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Auer Deference Should Be Dead; Long Live *Seminole Rock* Deference

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AUER DEFERENCE SHOULD BE DEAD; LONG LIVE *SEMINOLE ROCK* DEFERENCE[1]

John B Meisel[*]

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In *Kisor v. Wilkie*, the Supreme Court will soon consider whether to overrule a significant administrative law doctrine governing a standard of judicial review in which a reviewing court grants deference to an agency's reasonable, although not necessarily best, interpretation of one of its own regulations.[2] The Court should, instead, consider replacing the administrative law doctrine, *Auer* deference, with *Seminole Rock* deference.[3] However, the deference doctrines

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1 The title is adapted from the widely-cited article: Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015).

2 Kisor v. Wilkie, 869 F.3d 1360 (Fed. Cir. 2017), *cert. granted,* 2018 WL 6439837 (Dec. 10, 2018) (No. 18-15) (On granting certiorari to reconsider overruling judicial deference to agency interpretations of their own regulations).

3 Auer v. Robbins, 519 U.S. 452, 461-62 (1997) (establishing the *Auer* doctrine); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945) (establishing that using binding deference to hold that when a case "involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various

are commonly used interchangeably.[4] Indeed, in some ways, the 21st century application of *Auer* deference, by incorporating a number of limitations on binding deference, is better aligned with the original understanding and application of *Seminole Rock* deference established in 1945.[5] This is a step in the correct direction. Notwithstanding this doctrinal improvement, the Supreme Court has the opportunity to return the deference standard to its original meaning, a form of deference much less generous to agency regulatory interpretations while ensuring that a reviewing court has the final authority to determine the legal commands an agency is instructed to follow, whether by statute or in its own regulation.

There is growing dissatisfaction with deference doctrines in general, however particularly with *Auer* deference.[6] The legal community was surprised by the late Justice Scalia's concurrence in *Talk America, Inc. v. Michigan Bell Telephone Co*., in which he first criticized *Auer* deference, despite the fact that Justice Scalia originally authored the opinion in *Auer v. Robbins*, which entrenched the modern version of Auer deference granting generous deference to agency interpretations of their own regulations.[7] Apparently, Justice Scalia was persuaded that judicial deference was no longer justified, in part, since it violated the constitutional principle of separation of powers.[8] In *Perez v. Mortgage Bankers Association*, each of the concurrences expressed great skepticism for the Court's practice of granting generous deference to regulatory interpretations.[9] However, a majority of the Justices remained confident that there remains sufficient judicial control over agency regulatory interpretations

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interpretations, but the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

4 Kiser v. Wilkie, 869 F.3d 1360 (Fed. Cir. 2017), *cert. granted,* 2018 WL 6439837 (Dec. 10, 2018) (No. 18-15) (granting certiorari limited to the first question as to whether the Supreme Court should overrule *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, which directs courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.).

5 The *Seminole Rock* deference states that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414.

6 Daniel Waters, *The Empty Case for Overruling Auer Deference*, THE REG. REV. (Dec. 11, 2018), https://www.theregreview.org/2018/12/11/walters-empty-case-overruling-auer-deference; *see also* Aaron Nelson et al., *Reflections on Seminole Rock: The Past, Present, and Future of Deference to Agency Regulatory Interpretations*, YALE J. OF REG. AND THE AM. B. ASS'N SECTION OF ADMIN. LAW & REG. PRAC. at 11, 20, 26 (2017) https://ssrn.com/abstract=2847668.

7 Talk America, Inc. v. Michigan Bell Telephone Co., 564 U.S. 50, 67-68 (2011) (Scalia, J., Concurring).

8 *Id*. at 68.

9 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210-11, 1213 (2015) (Scalia, J., Alito, J., and Thomas, J., concurring).

notwithstanding *Auer* deference.[10]

It has been speculated that the interest in reexamining *Auer* deference was on the wane due to the death of Justice Scalia[11] and the Court's denial of certiorari to review *Bible v. United Student Aid Funds, Inc*., where the district court relied on *Auer* deference.[12] However, with the appointment of two new Justices, Justice Neil Gorsuch and Justice Brett Kavanaugh, and the granting of certiorari in *Kisor v. Wilkie*, interest in examining *Auer* deference is rekindled.[13] Both of these new Justices have authored scholarship and opinions indicating concern about the constitutionality of judicial reliance on deference doctrines.[14]

Part I of this Comment will present the theoretical model granting binding deference to an agency's statutory interpretations. This part will focus on the assumptions that underlie the model and identifies the merits of an emerging restriction on a grant of binding deference regarding the kinds of arguments an agency uses to justify its interpretive choice. Part II presents the model granting binding deference to an agency's regulatory interpretations. It will show that although this model is considered to be a rather simple extension of the statutory interpretation model, such an extension has no theoretical justification. It is critically important for a theoretical model underlying a deference doctrine to distinguish cases in which an agency purports to make new law in a gap in a legal text from those in which the agency is merely clarifying the inherent meaning of a static text. Finally, Part III argues how the Court's treatment of agency regulatory interpretations in the seminal regulatory interpretation case, *Bowles v. Seminole Rock & Sand Co.*, is the proper model for judicial review of an agency regulatory interpretation. This part will emphasize that the *Seminole Rock* model of deference is fundamentally different from the premises underlying *Auer* deference.

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10 *Id*. 1225 n.4 (arguing that "[e]ven in cases where an agency's interpretation receives Auer deference, however, it is the court that ultimately decides whether a given interpretation means what the agency says it means. Moreover, Auer deference is not an inexorable command in all cases.").

11 Kevin O. Leske, *A Rock Unturned: Justice Scalia's (Unfinished) Crusade Against the Seminole Rock Deference Doctrine*, 69 ADMIN. L. REV. 1, 3 (2017).

12 Bible v. United Student Aid Funds, Inc., 807 F.3d 839, 841-42 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1607 (2016).

13 Kisor v. Wilkie, 869 F.3d 1360 (Fed. Cir. 2017), *cert. granted*, 2018 WL 6439837 (Dec. 10, 2018) (No. 18-15); *see also* Walters, *supra* note 6, at 116-17.

14 *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2134-44 (2016) (suggesting a new approach to determine whether the text of a statute is clear which if implemented would impose a new limit on *Chevron* deference); *see also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151-52 (2016) (Gorsuch, J., concurring) (arguing *Chevron* deference requires a court to relinquish its constitutional power to say "what the law is" to an agency's (reasonable) statutory interpretation).

