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Revisiting Seminole Rock

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Revisiting *Seminole Rock*

JEFFREY A. POJANOWSKI*

ABSTRACT

The rule that reviewing courts must defer to agencies’ interpretations of their own regulations has come under scrutiny in recent years. Critics contend that this doctrine, often associated with the 1997 Supreme Court decision *Auer v. Robbins*, violates the separation of powers, gives agencies perverse regulatory incentives, and undermines the judiciary’s duty to say what the law is. This essay offers a different argument as to why *Auer* is literally and prosaically bad law. Auer deference appears to be grounded on a misunderstanding of its originating case, the 1945 decision *Bowles v. Seminole Rock*. A closer look at Seminole Rock suggests an unremarkable application of the less-deferential standard of review associated with the case *Skidmore v. Swift & Co*. These conclusions shed new light on contemporary worries about Auer deference, ground the Court’s recent limitations on the doctrine and lower the stakes for overruling it altogether. After Auer, the Court should return to Seminole Rock.

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INTRODUCTION

Judicial deference to administrative agencies is under attack. The most besieged beachhead of judicial abnegation is the doctrine that requires courts to defer to agencies’ interpretations of their own regulations. Critics contend that this doctrine, often associated with the 1997 Supreme Court decision *Auer v. Robbins*,1 violates the separation of powers, gives agencies perverse regulatory incentives, and undermines the judiciary’s duty to say what the law is. This essay offers a different argument as to why *Auer* is literally and prosaically bad law. Auer deference appears to be grounded on a misunderstanding of its originating case, the 1945 decision *Bowles v. Seminole Rock*. A closer look at Seminole Rock suggests an unremarkable application of the less-deferential standard of review associated with the case *Skidmore v. Swift & Co*. These conclusions shed new light on contemporary worries about Auer deference, ground the Court’s recent limitations on the doctrine and lower the stakes for overruling it altogether. After Auer, the Court should return to Seminole Rock.

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1. 519 U.S. 452 (1997).
incentives, and undermines the judiciary’s duty to say what the law is.\(^2\) This essay offers a different argument as to why Auer is literally and prosaically bad law, namely that it is literally, and more prosaically, bad law.

Auer deference appears to be grounded on a misunderstanding of its originating case, the 1945 decision Bowles v. Seminole Rock.\(^3\) A closer look at Seminole Rock suggests an unremarkable application of the less-deferential standard of review of Skidmore v. Swift & Co.\(^4\) Seminole Rock was a correct application of Skidmore deference, given the case’s circumstances and the era’s assumptions about statutory interpretation. More importantly, it is implausible to read Seminole Rock as supporting Chevron-like deference premised on delegated lawmaking authority.\(^5\) Rather, Seminole Rock is a classically legalist opinion, or, more precisely, is an ordinary deployment of one form of good, old-fashioned legalism, namely intentionalist interpretation, as applied in the administrative context.\(^6\)

The Supreme Court’s apparently unthinking transition from Seminole Rock to Auer was not one of doctrinal necessity. Rather, Auer deference is an anachronistic reading of Seminole Rock through Chevron-filtered lenses.\(^7\) The standard shorthand label of ‘Seminole Rock/Auer deference’ therefore runs together two very different kinds of deference regimes that are worth decoupling. The doubts about Auer doctrine in its current form, moreover, flow from this generalization and extension of Seminole Rock beyond the interpretive framework in which it was originally at home. These conclusions shed new light on contemporary worries about Auer deference, ground the Court’s recent limitations on the doctrine, and lower the stakes for overruling it altogether. After Auer, the Court can return to Seminole Rock.

I. Auer Deference and Its Discontents

Auer v. Robbins holds that an agency’s interpretations of its own regulations are “controlling unless ‘plainly erroneous or inconsistent with the regulation.’”\(^8\) The Supreme Court did not appear to think it was doing anything particularly momentous in Auer. The unanimous Court found this “plainly erroneous” standard of review sufficiently obvious that it simply quoted, without further analysis, Robertson v. Methow Valley Citizens Council, which in turn was

\(^2\) Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

\(^3\) 325 U.S. 410 (1945).

\(^4\) 323 U.S. 134 (1944).


\(^6\) By framing Seminole Rock as an ordinary application of Skidmore, my contribution draws on and complements, but is distinct from, Professors Knudson’s and Wildermuth’s incisive argument that “Seminole Rock deference is best described as a doctrine that has become untethered from its roots.” Sanne H. Knudson & Amy J. Wildermuth, Unearthing the Lost History of Seminole Rock, 65 EMORY L.J. 47, 52 (2015).

\(^7\) See infra Part III.

\(^8\) 519 U.S. at 461.
quoting, without analysis, *Bowles v. Seminole Rock*. In other words, any justification for *Auer*’s rule of deference rested on *Seminole Rock*.

