to act at T_2 (thus creating a retroactivity problem) or at some point in time after T_3 where there would be no retroactivity problem.

When reconciling the conflict between the originalist rationale and potential limits to retroactive application of an interpretation, it is important to remember the reasoning employed in cases such as *Satellite Broadcasting Co. v. FCC*. There, the court noted that due process protections require an agency to provide sufficient notice to a regulated entity before the entity can be subjected to a penalty.[188] Indeed, the right of an affected party to contest an adverse decision by an agency is one of the first principles of administrative law.[189] Such a right is rooted in the Constitution, protected under two amend-

183 *Id.* at 4.

184 *Id.*

185 Stephenson & Pogoriler, *supra* note 1, at 1454–55.

186 This example is similar to one used by Stephenson and Pogoriler. *See id.* at 1486–87.

187 *See id.* at 1455.

188 *Satellite Broad. Co.*, 824 F.2d at 3.

189 Londoner v. City & Cnty. of Denver, 210 U.S. 373, 385–86 (1908) ("But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the

ments.[190] The fact that an agency has special insight into the regulation's original meaning should not abridge these fundamental rights. Additionally, the retroactivity limitation can be viewed as a protection against separation of powers concerns, as applied to the regulated party. Recall that the consolidation of legislative, executive, and judiciary power into one body was—and still is—viewed as a serious threat to liberty.[191] If an agency received *Seminole Rock* deference for a retroactively applied interpretation, not only would the agency be, in effect, exercising all three governmental powers,[192] it would be doing so without notice to the regulated entity that such an exercise of power was forthcoming. By applying a retroactivity limitation, regulated entities will be assured that, when the agency de facto exercises all three types of power, courts will at least restrict agencies from doing so retroactively.[193] Because these constitutional protections come from a higher source of law, the retroactivity limitation should remain unaffected by the incorporation of the originalist rationale into *Seminole Rock* deference.

Similar arguments can be made about incorporating *Mead*-like limitations to *Seminole Rock*. *Mead*'s holding suggests that an agency would only receive *Chevron* deference for an interpretation which followed formal procedures, and an interpretation subject to less formal procedures would receive deference under the less deferential *Skidmore* standard.[194] Much like an interpretation of a statute, an agency can issue an interpretation of a regulation in a variety of procedural

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taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing.").

190 *See* Ga. Pac. Corp. v. Occupational Safety & Health Review Comm'n, 25 F.3d 999, 1005 (11th Cir. 1994) (stating that vague statutes or regulations violate the Due Process Clauses of the Fifth and Fourteenth Amendments).

191 *See supra* notes 38–47 and accompanying text.

192 The agency would be responsible for the draft of the regulation (legislative power), its enforcement (executive power), and, by virtue of deferential judicial review, its interpretation (judicial power).

193 *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208–09 (1988) (describing the general disfavor for retroactive lawmaking in the administrative context); *see also The Supreme Court 2011 Term: Leading Cases*, 126 HARV. L. REV. 176, 365 (2012) ("The potential for abuse inherent in combining legislative and adjudicative functions is at its apogee in cases of retroactive application, in which the regulated entity does not even have the opportunity to comment on or object to the new interpretation or to prospectively alter its conduct to avoid liability.").

194 United States v. Mead Corp., 533 U.S. 218, 234 (2001) ("To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations

contexts.[195] The interpretations may follow formal procedures like rulemaking or adjudication,[196] may follow interpretive rules such as general statements of guidance,[197] or may be in documents prepared in advance of litigation.[198] The interpretation may also come from different sources, such as from the director of the agency or a lower-level official within the agency.[199] While a *Mead* analog has not appeared yet, it seems reasonable to extend *Mead*'s logic to *Seminole Rock* because of the similarities among the various procedures from which statutory and regulatory interpretations may be issued.[200]

The originalist objection to the *Mead*-like limitation is similar to the objections to the retroactivity limitation. As Stephenson and Pogoriler observe, "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" under the originalist rationale.[201] The APA loophole component of the self-delegation problem would not be solved, however, if this reasoning were applied to Stephenson and Pogoriler's *Mead*-like limitation. If rejection of the *Mead*-like limitation to *Seminole Rock* deference were accepted, agencies would be capable of exploiting the APA loophole by promulgating ambiguous regulations which were later clarified through interpretive rules.[202] Such an approach would do nothing to incentivize an agency to properly use its interpretive power.[203] Conversely, adopting *Mead*-like limitations, in conjunction with adherence to the retroactivity limitation, would have the effect of forcing agencies to choose between receiving *Seminole Rock* deference

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and information' available to the agency . . . ." (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944))).