I. *CHEVRON* DEFERENCE AS A MODEL FOR *AUER* DEFERENCE.

A. *Chevron* Framework as Promulgated by the Supreme Court

Auer deference, which concerns judicial review of agency regulatory interpretations, is applied and justified in many ways similar to judicial review of agency statutory interpretations. It is important first to understand the administrative law and key assumptions underlying judicial review of agency interpretations of statutory language before turning to the modern understanding of *Auer* deference. The landmark Supreme Court case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*. provides the foundation and initial theoretical background and justifications for binding deference to agency statutory interpretations.[15] The *Chevron* theoretical framework contains two procedural steps. First, it is the court's responsibility to determine if the statute provided an unambiguous answer to the precise question at issue. For instance, in the *Chevron* case, the question at issue was whether the statute clearly defined the term 'stationary source.'[16] If, as in the *Chevron* case, the reviewing court concludes Congress did not provide a clear answer, the statute (more specifically, the term 'stationary source') was determined to be ambiguous.[17] A statute is deemed ambiguous if there is a gap or hole in the statute, or the statute is silent regarding the specific question at issue.[18]

Given a finding of ambiguity (which implicitly captures silence in the statute as well), court review moves beyond step one.[19] The second prong presumes Congress delegated the authority to resolve the statutory ambiguity to the administering agency as long as the court determined that the agency's statutory interpretive choice was reasonable.[20] The *Chevron* decision specifically stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. 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. If, however, the court determines Congress has not directly addressed the precise

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15 Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

16 *Id*. at 840.

17 *Id*. at 843.

18 *Id*. at 843-44.

19 As described below, as the Chevron framework evolved, the reviewing court, before moving to step two, holds ultimate power to determine whether there has been an implicit delegation of interpretive power by Congress to the agency. *Id.* at 843-44.

20 *Id*.

> question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. 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.[21]

Under the *Chevron* framework, the key distinction is to determine whether the source of the law derives from Congress or from the agency before the court may decide how to allocate interpretive power.[22] The Court has ultimate interpretive power to discern the congressional intent written into the statute.[23] While the agency can be an interpretive aid to help the Court identify congressionally-made decisions, the ultimate interpretive authority resides with the court.[24] Accordingly, if the Court does not surpass *Chevron* step one, then an agency does not possess binding interpretive authority regarding a decision that Congress has already made in the statute.[25]

In step two of the *Chevron* analysis, when Congress has not made specific statutory law on the precise question at issue (as it did not in the *Chevron* case with respect to the definition of 'stationary source'), the agency is delegated the responsibility to supply the law. The agency will typically provide the law in the form of a statutory interpretation embodied in a policy regulation to fill the statutory gap.[26] Although, the restrictive language in *Chevron* step one requires Congress to provide the answer to the precise question at issue, the reviewing court may circumvent a statutory command if it is not easily discernable, which facilitates an analysis under *Chevron* step two, transferring interpretive power to an agency.[27] This has led to a fundamental concern with the use of *Chevron*

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21 *Id*. at 842-43.

22 *See id*. at 842, 844, 865-66.

23 Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984); Conor Clarke, *The Uneasy Case Against Auer and Seminole Rock*, 33 YALE L. & POL'Y REV. 175, 180 (2014).

24 5 U.S.C. § 706 (1966).

25 Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. 187, 200-01, 232 (1992) (stating "Congress never implicitly delegated the authority to make binding interpretations of what Congress had in mind; that interpretive task remains for the courts. Congress does and can delegate the authority to make binding rules where it has not made them. That legislative task must be left to the agencies."); An exception to this principle is if Congress expressly delegated in the statute binding interpretive authority to an agency. *See* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. 187, 192-93 (1992).

26 *Chevron U.S.A., Inc.*, 467 U.S. at 843-44.

27 Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 460 (1989) (stating "*Chevron's* language so narrowly circumscribed the judicial function in statutory interpretation that it was difficult,

deference in that an agency could gain lawmaking power to decide what the law is. This is especially problematic when Congress has already created the law on the question at issue,[28] although not in a precise fashion.[29]

If Congress had decided the question at issue (and it will be argued that a congressionally-made decision should not be limited to resolving only precisely expressed commands), ultimate interpretive power stays with the reviewing court. The agency's statutory interpretation only serves as an input into the court's responsibility to produce a statutory interpretation.[30] The reviewing court retains responsibility to discern the congressional decision, even in the case of ambiguity, but not indeterminateness, in the statute.[31] Otherwise, in such a case, the move to step two was incorrect. In short, courts retain binding interpretive power to resolve questions of law that can be resolved by legal analysis, whereas agencies have delegated binding control over questions of policy that can be resolved using legislative-type skills.[32] As well as understanding the nature of the skill required to resolve an interpretive question, there are other implications of the *Chevron* framework which can be instructive for the subsequent examination of theoretical and practical problems with modern *Auer* deference.

B. Evolution of *Chevron* Deference into the *Auer* Deference

It is appropriate and necessary that a doctrine that grants binding deference to an agency's interpretation of a statute is grounded in a legal explanation because binding deference to an agency's interpretation "marks a departure from the

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at first, to believe Justice Steven's opinion could be taken literally. Deference, Chevron seems to say, means accepting any rational meaning the agency chooses to assign to the statute unless the court can find not only that Congress had addressed "the precise question at issue," but also that it had spoken "directly," to provide a "clear," "unambiguously expressed" answer.").

28 Bob Goodlatte, *Presidential power grabs distort democracy: Goodlatte*, USA TODAY (Feb. 1, 2016), https://www.usatoday.com/story/opinion/2016/02/01/presidential-power-grabs-executive-overreach-distort-democracy-congress-should-stop-goodlatte/79643162.

29 It is common to refer to the power transferred to an agency when Congress has not made law as interpretive power. It is more appropriate to refer to the kind of power transferred to the agency as lawmaking power since an agency is acting as a delegate of Congress to perform a legislative task, with the court retaining interpretive power which is a judicial duty to elucidate decisions that Congress has already made in the statute. Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 963-65 (2018) (explaining the distinction between interpretive power and lawmaking power).

30 *See Chevron U.S.A., Inc.*, 467 U.S. at 843-44; David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 336 (2000).

31 *See Chevron U.S.A., Inc.*, 467 U.S. at 843-44.

32 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1224 (2015); Hasen, *supra* note 30, at 332-33.

courts' normal approach to resolving questions of statutory meaning."[33] That is, "[o]rdinarily, to decide a case when an agency is not in the picture, a court would seek to give its own best interpretation of an ambiguous statute."[34] The theoretical framework that supplies the legitimacy and rationales for the *Chevron* framework has been the subject of continuous critical discussion and improvement.

In general, a theoretical model is built on a set of assumptions. First, it is assumed that Congress possesses the legal authority to allocate discretionary authority to create law when a statute is ambiguous or silent either to an administrative agency under the executive branch, or an Article III federal court.[35] However, if the objective of an interpretation of a statute is to discern law that Congress has already made, the reviewing court possesses ultimate interpretive authority.