But what does *Seminole Rock* mean? It is not obvious the *Auer* Court had a very clear idea about that at the time. Indeed, *Auer*’s author, the late Justice Antonin Scalia, later regretted his opinion and observed that the Court has “not put forward a persuasive justification for *Auer* deference.” He described *Seminole Rock*’s deferential doctrine as resting on a brute “*ipse dixit*.11

There is no shortage of justifications, however. Professor Richard Pierce claims that “common sense” justifies the doctrine: the agency is in a superior position to identify what the rule meant, its supposed application, and the “interpretation of the rule that makes the most sense given the agency’s purposes in issuing the rule.”12 As discussed below, this intentionalist justification of *Seminole Rock/Auer* is not far from the mark, though textualists like Justice Scalia would reject grounding the doctrine in uncodified authorial intent.13

Furthermore, authorial intent hardly justifies the categorical rule that *Auer* seems to contemplate. It is far from clear, for example, that an agency has a leg up on a reviewing court in terms of identifying the meaning of a regulation codified thirty years ago.14 Nor may an agency be a necessarily reliable narrator: should we trust a presidential agency to report faithfully the historical meaning of a regulation authored by an administration of the opposite political party?15

Transposing *Seminole Rock/Auer* deference into a more legal realist key, Professors Sunstein and Vermeule offer a broader functionalist justification for the doctrine. They argue that “interpretation necessarily includes consideration of policy consequences, and of the institutional roles that best serve to allocate responsibility for policy consequences.”16 As an institutional matter, they argue,

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10. It is possible that Scalia, a former D.C. Circuit judge, just took the doctrine for granted based on his familiarity with a strong *Seminole Rock* doctrine that expanded (also without much explanation) at the court of appeals level. *See Knudson & Wildermuth, supra* note 6, at 86 (“As the late 1960s gave way to the 1970s, the final transformation of *Seminole Rock* was on full display in both the lower courts and the Supreme Court. As before, courts continued to expand the doctrine without providing guiding principles or a rationale. Notably, the continued expansion of *Seminole Rock* was consistent with the judicial restraint that emerged in the late 1970s and 1980s when courts reviewed administrative actions.”).
12. 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.11 at 532 (5th ed. 2010).
13. *See Decker*, 568 U.S. at 618 (Scalia, J., concurring) (“The implied premise of [such an] argument—that what we are looking for is the agency’s *intent* in adopting the rule—is false. There is true of regulations what is true of statutes. As Justice Holmes put it: ‘[w]e do not inquire what the legislature meant; we ask only what the statute means.’”)
administrative agencies are far better suited than courts to balance the policy considerations intertwined with resolving ambiguities in regulations.\footnote{Id. at 306–07.} Sunstein and Vermeule therefore favor Auer for the same reasons they support Chevron’s fictive presumption that ambiguity is a congressional delegation of interpretative authority to agencies.\footnote{See id. at 307 (“Just as, on Scalia’s view in 1989, Chevron is the best fictional default rule for statutory construction, so too Auer is the best fictional default rule for interpretation of agency regulations.”); see also Stephenson & Pogoriler, supra note 14, at 1456 (identifying this Chevron-like “pragmatic” justification for deference).}

While the Auer decision does not invoke this rationale, it is consonant with the courts’ expanding practice of deferring to agency interpretation of regulations in the decades before Auer. As Professors Knudson and Wildermuth’s history of Seminole Rock’s development demonstrates, judicial concerns about the “magnitude and complexity” of the programs at issue helped push the doctrine beyond its original confines.\footnote{Knudson & Wildermuth, supra note 6, at 84 (quoting Boesche v. Udall, 373 U.S. 472, 484 (1963)); see also id. at 83–84 (discussing the D.C. Circuit’s “hands-off” to complex cases implicating such deference in the 1960s).} Contemporaneous academic exhortations also encouraged courts to stay their hands when interpretive choices came “to resemble a political process of weighing the claims of competing interest groups.”\footnote{Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1787 (1975) (quoted in Knudson & Wildermuth, supra note 6, at 84).} By 2017, Sunstein and Vermeule’s Chevron-inflected justification of Seminole Rock/Auer is not so much an innovation as a cogent account of the doctrine’s standard justification.\footnote{See Thomas Jefferson Univ. v. Shalala, 512 U.S. 680 (1991), a Chevron case, for its appeal to administrative expertise. See 512 U.S. at 512.}

Tellingly, the doctrine’s critics also have attacked the doctrine on Chevron’s own terms. Professor Manning’s seminal critique of Seminole Rock/Auer draws critical differences between the two doctrines. Chevron, which Manning does not challenge, implicates a delegation from Congress to administrative agencies. An implied delegation on those terms does not offend classical conceptions of separation of powers: Congress can always defend itself by writing more precise text and therefore delegating less authority to administrative agencies. Seminole Rock/Auer deference, however, implicates self-delegation: the agency drafting an unclear regulation confers on itself the power to create more law down the road.\footnote{See John Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612, 617 (1996).} Drawing on Manning—as well as Blackstone, Locke, and Montesquieu—Justice Scalia’s and Justice Clarence Thomas’s challenges to
such deference spotlight this self-delegation objection to the doctrine.\textsuperscript{23}