195 Stephenson & Pogoriler, *supra* note 1, at 1482.

196 *Compare* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999), *with* Humanoids Grp. v. Rogan, 375 F.3d 301, 305–06 (4th Cir. 2004).

197 *Compare* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000), *with* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 581–82 (D.C. Cir. 1997).

198 *Compare* Georgetown Univ. Hosp., 488 U.S. at 209, *with* Fed. Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008).

199 *Compare Mead*, 533 U.S. at 233 ("Indeed, to claim that classifications have legal force is to ignore the reality that 46 different Customs offices issue 10,000 to 15,000 of them each year . . . ."), *with* United States v. Lachman, 387 F.3d 42, 54 (1st Cir. 2004) ("The defendants now call our attention to post-trial affidavits that suggest Commerce officials within the agency internally gave the term a contrary interpretation and affidavits as to statements made by Commerce officials at industry seminars also suggesting a contrary interpretation.").

200 Stephenson & Pogoriler, *supra* note 1, at 1482–83.

201 *Id.* at 1456.

202 *Id.* at 1486.

203 *See supra* notes 59–67 and accompanying text.

after going through formal procedures, or preparing to defend the merits of an interpretation promulgated under more informal procedures.[204]

The originalist rationale does not comport with both the retroactivity limitation and the *Mead*-like limitation to *Seminole Rock* deference. On balance, however, the retroactivity and *Mead*-like limitations should not be rejected. If the purpose of imposing limits on *Seminole Rock* deference is to incentivize the proper use of an agency's interpretive power instead of abusing it in order to self-delegate,[205] then these limitations proposed by Stephenson and Pogoriler accomplish just that because they provide additional constraints to *Seminole Rock* deference. The retroactivity limitation eliminates concerns about due process. The *Mead*-like limitation addresses the loophole contained within the APA. The originalist rationale misses the opportunity to cure major defects to deferring to an agency's reasonable interpretation of its own regulation by rejecting the retroactivity and *Mead*-like limitations, because the rationale does not focus on the timing of interpretation relative to the regulated entity's action or on the form of the interpretive process. Because the originalist rationale is ill-equipped to address the concerns that the retroactivity and *Mead*-like limitations ameliorate, this rationale should not be given weight when courts resolve problems associated with interpretations that have retroactive effect or interpretations promulgated under less rigorous procedural paths.

C. Adopting an Additional Originalist Limitation to Seminole Rock *Deference*

Stephenson and Pogoriler argued against the adoption of some type of consistency limitation to *Seminole Rock* deference: an agency interpretation only receives deference when the agency has consistently interpreted the regulation over time.[206] Like the limitations in Section B of this Part, the originalist and pragmatic rationales for *Seminole Rock* deference suggest opposite conclusions about a consistency limitation. Unlike Section B, however, this Section argues that the originalist rationale provides sufficient justification for adopting a consistency limitation to *Seminole Rock* deference because it is stronger than the pragmatic argument against adopting such a limitation.

The argument against the adoption of a consistency limitation receives some support from analogy to *Chevron*. In *Chevron*, the

204 *See* Stephenson & Pogoriler, *supra* note 1, at 1487.
205 *See supra* notes 68–70 and accompanying text.
206 Stephenson & Pogoriler, *supra* note 1, at 1474–78.

Supreme Court explicitly said that "[a]n initial agency interpretation is not instantly carved in stone."[207] In supporting this position, the *Chevron* Court noted the importance of allowing a certain degree of flexibility to the agency so that it may engage in informed policymaking,[208] focusing on the flexibility and technical expertise that agencies offer as expositors of a source of law.[209] The Supreme Court has said in even stronger language that inconsistency within an agency's interpretation is not a reason to withhold deference. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[210] the FCC, after rulemaking proceedings, concluded that broadband internet cable modem service is an "information service" and not a "telecommunications service" under the Communications Act.[211] The Ninth Circuit vacated the portion of the ruling that relied upon this new definition, stating that prior precedent defined cable modem service as a telecommunication service.[212]

The Supreme Court rejected this conclusion, stating that *Chevron*, not court precedent, was the appropriate analytical framework for resolving statutory ambiguity.[213] The Ninth Circuit's reliance on stare decisis is only appropriate where a reviewing court finds "judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill."[214] Thus, the *Brand X* Court subjected "judicial interpretations contained in precedents to the same demanding *Chevron* step one standard" as if the court were reviewing an agency's initial interpretation of a statute.[215] *Brand X* suggests that the inconsistency of the FCC's interpretation did not matter when considering the issue of def-

207 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863 (1984).