Second, Congress is assumed to delegate lawmaking power to an agency to resolve statutory ambiguity.[36] The decision to identify an administrative agency as the entity with authority to resolve statutory ambiguity is based on a conception of the term "interpretation" meaning that resolution of statutory ambiguity requires the congressional delegate to fill gaps through public policy.[37] When a term or phrase in a statute is deemed ambiguous, it is the responsibility of the administrative agency to promulgate the law.[38]

An agency is comparatively superior in two ways to a court in making policy decisions, which become regulatory law, equal in force to statutory law.[39] First, an agency possesses superior subject matter expertise. An agency can draw on

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33 Cary Coglianese, *Chevron's Interstitial Steps*, 85 GEO. L. REV. 1339, 1382 (2017).

34 *Id*. at 1347.

35 Cass R. Sunstein, *Chevron as Law*, GEO. L.J., (forthcoming) (manuscript at 15) (available at SSRN: https://ssrn.com/abstract=3225880) (explaining that it is conventional legal analysis that whether courts should defer to agency interpretations of law is a question for Congress to decide (subject to constitutional limitations)).

36 Smiley v. Citibank, 517 U.S. 735, 741-42 (1996) (explaining *Chevron* deference is based on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

37 Jeff Pojanowski, *Showdown in the Supreme Court over Administrative Interpretations of Regulations*, YALE J. ON REG. (Oct. 1, 2014), http://yalejreg.com/showdown-in-the-supreme-court-over-administrative-interpretations-of-regulations-by-jeff-pojanowski/ ("A major premise governing contemporary judicial review of agency interpretations is that the line between interpretation and lawmaking is often illusory. That, much administrative law and scholarship tells us, is why we have Chevron deference when statutes are unclear: an interpreter makes law in statutory gaps and agencies should make these policy choices, not courts.").

38 Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 585 (D.C. Cir. 1997).

39 E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 14 (2005).

the expertise of engineers, economists, public policy experts, lawyers, and other staff trained in specialized policymaking fields within the administrative agency to conduct rigorous analytical studies of alternative policy solutions to the problems specifically or generally identified by Congress in the statute but for which Congress, for various reasons, did not resolve.[40]

Secondly, an agency is located in a politically accountable branch of government that is structured in a manner to be responsive to the demands of the public and, especially, the President. This ties *Chevron's* decision regarding the allocation of interpretive authority to make policy decisions to the democratic principle that policy decisions should reside with the politically accountable branches of government.[41] These "considerations [reasons], however, cannot provide independent legal justifications for *Chevron* deference as much as they reinforce the wisdom of judicial recognition in appropriate circumstances of an implicit delegation to 'the agency charged with the administration of the statute.'"[42] In short, the most cogent justification for *Chevron* deference is based on an assumption that it is a command from Congress.[43]

Under the *Chevron* framework, the reviewing court retains three forms of interpretive power in the sense of ultimate responsibility for discerning the decisions that Congress did make in the statute. First, in step one of the *Chevron* analysis, courts retain ultimate power to decide if Congress clearly resolved the precise statutory question at issue.[44] Second, if the statute is deemed ambiguous,

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40 *Id*. at 14 (quoting Mr. Elliott, who drew on his experience as EPA General Counsel starting in 1989, to provide real world evidence for how *Chevron* caused changes in the dynamics inside agencies as saying "[o]ne result of the *Chevron* induced shift of power to agencies within the Executive Branch, as mentioned earlier, is that agency experts are making more policy decisions rather than agency lawyers and federal courts.").

41 This principle also means that when Congress did make a policy decision in the statute, that instruction must be followed and not usurped by an agency's decision.

42 Coglianese, *supra* note 33, at 1348 n. 42 (quoting Chevron U.S.A. Inc. v Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984)).

43 This article accepts the correctness of this assumption but recognizes that there are compelling arguments that question the constitutional basis of the assumption. For example, Farina, argues that *Chevron* deference is "fundamentally incongruous" with the constitutional accommodation that permitted the delegation of legislative power to agencies. In return for allowing such delegations, the power to say what the statute means must rest with the courts. Thus, *Chevron* deference is at odds with the nondelegation doctrine. Farina, *supra* note 27, at 498; Among others, Justice Thomas, argues that *Chevron* deference is a violation of Article III because courts are assigned the power to say what the law is, or interpretive power. As is explained below, the type of power that Congress delegates to an agency is lawmaking power, not purely interpretive power. Justice Thomas' contention would be supported if, instead, agencies exercised delegated lawmaking power to merely explain what Congress had already decided in the statute. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring).

44 Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S 837, 842-43 (1984).

the court also retains ultimate power at step two of the *Chevron* analysis, to determine the set of interpretations that would satisfy the requirement of a reasonable interpretation.[45] Third, as the *Chevron* framework matured, it became clear that not all agency interpretations are eligible for deference.[46] That is, statutory ambiguity is a necessary condition to move to *Chevron* step two, but it is not a sufficient condition.[47] Given an ambiguity in the statutory provision at issue, the reviewing court retains ultimate authority to determine if Congress implicitly delegated lawmaking power to the agency.[48] In essence, the court must decide if a move to a step two analysis where the agency holds categorical lawmaking power is the appropriate step to resolve the specific ambiguity at issue.

The Court has identified several requirements as to whether the agency has been delegated lawmaking power implicitly to resolve the statutory ambiguity at issue. In *United States v. Mead Corp.*, the Court held that when an agency has been delegated lawmaking power and has exercised that power when it

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45 The set of reasonable interpretations has been described, according to a prominent administrative law scholar, as *Chevron* space. Strauss contends "'*Chevron* space' denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—-that is, its legally delegated or allocated authority." The agency is free to select from among the reasonable interpretations and, if factual or political circumstances change, to change from one reasonable interpretation to another. Peter L. Strauss, *Deference is Too Confusing—Let's Call Them Chevron Space and Skidmore Weight*, 112 COLUM. L. REV. 1143, 1145 (2012).

46 Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. OF CHI. L. REV. 447, 476 n.165 (2013); Two types of deference, categorical and epistemological, are implicated in the article. An agency interpretation is granted categorical deference (in the text, also, called binding or ultimate deference) if the reviewing court must accept the agency interpretation if the court determines it to be reasonable even if the court would have chosen a different interpretation if it instead held ultimate authority. An agency interpretation is granted epistemological deference (commonly referred to as Skidmore deference) if the reviewing court finds the agency's interpretation to be persuasive and adopts the agency interpretation as its own. Persuasiveness is considered a more demanding standard of judicial review than reasonableness. If a court is using the Skidmore standard of review, the court holds ultimate interpretive power. At *Chevron* step one, the court can grant epistemological deference to an agency interpretation, but the court holds ultimate interpretive power. At *Chevron* step two, the agency holds binding interpretive/lawmaking power if the interpretive choice lies in *Chevron* space. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

47 *Chevron U.S.A., Inc.*, 467 U.S at 842-43.