Manning’s separation-of-powers challenge to \textit{Auer}/\textit{Seminole Rock} also raises a more practical worry, namely that the doctrine encourages agencies to promulgate vague rules, and then subsequently use less formal procedures to clarify their meaning.\textsuperscript{24} This temptation is a powerful one, Manning argues, because “rulemaking costs, both political and monetary, rise with each increase in the precision and clarity of administrative rules.”\textsuperscript{25}

This worry is also interwoven in the concerns surrounding \textit{Chevron}. As Professor Matthew Stephenson and Miri Pogoriler have noted, standards of review could affect the agency’s calculus. After \textit{United States v. Mead}, courts are far more likely to confer \textit{Chevron} deference to interpretations offered through reasonably formal procedures.\textsuperscript{26} An unqualified version of \textit{Seminole Rock}/\textit{Auer} could allow agencies to arbitrage differing standards of review by promulgating vague regulations through notice-and-comment rulemaking and do the real policy work through less formal interpretations of the regulations.\textsuperscript{27}

Stephenson and Pogoriler argue that this concern counsels for limits on \textit{Auer}, though they do not think courts should wholly abandon it. Rather, they think that, like \textit{Chevron}, the doctrine needs a more fine-tuned test for when it applies.\textsuperscript{28} In short, Stephenson and Pogoriler seek to build a \textit{Mead} analogue for \textit{Seminole Rock}/\textit{Auer} to the extent such translation is germane.\textsuperscript{29}

The Supreme Court invoked something like this gamesmanship worry in \textit{Christopher v. SmithKline Beecham}, where it held \textit{Seminole Rock}/\textit{Auer} deference should not apply when the agency uses interpretation of vague regulations to spring an unfair surprise on the regulated community.\textsuperscript{30} And, like Stephenson and Pogoriler, the \textit{Christopher} Court settled, for the time being, on a \textit{Mead}-like carve-out from deference, rather than squarely rejecting the doctrine.\textsuperscript{31}

\begin{thebibliography}{9}
\bibitem{23} See, \textit{e.g.}, Decker v. Nw. Envlt. Def. Ctr., 568 U.S. 597, 620–21 (2013) (Scalia, J., concurring in part and dissenting in part) (citing Manning, Blackstone, and Montesquieu); Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199, 1215 (Thomas, J., concurring) (citing Locke and Montesquieu for argument that \textit{Auer} deference violates separation of powers principles). Justice Alito’s more tentative concerns about \textit{Auer} also touch on this point. \textit{See Perez}, 135 S. Ct. at 1210 (Alito, J., concurring) (citing Manning and noting that Justices Scalia and Thomas offer “substantial reasons why the \textit{Seminole Rock} doctrine may be incorrect”).
\bibitem{24} Manning, \textit{supra} note 22, at 655–57.
\bibitem{25} \textit{Id}. at 655.
\bibitem{26} \textit{United States v. Mead Corp.}, 533 U.S. 218, 229–30 (2001) (identifying “a category of interpretive choices distinguished by [that] additional reason for judicial deference”).
\bibitem{27} Stephenson & Pogoriler, \textit{supra} note 14, at 1464. For an argument that worry about \textit{Auer} introducing perverse incentives is unsubstantiated, see Sunstein & Vermeule, \textit{supra} note 16, at 308–10.
\bibitem{28} \textit{See id}. at 1504 (enumerating their suggested limits).
\bibitem{29} See, \textit{e.g.}, \textit{id}. at 1490–91 (borrowing \textit{Mead}’s requirement of formality in interpretation).
\bibitem{31} \textit{Id}. at 2168 (“[W]hatever the general merits of \textit{Auer} deference, it is unwarranted here.”).
\end{thebibliography}
II. *SEMINOLE ROCK BEFORE CHEVRON AND AUER*

As the previous discussion shows, current debate about deference to agency interpretations of regulation involves two related features. First, it understands *Seminole Rock/Auer* deference as a kind of Baby *Chevron* doctrine; the question is whether and how the *Chevron* framework for statutory interpretation should transfer to regulatory interpretation. Second, it understands *Seminole Rock* and *Auer* as representing a unified doctrine, linking them together both typographically (with a “/”) and jurisprudentially on the terms of *Chevron*. This essay challenges both premises by revisiting *Seminole Rock*, its doctrinal backdrop, and its assumptions about legal interpretation.

Before there was *Seminole Rock/Auer* deference, let alone *Chevron* deference, there was *Skidmore v. Swift & Co.*. Handled down in 1944, the unanimous opinion addressed how much credence reviewing courts should give to administrative agencies’ legal interpretations. *Skidmore* tells us that “the weight of [the agency’s] judgment... will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”

Today, in the context of reviewing agencies’ interpretations of statutes, courts invoke *Skidmore* when the more deferential *Chevron* framework does not apply. One alternative to *Auer* deference is applying *Skidmore* to agency regulations as well. What would that look like? *Seminole Rock* shows us just that.

*Seminole Rock*, decided in 1945, concerned the proper interpretation of a 1942 price control regulation. The opinion stated that “the ultimate criterion” in deciding the case was “the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” The Court cited no authority for this bold proposition, whose grant of “controlling weight” to agency interpretation appears antonymic to *Skidmore*’s proviso that agency readings “lack[] power to control.”