208 *Id.* at 863–64.

209 *Cf.* Stephenson & Pogoriler, *supra* note 1, at 1459–60 (listing the pragmatic arguments for *Seminole Rock* deference that "are familiar from the *Chevron* context").

210 545 U.S. 967 (2005).

211 *Id.* at 975, 978. "'[I]nformation service' . . . is 'the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . .'" *Id.* at 977 (quoting 47 U.S.C. § 153(20) (2000)). "'Telecommunications service' . . . is 'the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.'" *Id.* (quoting 47 U.S.C. § 153(46)).

212 Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1131 (9th Cir. 2003) ("*Portland*'s construction of the Communications Act remains binding precedent within this circuit, even in light of the FCC's contrary interpretation of the statute.").

213 *Brand X*, 545 U.S. at 980.

214 *Id.* at 982–83.

215 *Id.* at 982.

erence: at most, inconsistency could be a reason for finding the agency's action arbitrary and capricious if not adequately explained.[216]

Both *Chevron* and *Brand X* emphasize the problem with withholding deference for inconsistent interpretations in the *Seminole Rock* context. The flexibility of the agency would be undermined if it were not deferred to when it issued an interpretation inconsistent with a previous position.[217] Stephenson and Pogoriler also argue that a consistency limitation might serve to deprive deference when it should be encouraged most: when an agency encounters a new problem and needs to revise its prior interpretation based upon new circumstances.[218] This shows how a consistency limitation undermines the efficiency rationale for *Seminole Rock* deference. An agency cannot effectively use its perceived advantages as policymaker if it will not be deferred to by a reviewing court. Under a regime that exclusively focuses on the pragmatic rationale for *Seminole Rock* deference, there is no support for adopting a consistency limitation.

However, there is a body of case law that suggests that courts invoke consistency as a factor when deciding whether to grant or withhold deference. First, the importance of consistency is not settled within the *Chevron* context.[219] The Supreme Court has repeatedly stated that inconsistent interpretations are "'entitled to considerably less deference'" than a view which has been consistently held by the agency.[220] This position, as Stephenson and Pogoriler observe, has continued even after the Supreme Court's holding in *Brand X*.[221] Inconsistency is also cited as a reason to withhold deference in the regulatory context because an agency view that is inconsistently held may indicate that the interpretation is not the product of "the agency's fair and considered judgment."[222] In *Advanta USA, Inc. v.*

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216 *Id.* at 980–81 (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46–57 (1983)).

217 Stephenson & Pogoriler, *supra* note 1, at 1478 ("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.").

218 *Id.* at 1479.

219 *Id.* at 1474.

220 Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987)); *accord* Pauley v. BethEnergy Mines, Inc., 501 U.S 680, 698 (1991); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212–13 (1988); Watt v. Alaska, 451 U.S. 259, 273 (1981).

221 Stephenson & Pogoriler, *supra* note 1, at 1474 & n.103.

222 Auer v. Robbins, 519 U.S. 452, 462 (1997).

Chao,[223] Advanta was fined for failing to comply with a regulatory requirement of maintaining restroom facilities within a quarter mile of where employees work.[224] On appeal, Advanta argued that a "terrain exception" allowed the company to place facilities at the points of vehicular access.[225] The Eighth Circuit held that the Department of Labor's assertion, which was contrary to a contemporaneous interpretation issued by OSHA in 1987, was not entitled to deference.[226] This suggests that courts are still willing to use the consistency of an interpretation in determining whether to defer to an interpretation. *Gonzalez v. Oregon* is especially illustrative of this point. There, the Supreme Court also used originalist reasoning in reaching its conclusion that a lack of consistency was reason for withholding deference:

> [I]f there is statutory authority to issue the Interpretive Rule it comes from the 1984 amendments to the [Controlled Substance Act] that gave the Attorney General authority to register and deregister physicians based on the public interest. The regulation was enacted before those amendments, so the Interpretive Rule cannot be justified as indicative of some intent the Attorney General had in 1971. That the *current interpretation runs counter to the intent at the time of the regulation's promulgation*, is an additional reason why [*Seminole Rock*] deference is unwarranted.[227]

If the fact that the regulation parroted the statutory language was a sufficient ground for withholding deference, it seems unlikely that the Supreme Court would then go on to indicate that the Attorney General's inconsistency in interpretation also precluded deference. *Gonzalez*'s originalist, consistency-based approach thus served as an additional, and perhaps necessary, reason for withholding *Seminole Rock* deference.