48 Hubbard, *supra* note 46, at 457. The stage in which a reviewing court determines if the agency has been delegated implicitly lawmaking power is an interstitial step. According to Coglianese, the *Chevron* framework conceives of this decision as occurring after the court's step one decision regarding ambiguity, and before the step two decision to consider granting categorical deference to the agency's statutory interpretation. Coglianese, *supra* note 33, at 1361-62. Other scholars refer to these interstitial decisions as occurring at *Chevron* step zero. *See, e.g.,* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 837 (2001).

formulated its statutory interpretation, the interpretation has the legal force of a statute and should be granted categorical deference.[49] Accordingly, if Congress intends for an agency to make law to fill gaps in a statute, Congress must first delegate the lawmaking power to the agency. The agency then must have exercised that power to make law, in a fashion that exhibits fairness and deliberation as does the manner in which Congress exercises its lawmaking power.[50] Unfortunately, the *Mead* decision failed to clarify when the Court should find an implicit congressional delegation of lawmaking power.[51]

The Court has identified other circumstances in which an implicit delegation of lawmaking power should not be inferred from mere ambiguity in a statute.[52] These examples represent circumstances when it seems unlikely that Congress intended to delegate lawmaking power to an agency to make law by resolving a statutory ambiguity. For instance, in *King v Burwell*,[53] the Court did not find an implicit delegation for two reasons, even though the Court determined the statutory provision at issue was determined to be ambiguous and the agency had utilized the notice-and-comment rulemaking process to produce the statutory interpretation. First, the statutory question at issue was considered to be too important in the sense of implicating significant social and economic effects to be left for resolution by an agency without an express delegation from

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49 United States v. Mead Corp., 533 S. Ct. 218, 226-27 (2000) (A court should move to step two "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and that the agency interpretation was promulgated in the exercise of that authority.").

50 *Mead Corp*., 533 U.S. at 230; *Chevron U.S.A., Inc*., 467 U.S. at 843.

51 *See* Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1040 (2005) ("[T]he case did send a clear signal that the Court expects that interpretations produced through either notice-and-comment or formal adjudication will typically enjoy the "force of law.""); Barnhart v. Walton, 535 U.S. 212, 222 (2002) (showing how only one year elapsed before the Court granted categorical deference to an agency's informally produced statutory interpretation explaining that its longstanding status served as an independent ground for such deference); Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1477-78 (2005) (arguing that *Mead* created confusion among the lower courts in their efforts to ascertain the circumstances in which Congress intended to implicitly delegate lawmaking power to agencies).

52 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); Hasen, *supra* note 30, at 350 n.113; *see, e.g.*, Owner-Operator Indep. Drivers v. U.S. Dept. of Transp., 840 F.3d 879, 888 (7th Cir. 2016) (stating how the petitioner reading a single word in isolation ignores the whole statute, which is contrary to what the Supreme Court has held); U.S. House of Representatives v. Burwell, 185 F.Supp.3d 165, 188, (D.D.C. 2016) (reasoning that the defendant's argument that they deserve deference pursuant to their interpretation of 31 USC § 1324 fails).

53 King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015) (discussing how the Supreme Court chose not to find an implicit delegation despite ambiguity after relying on principles of statutory interpretation and Congressional intent).

Congress.[54] Interestingly, if the reviewing court instead found an implicit delegation of lawmaking power, it would grant an agency the authority to change the regulatorily-made law in the future as policy decisions should respond to changing factual circumstances and changes in political administrations. Delegating authority to an agency to make law is also accompanied by the authority to change that law.[55]

Second, the Court determined it was not appropriate for the agency to resolve such an issue since it lacked the necessary policymaking expertise.[56] These are some of the factors that the reviewing court will consider when determining whether there has been an implicit delegation of lawmaking power to the agency. It is evident that the reviewing court holds ultimate power to decide if Congress intended implicitly to delegate to an agency the power to resolve authoritatively the statutory ambiguity.[57]

Suppose that the reviewing court has determined that the statute is ambiguous, and that Congress intended implicitly to delegate lawmaking power to the agency. The nature and extent of judicial scrutiny at *Chevron* step two to determine if an agency's interpretation warrants categorical deference is a question in a state of flux.[58] Recall, the legal theory that underlies *Chevron* is

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54 *Id*.

55 *See* Catherine M. Sharkey, *Cutting In On The Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2417 n. 355 (2018) ("A second response hinges on the particular political stakes—namely that upholding the Act on *Chevron* grounds, giving deference to the IRS's interpretation of ambiguous statutory language, would mean that the Act would be susceptible to political unraveling down the road, should the IRS change its interpretation in a new administration. Indeed, Chief Justice Roberts raised this concern [during the] oral argument [of *King v. Burwell*].") (quoting Transcript of Oral Argument at 76, King v. Burwell, 135 S. Ct. 2480 (No. 14-114)).

56 *King*, 135 S. Ct. at 2489 (explaining how the Court found the IRS wasn't the appropriate agency to decide the relevant issue given its lack of expertise in crafting health insurance policy).

57 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 n.9 (1984); FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981).

58 *Compare* Herz, *supra* note 1, at 1885 (explaining how at Chevron step two, "the agency is no longer on the court's turf, the court is on the agency's" and thus there is little room for judicial scrutiny), *with King*, 135 S. Ct. at 2488-89 (discussing how in extraordinary cases, judicial scrutiny may be required to limit deference under *Chevron* step two), *and* Asher Steinberg, *Encino Motorcars, Cuozzo, and the Impossible Dream of Step Two Arbitrary and Capricious Review*, THE NARROWEST GROUNDS (June 29, 2016), http://narrowestgrounds.blogspot.com/2016/06/encino-motorcars-cuozzo-and-impossible.html (explaining that at step two, interpretive reasonableness should not suffice for a court to hold that an agency's statutory interpretive choice deserves categorical deference. Furthermore, interpretive reasonableness supported by an agency's legal justification for what it determined to be the intention of Congress should also fail the step two test. To warrant *Chevron* deference, an agency needs to satisfy both an interpretive reasonableness standard and a rigorous reason-giving requirement in which the agency supplies empirical and policy-based reasons for its interpretive choice).

that deference is warranted because Congress has implicitly delegated lawmaking power to an agency to make law to fill gaps in a statute.[59] That is, an agency is expected to resolve a statutory ambiguity by making law since the gap represents the absence of congressionally-made law on the issue.[60]

Questions of interest that apply to both *Chevron* and *Auer* deference center upon: (1) distinguishing the mode of reasoning an agency uses to justify its interpretive choice and; (2) whether the kind, or mode of reasoning should be a factor in deciding whether a court grants categorical deference. First, it is important to distinguish the mode of reasoning an agency uses to justify its interpretive choice.[61] One mode of reasoning is prescriptive reasoning. This is when "an agency exercises its discretion to implement a legislative directive by weighing evidence, utilizing technical expertise, and making policy choices."[62] This mode of reasoning is consistent with *Chevron's* underlying theory that assumes that an agency is using its delegated authority to fill gaps in statutory law. This requires an agency to utilize its subject matter expertise and policymaking skills to make legislative-type judgments (reflecting the values of the current Administration) which serve to justify its interpretive choice.