It is possible that, in the forty days between argument and decision in *Seminole Rock*, the Supreme Court fashioned a new, remarkable, but unremarked-upon categorical category of deference. It is also possible—and, I would argue, more plausible—that the case is an unremarkable application of ordinary science and not a silent paradigm shift. *Skidmore*, which the Court handed down the previous year, was more an expression of conventional wisdom about judicial review than a path-breaking announcement of a new standard.

32. 323 U.S. 134 (1944).
33. Id. at 140.
34. See United States v. Mead Corp. 533 U.S. at 234–35 (2001) (holding that *Skidmore* deference applies when *Chevron* does not).
35. 325 U.S. at 414.
36. *Skidmore*, 323 U.S. at 140.
Skidmore framework was plainly in the air, in the briefs, and appears to be the basis for what Auer’s author later described as an otherwise “ipse dixit” assertion of deference.37

As Professor Bamzai has recently noted, Henry Hart’s brief for the government in Seminole Rock explicitly relied on Skidmore,38 but it did not invoke the proto-Chevron decision of Gray v. Powell.39 In its argument, the government first offered a textual defense of its interpretation of the regulation and then placed weight on the fact that its interpretation was a contemporaneous construction of the rule.40 In faulting the appellate court for ignoring the agency’s contemporaneous construction, the Government invoked the “presumed expertise of an administrative agency in determining the meaning of its own regulation.”41 The Government continued:

Whatever qualifications there may be upon the rule which attributes weight to a settled administrative construction, such a construction cannot be ignored even when it involves only the Administrator’s views as to the meaning of the statute under which he is operating. Skidmore v. Swift & Co., 323 U. S. 134, 137–140. The weight to be given to his construction of his own regulations should obviously be much greater; for then he is explaining his own intention, not that of Congress. This Court has gone so far as to say that the latter type of “interpretation is binding upon the courts.”42

Here we see a reconciliation between Seminole Rock’s statement that the administrative interpretation is controlling (or “binding” as the government suggested) and Skidmore’s stipulation that agency legal interpretations persuade rather than “control.” If the Skidmore framework requires some consideration of the agency’s views in the statutory context, a fortiori that sliding scale points toward far more respect when the agency is reporting the views of its own regulatory handiwork.43 The measure of that sliding scale, in relevant part, is the agency’s knowledge of its own intention in authoring the regulation.

41. Id. at 20.
42. Id. at 20 (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 n.6 (1940)).
43. The Government cautioned that the Court need not go so far as to treat its interpretation as “binding,” particularly in light of its strong textual argument. See id. at 20.
Why would that matter? Keep in mind the methodological context of the time. Compared to today, mainstream statutory interpretation was then far more intentionalist in orientation.\textsuperscript{44} Skidmore and Seminole Rock preceded textualism’s rejection of the validity—or even the cogency—of looking to the original intentions of a historical legal author.\textsuperscript{45} The cases also predate the consolidation at the Supreme Court of the Legal Process School’s focus on a \textit{hypothetical} reasonable legal author pursuing reasonable purposes reasonably.\textsuperscript{46} This is not to say all the Justices were old-fashioned original intentionалист, to the extent they had any governing theory at all. The Legal Realist critique of legislative intent was well-known by then.\textsuperscript{47} Nevertheless, it is fair to say that repair to historical intent was more prominent and respectable then than it is now.\textsuperscript{48}

In fact, even the then-ascending Legal Realist critiques of intentionalism had less force in cases like Seminole Rock. Max Radin focused on the challenges of ascribing a single, coherent intention to a legislature. He argued that, while the search for the intention of the single author of a religious or literary text “is precisely what we have as our task in interpretation,” such “literary and theological methods are irrelevant” to statutes adopted by multimember legislatures.\textsuperscript{49} Even if Congress is a “They” and not an “It,”\textsuperscript{50} Chester Bowles, the head of the Office of Price Administration, was emphatically singular,\textsuperscript{51} which renders appeals to his intent less vexed under the Realist’s skeptical rubric.\textsuperscript{52}

With that in mind, consider how a run-of-the-mill intentionalist would approach Seminole Rock under Skidmore. If the intent of the author is central, the agency’s account is certainly something that “has the power to persuade” under

\textsuperscript{44} See Philip P. Frickey, \textit{From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation}, 77 \textit{MINN. L. REV.} 241, 248 (1992) (citing Takao Ozawa v. U. S., 260 U.S. 178 (1922) as an example of the Supreme Court’s willingness in that period to focus on legislative intent).


\textsuperscript{46} \textit{HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW} 1378 (Es(kridge and Frickey ed. 1994).

\textsuperscript{47} See generally Max Radin, \textit{Statutory Interpretation}, 43 \textit{HARV. L. REV.} 863 (1930) (criticizing intentionalist interpretation); see also Frickey, supra note 44, at 248 (“By the 1950s, the legal realists’ critique of interpretive formalism [including intentionalism] had become deeply rooted.”); \textit{REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES} 68–69 (1975) (describing “The Radin Onslaught”).