Thus, this Note advocates for the adoption of a weaker version of the consistency limitation.[228] Under this proposed test, a reviewing court would defer to an agency's consistent interpretation, while only applying the less deferential *Skidmore* standard to inconsistent inter-

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223 350 F.3d 726 (8th Cir. 2003).

224 *Id.* at 728.

225 *Id.* at 729.

226 *Id.* at 730–31 ("We can find no evidence the DOL has consistently interpreted the Standard to require seasonal seed corn operations to place facilities in the middle of cornfields. The DOL's delinquent assertion of such a position further diminishes any deference.").

227 Gonzalez v. Oregon, 546 U.S. 243, 257–58 (2006) (emphasis added) (internal quotation marks omitted).

228 Stephenson & Pogoriler, *supra* note 1, at 1475.

pretations.[229] Adopting such a position appears to be the best way to reconcile the contradictory manner in which courts treat consistency. While it is true that the Supreme Court rejected consistency as a factor for granting deference in *Brand X*, it did state that inconsistency, if unexplained, would be arbitrary and capricious.[230] This suggests that the Supreme Court did not consider consistency important when an agency issued a new interpretation after the agency followed more formal rulemaking procedures. In *Brand X*, the FCC issued a new interpretation after rulemaking.[231] Consistency might not be as important if the agency has gone through notice and comment rulemaking, but what about interpretive rules that are not subject to the same procedural safeguards?[232]

In this way, a consistency limitation works especially well when paired with the *Mead*-like limitations. A court facing an interpretation similar to *Brand X* would grant deference not because the interpretation was consistent, but because the interpretation followed formal procedures. On the other side of the coin, adopting a weak version of the consistency principle would allow courts to show deference to those interpretations that are opposite of the one at issue in *Brand X*: interpretations issued in an interpretive rule, in a general statement, or in some otherwise informal procedure, but that are nonetheless positions consistent with how the agency has interpreted the underlying regulations in the past. Such a position would be easily administrable because the court would know whether to apply the *Mead*-like or the consistency limitation based on the procedures used in the promulgation of the interpretation. If the interpretation was promulgated under a formal procedure or notice and comment rulemaking, the court would apply the *Mead*-like limitation.[233] If the interpretation was promulgated under a less formal procedure, then the court may conclude that the interpretation is nonetheless entitled to deference if it is a consistently held view of the agency.[234]

Furthermore, there is normative appeal to the consistency limitation because the limitation encourages predictability. Predictability within the law is highly desirable in both administrative law and other

229 *Id.* For a discussion on the *Skidmore* standard, see *supra* note 50.

230 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005). For a discussion of arbitrary and capricious review, see *supra* note 56.

231 *Brand X*, 545 U.S. at 977–78.

232 *See* 5 U.S.C. § 553(b)(A) (2006).

233 *See* Stephenson & Pogoriler, *supra* note 1, at 1481–90.

234 *See supra* notes 219–27 and accompanying text (observing that courts are willing to consider consistency as a factor when determining whether the interpretation should be shown deference).

contexts. Consistency is one of the factors that a court considers when deciding whether to grant an interpretation *Skidmore* deference.[235] The requirement that an agency's final rule be a "logical outgrowth" from its proposed rule protects regulated entities from being blindsided by the final rule without constraining the agency's flexibility too greatly.[236] A desire for consistency can also be found in the Fourteenth Amendment: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[237] In civil procedure, a defendant's minimum contacts with a forum state make it predictable that the state can exercise personal jurisdiction over the defendant, thus preventing a person from becoming a party to surprise litigation in an unexpected forum.[238] Professor Fuller even argued that predictability and consistency are part of the moral justification for a legal system.[239] With the adoption of a consistency limitation, regulated entities could order their affairs based upon current agency interpretations with more confidence and without fear that the a court will defer to a new, inconsistent interpretation that was not promulgated through formal procedures in which the entities have a voice. In this way, the consistency limitation functions similarly to the retroactivity limitation: both provide regulated entities with affair-ordering confidence that an agency will not "spring a trap" upon them when least expected.[240]

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235 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

236 *See, e.g.*, Conn. Light & Power Co., v. NRC, 673 F.2d 525, 533 (D.C. Cir. 1982) (quoting Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1031 (D.C. Cir. 1978)) (noting that the agency "need not renotice" regulated entities except for major changes to the proposed rule).