A second, different mode of reasoning is called expository reasoning. This mode of reasoning is when an agency attempts to determine, "what Congress actually intended with respect to a particular issue or what the relevant judicial precedents dictate the proper answer to be."[63] The agency subordinates its authority to what legal texts instruct it to decide. Essentially, an agency is performing a judicial task by approaching the problem with a neutral and dispassionate mind-set, free from political considerations to determine the meaning inherent of a statute or regulation.

However, when an agency relies on prescriptive reasoning, it is making law. Whereas, when an agency relies on expository reasoning, it is making a statement about what the meaning of the law is.[64] It is a logical extension of the distinction between these modes of reasoning to conceive of the *Chevron* framework as demanding the use of expository reasoning at step one and prescriptive reasoning at step two.[65] That is, in the presence of statutory

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59 *Chevron U.S.A., Inc.*, 467 U.S. at 843-44; Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 17 (1990).

60 *Chevron U.S.A., Inc.*, 467 U.S. at 843-44.

61 Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 115 (2011) (describing how an agency's chosen mode of reasoning is an underappreciated feature of agency action and the different modes of reasoning an agency may use to justify a change in its action).

62 *Id*.

63 *Id*. at 117.

64 *Id*. at 141-42.

65 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 n. 9

ambiguity, deference is warranted when an agency selects a statutory interpretation based on its lawmaking skills and explains its interpretive choice using prescriptive reasoning. Comparatively, if the agency relies on expository reasons during step two of the analysis, it is making its interpretive choice to coincide with what it determines to be the interpretation that Congress intended, rather than filling gaps in a statute when Congress had no intention regarding the issue at question. The agency's interpretive choice may be a valuable source for understanding what Congress intended to decide in the statute, but it does not warrant categorical defense based on the theory that underlies the Chevron framework.

At *Chevron* step two, an agency's interpretive choice must fall within the parameters set forth in *Chevron*, which are the set of permissible interpretations, as determined by the reviewing court.[66] But, to earn categorical deference, the agency should be asked to do more.[67] The reviewing court must not only ensure that the agency's interpretive choice falls within *Chevron* space but it must also ensure that the agency's exercise of its discretion within *Chevron* space is not arbitrary and capricious.[68] The Court should consider the reasons an agency provides for its interpretive choice to determine if deference is appropriate. On one hand, an agency that offers expository reasons for its choice, even though it may have used a formal procedure such as notice-and-comment rulemaking, it in effect, offered an interpretive rule for the statute.[69] That is, the agency's legal reasoning merely clarified what Congress intended an ambiguous term to mean even though the reviewing court at step one had concluded that the statute was ambiguous. Apparently, in the agency's view, the statute was ambiguous but not

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(1984) (Courts are instructed to use the "traditional tools of statutory interpretation" to ascertain congressional intent at step one).

66 *Id*. at 843-44.

67 Sharkey, *supra* note 55, at 2371-85 (identifying several cases in which a reviewing court grants categorical deference for an agency's statutory interpretation that falls within the *Chevron* space, but the agency offers either a minimally reasonable explanation for its choice or a legal justification for its interpretive choice. This article agrees with Professor Sharkey that such an approach to step two is not consistent with the underlying assumptions of the *Chevron* framework, that incorporates a reasoned decision-making requirement for its interpretive/policy decision).

68 Peter L. Strauss, *Deference is Too Confusing—Let's Call Them Chevron Space and Skidmore Weight*, 37 ADMIN. & REG. L. NEWS 9, 9 (2012).

69 Sharkey, *supra* note 55, at 2372 (analyzing a water-pollution case, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, involving contrary deference decisions of a district court and the circuit court, the author concludes that the circuit court's decision to grant deference to the agency's interpretation (overturning the district court) was in error: "What is missing from the EPA's legal exegesis is any fact finding, critical analysis, or even explicit acknowledgement of any underlying policy considerations embedded in what is essentially an interpretive rule." In short, the circuit court incorrectly granted categorical deference for a statutory interpretation that was justified using expository reasoning. This type of agency reasoning only warrants less deferential Skidmore deference).

indeterminate.[70] In fact, in reality, the agency made a step one decision under the umbrella of a step two analysis. It is clear, under the legal foundation of *Chevron*, that the reviewing court holds interpretive power in step one decisions and categorical deference for an agency's statutory interpretation is unwarranted. It is likely that some ambiguity in a statute can be resolved satisfactorily by the court's ultimate determination.[71]

On the other hand, when a reviewing court determines whether the agency's statutory interpretation is a reasonable choice it should demand that an agency demonstrate prescriptive reasoning for its choice. The prescriptive reasons should describe how the agency utilized its subject matter expertise and political judgments to make law when there is a gap left by the statute. Expository reasoning should not suffice for it is not intended to fill a gap but merely to clarify existing law.[72] It is time for courts to distinguish, in a case of statutory ambiguity, between agency efforts to determine the law that Congress intended to make from those efforts to make law in gaps in the statute. As Steinberg persuasively argues,

> 32 years after *Chevron* was decided, the Court still doesn't understand—or understands but refuses to admit—that there are no good reasons for mandatory [categorical] deference (as opposed to contingent Skidmore deference) to agency regulations that adopt a particular interpretation of a statute because the agency says the statute is textually best read that way. 32 years after *Chevron* was decided, the Court still doesn't understand—or understands but refuses to admit—that *Chevron* only gives agencies deference on the

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70 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 859-61 (1984).

71 It is recognized that this point runs contrary to the current understanding of administrative law that rejects the interpretation versus policymaking distinction. *See* Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1089-90 (2016) (the thrust of this article is that such a distinction is both coherent and judicially manageable and that "It would represent a triumph of classical, pre-legalist thought that, while aware of the blurriness in the lines between making, executing, and interpreting law, nevertheless insists that the division of these activities was coherent in theory and estimable in practice.").