\textsuperscript{48} See, e.g., Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 704–05 (1945) (“[T]he question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute.”); see \textit{id.} at 705 (identifying statutory language, legislative reports, and legislative debates as sources of intent).

\textsuperscript{49} Radin, supra note 47, at 867.

\textsuperscript{50} Cf. Kenneth A. Shepsle, \textit{Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron}, 12 \textit{INT’L REV. OF L. & ECON.} 239 (1992). The conceptual coherence of identifying an administrative author’s intention, of course, is not the same as stating a court should give that intention legal authority as against text, purpose, or anything else.

\textsuperscript{51} \textit{But see} Walt Whitman, \textit{Song of Myself, in LEAVES OF GRASS AND OTHER WRITINGS} 78 (“I am large, I contain multitudes.”).

\textsuperscript{52} This is not to say some puzzles remain here. One might ask whether the relevant intent for a regulation issuing from a cabinet agency is the agency head or the President, or what to do about regulations that multi-member commissions promulgate.
Skidmore. And, as quoted above, this is in line with how Henry Hart used Skidmore in his Seminole Rock briefing. Although such deference would have less force in the agency’s construction of legislation written by Congress, the interpretive logic of the time suggests great deference toward the author’s own reportage.53 Furthermore, this intentionalist Skidmore reading of Seminole Rock illuminates why, as Bamzai has discovered and explained, Justice Murphy’s first draft of Seminole Rock found congressional intent irrelevant to the inquiry.54

Under Skidmore, an administrative author’s account need not be decisive:55 an author’s hasty, poorly reasoned, inconsistent, or plainly countercontextual claim about the meaning of its legal pronouncement would raise suspicions about the sincerity or reliability of the narrator. Those would also be the very kinds of flaws that would deprive the agency’s interpretation of its power to persuade.56 Nothing in the Seminole Rock 8-1 opinion suggests the Court saw any of these flaws in the agency’s reportage, particularly given the Court was reviewing a legal author’s consistent and nearly contemporaneous reading of a newly minted regulation.

The dispute in Seminole Rock concerned the regulation the administrator of the Office of Price Administration issued on April 28, 1942.57 Almost immediately thereafter the government sought to enforce its interpretation of the regulation in court.58 A district court ruled against the government in April 1944 and the Fifth Circuit affirmed that November.59 The government immediately and successfully sought review before the Supreme Court, which, in June 1945, reversed the appellate court and issued its now-famous deferential opinion. It is an exaggeration to say the ink on the regulation had barely dried before the Supreme Court handed down Seminole Rock, but the underlying interpretation followed just on the heels of the Administrator’s dictate.

The primary matter was the intent of the agency author, so long as it bore other indicia of credibility, and here it did. This reading of Seminole Rock as an easy application of Skidmore deference also helps explain why nobody at the

53. Brief for Petitioner, supra note 39, at 20.
54. See Bamzai, supra note 38.
55. The Government’s briefing even seemed to recognize these potential limits. While noting that “[t]his Court has gone so far as to say that [such] ‘interpretation is binding upon the courts,’” the Government explained that its textual interpretation was so strong that “it is not necessary to go that far here.” Brief for Petitioner, supra note 39, at 20–21, Bowles v. Seminole Rock, 325 U.S. 410 (No. 914). Neither Pottsville Broadcasting nor the other three cases in the accompanying string cite discussed standard of review, let alone offered an alternative to Skidmore. Id.
56. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (“The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).
57. Seminole Rock, 325 U.S. at 413.
58. See Brief for Petitioner, supra note 39, at 8–9.
time seemed to think the case was a big deal. If *Seminole Rock* conferred extensive lawmaking authority to agencies in the way we think about it today, one would expect a fulsome dissent about separation of powers along the lines of Justice Jackson two years later in *Chenery II*. Here, we only have Justice Roberts issuing a one-line dissent agreeing with the court of appeals that the agency’s interpretation was implausible.

Finally, as Knudson and Wildermuth note, “early cases connected *Seminole Rock* with the deference framework for an agency’s interpretations under *Skidmore*.” Early appellate applications of *Seminole Rock* that did not invoke *Skidmore* also undertook rigorous review before ruling on the validity of the agency’s interpretation—review that is far closer to the less-deferential *Skidmore* standard. These lower courts neither explained the linkage of *Seminole Rock* and *Skidmore*, nor did they justify their rigorous review under the banner of what we now consider the very deferential doctrine of *Seminole Rock*. Knudson and Wildermuth suggest that this tendency may, in part, have been a product of inattention to proper standards of review or discomfort with the broad doctrine *Seminole Rock* had apparently announced. That is possible. But these results are also consistent with the simpler conclusion that *Seminole Rock* was an unproblematic application of a more general framework of review that sounded in *Skidmore* principles.