237 U.S. CONST. amend. XIV, § 1. The Equal Protection Clause embodies the norm of consistency because it requires the government to treat its citizens consistently across certain suspect classifications, such as race. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 10–11 (1967) (holding that a law prohibiting interracial marriages was "arbitrary and invidious discrimination" that had "no legitimate overriding purpose" to justify the classification).

238 *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) ("'[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" (alteration in original) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980))).

239 LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969) (arguing that "introducing such frequent changes in the rules that the subject cannot orient his action by them" fails one of the eight inner moralities of the law); *see also id.* at 79–81 (articulating how constancy through time and protections against retroactive legislation both protect against a similar harm of legislative inconstancy).

240 *Compare supra* notes 188–93 and accompanying text, *with supra* notes 228–34 and accompanying text.

CONCLUSION

This Note has further explored the proper limits to *Seminole Rock*. Agencies play an increasingly central role in our modern government because of their ability to resolve ambiguity in a way that other governmental actors cannot, whether compared to the much slower process of legislation or to the less technically experienced judiciary.[241] Yet for all the advantages of granting deference to an agency's reasonable interpretation of its own regulation, there are problems that preclude an expansive application of the doctrine. The doctrine itself may rest on shaky constitutional ground.[242] Additionally, unlimited *Seminole Rock* deference incentivizes an agency to abuse the doctrine through use of a loophole contained within the APA.[243] Limitations to *Seminole Rock* deference can help to mitigate these problems and incentivize the agency to properly engage in interpretation where appropriate.

The pragmatic rationale of *Seminole Rock* deference is a sound starting point. Stephenson and Pogoriler prescribe a number of limits, rooted in the similarities between *Seminole Rock* deference and *Chevron* deference, which address problems with unchecked *Seminole Rock* deference. A limit prohibiting placeholder regulations, which can be interpreted later, prevents agencies from abusing the APA loophole and encourages agencies to use their rulemaking or adjudicative capabilities to announce new substantive policy.[244] The retroactivity limitation affords due process to regulated entities, mitigating some of the constitutional concerns of consolidating rulemaking and interpretation within the same branch of government.[245] *Mead*-like limitations have a similar effect, granting only *Skidmore* respect to interpretations announced through informal procedures.[246]

Yet a discussion of the pragmatic rationale alone does not describe how courts justify *Seminole Rock* deference. While *Chevron* and *Seminole Rock* may be similar to the extent that they both involve an agency resolving ambiguity in a source of law, *Seminole Rock* has the added twist that the entity responsible for interpreting the source of law is also the entity responsible for drafting it.[247] This creates unique

241 *See supra* notes 71–80 and accompanying text.

242 *See supra* notes 38–47 and accompanying text.

243 *See supra* notes 49–53 and accompanying text.

244 *Compare supra* Section III.A, *with supra* notes 49–53 and accompanying text.

245 *Compare supra* notes 191–93 and accompanying text, *with supra* notes 43–47 and accompanying text.

246 *Compare supra* notes 195–204 and accompanying text, *with supra* notes 55–62 and accompanying text.

247 *See supra* notes 102–09 and accompanying text.

problems for *Seminole Rock* deference that must be addressed through the imposition of limits to the doctrine. But it is also a benefit that the agency might have special insight into the original meaning of the regulation.[248] That benefit should be kept in mind when delineating the limits to the deference that a reviewing court should show. While it may not be the primary rationale that courts invoke to support granting deference, the originalist rationale is still useful in prescribing limitations on *Seminole Rock*. It justifies deference in close antiplaceholder cases where the agency can show it used its special insight to determine the ambiguous regulation's meaning through interpretation and has not engaged in interstitial policymaking absent the proper procedural safeguards, notwithstanding the appearance of "mush" or parroting of the organic statute.[249] Furthermore, it suggests that deference is appropriate for consistent interpretations that may not otherwise be given deference, such as consistent interpretations issued through less formal procedures.[250] The consistency limitation, if accepted by courts, could provide another route to deference for agencies, thereby encouraging the proper use of agency interpretive power while restricting the possibility of self-delegation.

248 *See supra* notes 113–16 and accompanying text.
249 *See supra* notes 156–69 and accompanying text.
250 *See supra* Section III.C.