72 Kozel & Pojanowski, *supra* note 61, at 153-54 (explaining the Kozel and Pojanowski model assumes that expository factors that determine the meaning of existing law are distinct from prescriptive factors that enable an agency to make new law. The authors respond to the argument that their model is too simplistic and that, in reality, "… the process of exposition necessarily entails consideration of factors such as optimal policy and political preferences." The authors provide persuasive rebuttals to this argument. For instance, they (at 154) argue, "even if some ambiguity exists, it is erroneously reductive to assume that the only recourse is application of policy preferences. Disputes over statutory meaning or the trajectory of judicial precedent are more nuanced than that. To be sure, some statutory provisions contain phrases (for example, "in the public interest") that invite prescriptive policy choices. But in many cases considerations of text, structure, and purpose will suggest a best reading exogenous to the decisionmaker's ideology.").

> premise and condition that they do *not* interpret statutes that way, but instead make policy choices that call on expertise, public opinion, and presidential preferences.[73]

Consistent with the modern conception of interpretation that if the line between interpretation and policymaking is blurry, courts face significant difficulty when determining whether the agency's interpretation is explaining existing law or making new law.[74] One way to distinguish between the two modes of reasoning is for the court to examine the reasons an agency gives for its statutory interpretation. The reviewing court should determine whether the agency's reasoning analysis relied on legal interpretation skills (such as reliance on textual analysis, legislative history, the overall structure and purposes of the statutory scheme) or by the use of its subject matter expertise (such as use of cost-benefit analysis and fact-finding) and political judgments. That is, a court is fully capable of assessing the type of reasoning an agency utilized to defend its statutory interpretation unless one subscribes to the view that all statutory interpretation, regardless of the reasoning utilized, is a function of policymaking.[75] But that view of interpretation, paradoxically, is inconsistent with the two-step method implementing the *Chevron* framework.

Chevron distinguishes between the judicial function, exercised by courts at step one and an agency's legislative-like function, exercised when it makes law at step two.[76] In addition, a court can look to what the agency says its interpretation is doing. Does it say, when justifying its statutory interpretation, that it found what Congress intended to be the best policy in the statute or what judicial precedents required it to do? If so, this is a sign that it likely engaged expository reasoning for which categorical deference is not warranted.[77]

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73 Steinberg, *supra* note 58.

74 *Id*. (describing an interesting exchange during oral argument in the case of *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016) between a participating lawyer and Justice Kagan in which the Justice admits that the Court has not taken into consideration for the deference decision at step two the reasons the agency uses to justify its interpretation. Specifically, categorical deference has been granted when the agency merely says that its interpretation is justified because that is how the agency read the statute. Reading a statute would indicate that the agency has not made new law but merely found existing law).

75 *See* Kozel & Pojanowski, *supra* note 61, at 142.

76 *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (describing that "if the statue 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").

77 Steinberg, *supra* note 58 (arguing "[a]nd while a distinction between purely interpretive and policy reasoning might be unadministrable, the proper distinction between agencies that profess to say what Congress meant and agencies that profess to be making policy decisions is probably much easier to draw."); *see also* Herz, *supra* note 25, at 187, 200-01, 229-30, 232 (1992) ("Indeed, absent express delegation of interpretive authority, whenever an agency says, explicitly or implicitly, "we think Congress intended...," its conclusion must be reviewed under step one. What Congress intended is a question for the

II. *AUER* DEFERENCE AS AN EXTENSION OF *CHEVRON* DEFERENCE.

A. Resolution of the tension between interpretation under *Chevron* Deference and the Administrative Procedure Act

The approach to *Chevron* step two analysis emphasizes the conceptual and practical differences, as revealed in judicial precedents and legislative action such as the Administrative Procedure Act ("APA"), between a legislative rule and an interpretive rule.[78] That is, there is a difference between an agency's statutory interpretation that makes law, by the creation of new rights, duties, or responsibilities, and an interpretation that clarifies existing law. But how can this distinction be reconciled with *Chevron's* assumption that policymaking and interpretation are indistinguishable?[79] The tension between the *Chevron* and the APA conception of interpretation is apparent in the Supreme Court case, *Perez v. Mortgage Bankers Association.*[80]

The dispute involved a D.C. Circuit rule that required any administrative agency that changed a definitive interpretation of a regulation, to use notice-and-comment rulemaking for the new interpretation.[81] The Paralyzed Veterans Doctrine arose from concern on the part of the D.C. Circuit court that it was too

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courts. It may be that the agency is wrong, and Congress had no intent, but that is for the court to decide.").

78 Perez v. Mort. Bankers Ass'n, 135 S. Ct. 1199, 1203-04 ("The Administrative Act (APA) establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." The APA distinguishes between two types of rules: So-called "legislative rules" are issued through notice-and-comment rulemaking and have the "force and effect of law." "Interpretive rules," by contrast, are "issued . . . to advise the public of the agency's construction of the statutes and rules which it administers," do not require notice-and-comment rulemaking, and "do not have the force and effect of law,") (citations omitted).

79 Kozel & Pojanowski, *supra* note 61, at 151 (supporting the idea that there are real, underappreciated differences between interpretation and policymaking in *Chevron* although it is common to conclude that the framework is based on the assumption that it is not possible to distinguish interpretation from policymaking. More accurately, under *Chevron*, pure interpretation remains within the authority of the courts to determine all law that Congress has made in the statute whereas policymaking is a result of a congressional command to delegate to an agency the law-making authority to make law when there is a gap in statutory law. "While *Chevron* is most famous for linking policymaking discretion with the resolution of textual ambiguity, another notable feature of the case is its affirmation of how the meaning of legal texts define and cabin administrative discretion.").

80 *Perez*, 135 S. Ct. at 1205 (explaining that a change in the Department of Labor's interpretation of one of its regulation is an interpretive rule that, of course, was not the result of a notice-and-comment rulemaking. The new interpretation concluded that mortgage-loan officers were eligible for overtime compensation).

81 *See* Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579, 587-88 (D.C. Cir. 1997) (creating the new judge-made rule referred to as the Paralyzed Veterans Doctrine).

easy for an agency to flip-flop on an issue that seemingly had been settled by a prior agency interpretation so that the prior interpretation had effectively become part of the law.[82] Of particular concern was that there was no need to use any type of formal process, there was a lack of required public comment, and a lack of rigorous judicial review of the change.