### III. FROM *SEMINOLE ROCK* TO *AUER* AND BACK

If you are sympathetic with old-fashioned intentionalism and think of judicial review in terms of *Skidmore*, *Seminole Rock* is a run-of-the-mill 8-1 case. Things look quite different, however, if you pluck out and abstract *Seminole Rock*’s “plainly erroneous” verbiage beyond this context, such as when courts review interpretations that long antedate the regulation’s promulgation. Furthermore, if you drop the *Skidmore* contextualism and *Chevron*-ize the doctrine by reading it as a strong, general rule of deference grounded in law-making (not law-reporting) authority, the doctrine looks even more radical. Finally, drop any

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60. See Knudson & Wildermuth, supra note 6, at 63 (“In the aftermath of *Seminole Rock*, there was no indication from scholars or the Court that a new doctrine of administrative law had just been announced.”).


62. See *Skidmore*, 323 U.S. at 134 (1944) (Jackson, J.).

63. Knudson & Wildermuth, supra note 6, at 94–95.


65. See Knudson & Wildermuth, supra note 6, at 96–97 (citing cases).

66. See id. at 95 (explaining that the link was related to the fact that “in the early period, *Seminole Rock* was sometimes erroneously applied in statutory cases.... This kind of error is less frequent in modern cases, [which] require[,] lawyers and courts to be much more careful in articulating what deference standard applies . . . .”).

67. Id. at 98.
faith in intentionalism, and the resulting doctrine begins to look incomprehensible in the eyes of a 1940’s interpreter.

In short, the move from the Seminole Rock case to “Auer deference”—understanding Auer as a Chevron-like deference rule presupposing delegated authority to make policy in the gaps—creates an entirely different doctrine than envisioned in 1945. It is this retheorization, moreover, that raises the worries many have about Auer today. If an agency is using delegated legal authority when it interprets unclear regulations, of course some will worry about separation of powers and self-delegation, the possibility of unfair surprise, or agency attempts to game judicial review by seeking deference to interpretations of regulations that are either vacuous or simply parrot the underlying statute.

But if presumptive deference is grounded in authorial competence, that changes the game. Seminole Rock deference under Skidmore is epistemic and defeasible, whereas Auer deference turns on administrative lawmaking in the guise of interpretation. Reconsider each prominent Auer worry under a framework of Skidmore intentionalism.

- **Self-Delegation**: Rather than making new law in the gaps it reserved for itself, an agency is reporting what preexisting law means. Although being able to offer privileged testimony about legal meaning is a non-trivial power, it depends on other measures of reliability and a court can override it.
- **Unfair Surprise**: An agency that unfairly surprises a regulated party by turning on a dime faces distinct disadvantages. Skidmore deference in general favors longstanding and consistent interpretations and, from an intentionalist perspective, an about-face raises doubts about the reliability of the agency testimony. This is consistent with the Supreme Court’s unfair surprise exception to Auer it announced in Christopher v. SmithKline Beecham.

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70. Stephenson & Pogoriler, supra note 14, at 1461 (raising this concern).

71. Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (“An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”).


73. 567 U.S. 142, 157–59. That said, abandoning Auer deference does not eliminate all opportunities for unfair surprise. Agencies administering unclear statutes might just enforce them through adjudication in a format that qualifies for Chevron deference. See Aaron Nielson, Beyond Seminole Rock, 105 GEO. L.J. 943 (2017). This is a serious concern, though one who is skeptical of deference for reasons beyond self-delegation, and Chevron-gaming might be inclined to withhold deference more generally. See Jeffrey A. Pojanowski, Without Deference, 81 Mo. L. Rev. 1075, 1076 (2016) (“The theoretical
• **Parroting Regulations**: If an agency regulation parrots a statute, it is far less plausible to say, as in *Seminole Rock*, that what matters is the agency’s intention, as opposed to Congress’s. Rather, it is natural to infer that the agency is simply borrowing congressional meaning, over which its epistemic authority is far more limited. This is consistent with the anti-parroting exception to *Auer* the Court deployed in *Gonzalez v. Oregon*.

• **Vacuous Regulations**: As with parroting regulations, a reviewing court can rightfully be suspicious when an agency claims that a vague text it promulgated in notice-and-comment rulemaking in fact had a particular, unexpressed historical meaning.

The *Auer* decision, in short, reads *Seminole Rock* through the eyes of *Chevron* and a concomitant belief that resolution of legal uncertainty is irretrievably intertwined with law- and policymaking. This transposition of *Seminole Rock* beyond its original interpretive context creates contemporary worries about *Auer* deference. Returning to *Seminole Rock*’s original constraints dissolves those concerns.

A return to this understanding of *Seminole Rock* might also be more faithful to the Administrative Procedure Act’s judicial review provisions. If the framework I described were part of the legal backdrop at the time of the APA’s codification in 1946—a mere year and a week after *Seminole Rock*—this understanding should then inform what it means for a reviewing court “to decide all relevant questions of law . . . and determine the meaning or applicability of the terms of agency action.”