The D.C. Circuit offered a procedural remedy to correct a problem determining that there was no existing *ex ante* procedural check or *ex post* judicial check on possible arbitrary agency action.[83] If one subscribes to the conceptual view that interpretation is policymaking, an *ex-ante* procedural rule is appropriate for a new interpretation which creates new rights and duties that should result from the use of a formal process. Under this conception of interpretation, there is no difference between an interpretive rule and a legislative rule. In either situation, the agency is filling a gap in an ambiguous regulation just as in *Chevron*, where the agency is filling a gap in an ambiguous statute.[84] As such, when an agency changes an interpretation of a regulation it is, in reality, creating new law.[85] With such a view of interpretation, the Paralyzed Veterans Doctrine seemed to make sense. However, the Court found the judge-made doctrine to be inconsistent with APA procedural requirements.[86] The Court's unanimous holding, relying on the literal text of the APA, maintained that there are distinguishing differences[87] between a legislative rule (creates law and requires a formal process) and an interpretive rule (clarifies existing law and no need for a formal process). Since the rule in question was an

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82 *Perez*, 135 S. Ct. at 1203-04 (overturning *Paralyzed Veterans of America v. D.C. Arena* in part and explaining that if the agency is flip-flopping on a legislative rule, then the agency must undergo notice-and-comment rulemaking; however, does not need to use informal rulemaking for interpretive rules); *see* Paralyzed Veterans of Am., 117 F.3d at 586 (requiring federal agencies to engage in notice-and-comment rulemaking when they substantially altered an "interpretive" rule).

83 *See Paralyzed Veterans of Am.*, 117 F.3d at 586.

84 *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

85 *Perez*, 135 S. Ct. at 1203 (explaining that published interpretations do not have the effect of law but are heavily relied upon by the public); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515-16 (2009) (explaining that when an agency changes direction and departs from a prior policy, it need not "provide detailed justification than would suffice for a new policy created on a blank slate"); *see Paralyzed Veterans of America*, 117 F.3d at 586-87 (explaining that their holding applies to subsequent interpretive rules, but not elaborating on whether agencies must undergo notice-and-comment for their initial interpretive rule).

86 *Paralyzed Veterans of Am*., 117 F.3d at 584.

87 Herz, *supra* note 1, at 1881 ("the constitutional structure, the APA's distinction between legislative and interpretive rules, centuries of jurisprudence, and most people's intuitions accept a distinction between interpreting law and making law."); *Perez*, 135 S. Ct. at 1203-04 (relying on the literal text of the APA to draw a distinction between legislative and interpretive rulemaking); *Chevron U.S.A., Inc.*, 467 U.S. at 842-43.

interpretive rule,[88] APA requirements should be strictly followed, and interpretive rules are unambiguously exempt from notice-and-comment.[89] However, the underlying tension between the *Chevron* concept of interpretation and the APA concept was not addressed.[90]

The *Perez* case was resolved as a rather simple case based on APA procedural requirements, but the real fireworks were contained in the three concurrences that raised a controversial issue not at question in the case.[91] The concurrences, while not questioning the Court's decision to deny the authority of a lower court to add a procedural requirement without congressional approval, focused on the lack of strict judicial scrutiny of agency interpretations of their own regulations that results in those rules having binding power on courts.[92] When a court relies on *Auer* deference, interpretive rules lack either *ex ante* procedural protections or *ex post* rigorous judicial scrutiny. This implicates an administrative law principle that is captured by the phrase: "pay me now or pay me later."[93] This means that a more forgiving *ex post* judicial review standard, such as categorical deference, is earned by an agency undertaking rigorous *ex ante* procedures, such as notice-and-comment. However, when a rule is produced in a more informal manner *ex ante,* it should be subject to a stricter ex post judicial review standard, such as an epistemologically-based standard of review.[94] The *Paralyzed Veterans Doctrine* was ultimately an unsuccessful effort to apply this principle.

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88 *Perez*, 135 S. Ct. at 1203-04 (explaining the APA process for rule making and interpretation); *see* Adam J. White, *Perez v. Mortgage Bankers: Heralding the Demise of Auer Deference?,* 2014 CATO SUP. CT. REV. 333, 346-47 (2014-2015) (explaining that the Court asserted that this view was subscribed to by both sides in the dispute, but one can question this assertion).

89 *Perez*, 135 S. Ct. at 1203.

90 Pojanowski, *supra* note 37 (commenting on the D.C. Circuit's rule before the outcome of the *Perez* case stated "Or, if the D.C. Circuit is wrong [as it turned out to be], and if the APA precludes notice-and-comment for modification of interpretive rules, that could be because the APA assumes an understanding of interpretation that is quite less policy-laden than the conventional wisdom in administrative law and scholarship.").

91 *See Perez,*135 S. Ct. at 1210-25 (Alito, J., concurring in part and concurring in the judgment; Scalia, J., concurring in judgment; and Thomas, J., concurring in judgment).

92 *Id.* at 1212, 1224 (Scalia, J., concurring in judgment; and Thomas, J., concurring in judgment).

93 *See* Craig J. Duchossois Revocable Tr. v. CDX Labs., Inc., 495 F.Supp.2d 869, 871 (2006) (explaining phrase "pay me now or pay me later"); David Weyher, *Pay Me Now or Pay Me Later*, SWEET PAY (Aug. 17, 2018), https://sweetwaytopay.com/2018/08/17/pay-me-now-or-pay-me-later/ (explaining how phrase "pay me now, or pay me later" is relevant across goods and services).

94 *See* White, *supra* note 88, at 354, 356.

B. *Auer* Deference Improperly Transfers Law Interpretation Power to the Executive Branch

Why would the Court create a deference doctrine that violated this principle?[95] To begin to understand the answer to the question, one must first realize that, in many ways, today's Auer deference is modelled after *Chevron* deference. It has evolved into a doctrine that grants categorical deference to agency interpretation of its own ambiguous regulations with some exceptions to deference,[96] just as *Chevron* grants categorical deference to an agency's statutory interpretation subject to some exceptions.[97] However, the *Auer* doctrine is not supported with its own theoretical model but instead has resorted to explanations based on an assumption that an agency knows its rules better than anyone else and its similarity to *Chevron*.[98] In fact, proposals for improvement in *Auer* often suggest that the limitations in *Auer* should be modelled after those that apply for *Chevron*.[99]

Before further incremental improvements to the modern conception of *Auer* should be considered, one must first consider whether there is legal justification for a court to give binding deference to an agency's interpretation of its own regulation. There is no legal justification for a court to give categorical deference to an agency's interpretation of what an existing regulation means.[100] Recall, in

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95 *See* Robert A. Anthony & Michael Asimov, *The Court's Deferences—-a Foolish Inconsistency*, 26 ADMIN. & REG. NEWS 10, 11 (2000) (arguing that the APA contemplated plenary judicial review of interpretive rules. Auer deference "contradicts the reason the framers of the APA included an exception [to notice-and-comment] for interpretative rules in Section 553; namely, that such rules are subject to "plenary judicial review."); Herz, *supra* note 25, at 213 n. 131 ("The Senate Report accompanying the Administrative Procedure Act explained that notice and comment was unnecessary for interpretive rules because these "rules"—as merely interpretations of statutory provisions –are subject to plenary judicial review." S. DOC. NO. 248, 79TH CONG., 2D SESS. 18 (1946)).