Finally, this reading deflates *Auer* in a way that renders it more vulnerable to overruling. This is so even if one accepts the contested proposition that deference doctrines and interpretive frameworks like *Auer* merit stare decisis.
From this perspective, Auer is neither a foundational doctrine nor a carefully considered sea change in the constitution of the administrative state, but rather is an unreasoned misreading of an unremarkable case.\textsuperscript{79} In fact, by withholding Auer deference in the context of parroting regulations and unfair surprise,\textsuperscript{80} the Court, as a practical matter, is already backing into its original approach to Seminole Rock.\textsuperscript{81}

Now, deference to agency regulation after Seminole Rock did not begin and end with Auer, and much of it is inconsistent with this essay’s reinterpretation of the doctrine. Thomas Jefferson University v. Shalala, for example, pre-dates Auer and provides the anachronistic Chevron gloss to Seminole Rock that the broad defenders of deference now invoke.\textsuperscript{82} (Perhaps advocates of Chevron-strength deference should call the doctrine “Thomas Jefferson deference,” given the absence of any reasoned justification in Auer.) And the courts of course continued to invoke strong deference after Auer, though the most recent Supreme Court application of Auer that does not raise skeptical notes or qualifications occurred seven years ago.\textsuperscript{83} Even if the Skidmore reading of Seminole Rock is correct, one could argue that subsequent events have rendered it irrelevant.

I am not so sure. If the doctrine were systematically and consciously retheorized, uncontroversial, and uniformly applied, a little Seminole Rock revisionism might be beside the point. But the Court has in fact stumbled into its Chevron-ized reading of Seminole Rock and the resulting doctrine has become controversial and ridden with exceptions. If the origins of the doctrine do not compel that reading, and in fact account for the consequent concerns and exceptions, Auer appears to be a doctrinal wrong turn meriting a reversal in course.\textsuperscript{84}

CONCLUSION

The philosopher Alasdair MacIntyre posits in his book After Virtue that moral argument today is incoherent and interminable because we use terms and

\textsuperscript{79. Cf. Seminole Tribe v. Florida, 517 U.S. 44, 65 (1996) (“Never before the decision in Union Gas had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment . . . . The plurality’s citation of prior decisions for support was based upon what we believe to be a misreading of precedent . . . .”).}

\textsuperscript{80. See Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012); Gonzales v. Oregon, 546 U.S. 243 (2006).}

\textsuperscript{81. See Knudson & Wildermuth, supra note 6, at 99 (identifying Christopher as supporting their theory “that discomfort with Seminole Rock doctrine might lead courts to incorporate more Skidmore-like factors”).}

\textsuperscript{82. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).}

\textsuperscript{83. See Pliva, Inc. v. Mensing, 564 U.S. 604, 615–16 (2011).}

\textsuperscript{84. Cf. Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting) (“One can hardly grieve for the shoddy treatment given today to Humphrey’s Executor, which, after all, accorded the same indignity (with much less justification) to Chief Justice Taft’s opinion 10 years earlier in Myers v. United States.”).}
concepts that originated in an understanding of human nature and goods that we no longer accept or even comprehend. A parallel pattern may have unfolded with our deference doctrine, which was once rooted in an intellectual milieu less skeptical of intentionalism and less likely to understand legal uncertainty as a policy space.

Now, as noted, this is a generalization. Not everyone in 1945 was an intentionalist, and Legal Realists had already been working to weaken faith in that form of legal craft. Similarly, today sophisticated work seeks to revive intentionalism in general and to think about it more rigorously in the Auer context. Nevertheless, the deference Auer invokes appears to be a fragment from an earlier legal era detached from the original suppositions which made its originating decision, Seminole Rock, unremarkable in the first place. Small wonder, then, that the Court’s abstraction and expansion of the doctrine in a different jurisprudential climate has proven controversial.

Just as MacIntyre and others have attempted to rehabilitate and reconstruct virtue ethics in moral philosophy, in recent years, administrative law has witnessed a neoclassical revival of sorts. This has been most pronounced in the (admittedly minority) movement criticizing Chevron deference. The press to abandon Chevron appears motivated by a return to more a classical legal cast of mind, one that less readily accepts administrative law’s dogma that resolving uncertain interpretive questions is a matter of policy choice as opposed to legal craft. Professor Hamburger’s work on judicial duty and administrative law plays a large agenda-setting role here in the academic discussion. Legalist criticisms are even more common among judges, with Justice Thomas and now-Justice Gorsuch criticizing Chevron in concurring opinions, Chief Justice Roberts willing to narrow it due to rule of law concerns, and D.C. Circuit

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87. See Stephen M. DeGenaro, Note, Why Should We Care About an Agency’s Special Insight, 89 Notre Dame L. Rev. should be in small caps. 909 (2013).
88. See also G.E.M. Anscombe, Modern Moral Philosophy, 33 Phil. (1958); Philippa Foot, Virtues and Vices (1978); Rosalind Hursthouse, On Virtue Ethics (1999).
90. See generally Pojanowski, supra note 73.
94. See King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (holding that on questions of “deep ‘economic and political significance,’” any delegation of interpretive authority to agencies must be
Judge Kavanaugh seeing the doctrine as something that needs to be “fixed” in statutory interpretation. 95

The parallels of neoclassicism play out here with respect to Auer deference as well. Professor Ekins argues in the opening chapter of The Nature of Legislative Intent that, until the latter half of the 20th Century, the intent of the legislature was the lodestar of interpretation in Anglo-American jurisprudence. 96 Indeed, many classical legal thinkers would be baffled by the notion that law could be authoritative without the mind of, well, an author to make reasoned plans and choices. 97

This is not to say precisely how courts should pursue that intent. In fact, there is a good argument that sophisticated textualism and intentionalism today are converging at the level of method, if not justification. 98 Ekins, for example, eschews legislative history, 99 and it is far from clear that we should return to the occasional practice in the classical common law period of deferring to Law Lords who helped draft the statutes at play in litigation. As with the revival of virtue ethics in moral philosophy, any bid to include a form of intentionalism in the neoclassical revival of administrative law needs to respond and reformulate the method in light of criticisms that put it out of fashion in the first place. 100 Therefore, a 21st Century, Skidmore-grounded Seminole Rock may regard the regulatory author’s claims with a different—and perhaps less deferential—gaze than its predecessor.

Nevertheless, we should not be surprised that a jurist more amenable to classical legal thought would be more willing to defer to agency interpretations in circumstances of authorial reliability. Skidmore deference, in turn, is not worrisome from that perspective if we understand it as a rule (or standard?)-of-thumb that helps a court leverage administrative insight in its search to discover what the law truly is. This epistemic deference is quite different from Chevron’s understanding of deference as a delegation of authority. 101

explicit); City of Arlington v. FCC, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting) (“An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.”).

95. See Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 HARV. L. REV. 2118, 2150–54 (2016) (advocating limits to Chevron deference); see also United States Telecommunications Ass’n v. FCC, 855 F.3d 371, 417, 419 (Kavanaugh, J., dissenting from denial of rehearing en banc) (“For an agency to issue a major rule, Congress must clearly authorize the agency to do so. If a statute only ambiguously supplies authority for the major rule, the rule is unlawful” and therefore beyond the scope of Chevron deference).

96. EKINS, supra note 86, at 1–3.


98. I thank Randy Barnett for emphasizing this point.


100. Hence Richard Ekins’ use of philosopher Michael Bratman’s work on joint intention and group agency to respond to Radin’s, Dworkin’s, and Scalia’s criticisms of intentionalism.

101. Because agencies are not the authors of statutes, a more general embrace of Skidmore would have much less force regarding agency interpretations of legislation, even if one were amenable to intentionalist interpretation.
Tellingly, this critique of *Auer* uses a cognate method to interpret *Seminole Rock*. The gist of my argument is that later interpreters of *Seminole Rock* missed the music of the decision’s words by focusing briskly and exclusively on a snippet of bare text that appears clear and categorical in isolation. A more contextual approach, which focuses on the broader legal fabric and even the shared understandings of the jointly authored opinion, is critically important in understanding the law a decision produces. To accept my argument is to be open to a more tradition-and intention-dependent way of drawing doctrine from legal texts, especially for judicial opinions, and to have faith that such an approach is worthwhile and reasonably determinate.\(^\text{102}\)

So domesticated, *Seminole Rock* is more consonant with traditional understandings of the rule of law and judicial duty than a *Chevron*-ized *Auer*. It is not a foregone conclusion that all neoclassical critics of contemporary administrative law would embrace this revisited *Seminole Rock*. Many are textualists who think legislative intent is a myth or find judicial use of authorial intentions illegitimate\(^\text{103}\) (though, as noted above, the lines between sophisticated textualist and intentionalist methods can blur). Others will think that even this moderate dose of epistemic deference introduces undue bias to the proceedings.\(^\text{104}\) We might also worry about courts’ abilities to smoke out insincere professions of intent by agency litigators. All of these concerns might press for *de novo* review of agency interpretations of regulations or exclusion of agency intent from the *Skidmore* inquiry.\(^\text{105}\)

Nevertheless, for legalists more hospitable to the intentionalist theory that grounded classical Anglo-American legal thought about interpretation, a chastened reading of *Seminole Rock* on its face and facts is ordinary and not particularly objectionable. In any event, they will find this more constrained reading of *Seminole Rock* superior to a blunt, unqualified *Auer* doctrine. As discussed above, moreover, this revised reading of *Seminole Rock* also makes sense of the apparently ad hoc exceptions to the doctrine that have emerged in recent years. After *Auer*, administrative legalists should revisit *Seminole Rock*.

\(^{102}\) This, admittedly, may be against the spirit of the age. See Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1188 (2006) (“[T]he common law consists of what judges *write* in their opinions. What they *think* or what they *say* during the proceedings before them is almost entirely irrelevant.”).


\(^{104}\) Unlike, say, consideration of parole evidence in interpretation of a contract, there is only one side of the story in play in *Seminole Rock*. Cf. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016) (“When judges defer to administrative interpretation, they are deferring to the government . . . . Such deference . . . . is systematic judicial bias in favor of the most powerful of parties and against other parties.”).

\(^{105}\) Though there is good reason to believe there is little difference between *Skidmore* and *de novo* review. Cf. ADRIAN VERMEULE, LAW’S ABNEXATION 83 (2016) (“Even when courts have plenary [reviewing authority] if they are at all sensible they take into account—for whatever they are worth—the expert views of agencies, legal scholars, or anyone else with an interest in the subject matter. It would be odd, to say the least, for a court to willfully refuse even to consider well-informed views.”).