96 *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166-67 (2012) (showing that *Auer* Deference is not appropriate in all cases, for example, "when the agency's interpretation is plainly erroneous or inconsistent with the regulation," "when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question," or "when it appears that the interpretation is nothing more than a convenient litigating position, " or "post-hoc rationalization.").

97 *See, e.g.,* King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (suggesting that *Chevron* should not apply when a "question of deep economic and political significance" is at issue and Congress has not explicitly delegated authority to an agency to deal with the issue).

98 Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J.L. & PUB. POL'Y 87, 90 (2018).

99 *See, e.g.,* Brief of Professors—Dean Ronald A. Cass, Christopher C. Demuth, Sr., and Christopher J. Walker—As *Amici Curiae* in Support of Petitioner at 15-16, Gloucester County School Bd. v. G.G. ex rel. Grimm, 136 S. Ct. 2442 (2016), (No. 16-273) (arguing among other things, that Auer should not only follow Chevron deference in its application to agencies who have not clearly been given discretion but should be stricter in its application).

100 The one exception to this conclusion is if Congress gives the agency explicit authority to make such an interpretive determination. However, there seems to be little legal

Chevron, the Court provided that the power that Congress delegated to an agency was power that it had been vested with pursuant to Article I of the Constitution, that is, the power to make law.[101] Although, the *Chevron* decision labelled this as a delegation of interpretive power, it is more appropriately considered a conferral of lawmaking power to fill gaps in statutory law.[102] Congress did not delegate interpretive power granting an agency deference for its understanding of the commands that Congress issued in the statute. Furthermore, as with *Chevron* deference, it is not up to reviewing courts to decide whether they should defer to an agency regulatory interpretation, it is Congress' decision.[103]

The basic premise of modern *Auer* deference is that when Congress delegates lawmaking power to an administrative agency this includes a delegation of interpretive power to the agency to say what its own regulations mean.[104] There are several flaws in this premise. First, one reason that Congress is permitted to delegate lawmaking power to an agency is because it can directly control the magnitude of the power delegated by how specifically it writes its statutory commands and by inclusion of an intelligible principle to cabin the agency's discretion. The magnitude of an agency's discretion is directly controlled by Congress.[105] No such argument can be made with respect to an indirect delegation of authority. Congress has little control over the specificity an agency uses when it writes a regulation.[106] In fact, one of the complaints about *Auer* deference is that the doctrine encourages an agency to write ambiguous regulations to which it can subsequently add specificity in order to make real policies by using interpretive rules (rules lacking either *ex ante* procedural or *ex*

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justification for a court to find an implicit delegation of such interpretive authority.

[101] Chevron U.S.A. v. Nat'l Res. Def. Council, Inc., Inc., 467 U.S. 837, 844 (1984).

[102] Siegel, *supra* note 29, at 964-65.

[103] *Chevron U.S.A., Inc.*, 467 U.S. at 842-43.

[104] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 680-81 (1992) (identifying how the premise of *Auer* deference is inconsistent with a constitutional requirement that the lawmaking and law interpretation functions should be controlled by separate branches of government. Under this view, *Chevron* deference does not violate the constitutional requirement because Congress writes the law that an agency interprets. In contrast, if a court grants categorical deference to an agency interpretation of one of its own regulations, the same entity is engaged in both functions); *see also* Peter M. Torstensen Jr., *The Curious Case of Seminole Rock: Revisiting Judicial Deference to Agency Interpretations of their Ambiguous Regulations*, 91 NOTRE DAME L. REV. 815, 817 (2015) (noting a common-sense argument for *Auer* deference that "if Congress intends to have an agency resolve ambiguities in a statute, surely [. . .] it intends for an agency to resolve ambiguities in its own regulations.").

[105] Elliott, *supra* note 39, at 6-7.

[106] Manning, *supra* note 104, at 662 (arguing that when agencies self-interpret vague rules through adjudication, the efficacy of notice-and-comment rulemaking is reduced).

post judicial protections for the public).[107]

Second, when Congress delegates lawmaking power to an agency, it is reducing its own legislative power, while also increasing the power of the other political branch of government.[108] This alters the balance of power between the two political branches. With *Auer* deference, the issue is not simply the transfer of power but the enhancement of executive power since the agency retains power to make regulations and adds interpretive power over its own ambiguous regulations.[109] This can potentially lead to a dangerous accumulation of power in the executive branch.[110]

Third, in *Chevron*, Congress is directly delegating its power to a different branch of government.[111] In contrast, the *Auer* premise assumes that Congress' delegation of lawmaking power implicitly includes a subsumed, indirect delegation of power. This implies that the initial grant of authority from Congress effectively assigns authority to an agency to delegate to itself interpretive power over its own regulations.[112] Self-delegation is not consistent with the lawmaking authority that Congress can exercise or with the constitutional imperative to separate the three branches of government. These flaws were neither acknowledged nor addressed in Court decisions implicating modern *Auer* deference until Justice Scalia began to call for reexamination of the doctrine in 2011.[113] It is now evident that the *Auer* premise is built on a shaky foundation. The deference doctrine has been propped up with additional limitations but still lacks a solid theoretical explanation.

Furthermore, proponents in favor of Congress delegating lawmaking power to an agency to make law to fill gaps in statutory language, argue the agency holds subject matter expertise and remains politically accountable. However, these policies do not necessarily apply to the interpretation of an existing, ambiguous regulation. According to the APA, an interpretive rule is not intended to make a new policy choice but rather to clarify how the agency interprets a

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107 Pojanowski, *supra* note 98, at 91.

108 Manning, *supra* note 104, at 654 (urging that if Congress does not specify policies clearly during the process of bicameralism and presentment, it risks giving power to another).

109 *See* White, *supra* note 88, at 334-35 (describing how agencies are unaccountable to the 'people' yet make most of the federal law through their regulations or adjudications).

110 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (Alito, J., concurring) (describing that *Auer* deference contributes to the increasing power of administrative agencies).

111 *See* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

112 *See* Brief of Professors, *supra* note 99, at 6 ("The discretionary authority granted to the agency by law should not be seen as a "nested" grant of authority—-akin to a set of Russian "matryoshka" dolls—-with each grant containing an implicit sub-grant of further discretion…").

113 Talk America, Inc. v. Michigan Bell Telephone Co., 564 U.S. 50, 67 (2011) (Scalia, J., concurring).

regulation it has already promulgated.[114] One would expect an agency to rely on expository reasoning to justify its interpretive rule. If the agency is, in fact, making new policy with an interpretive rule, then the agency is obligated to use notice-and-comment and *Auer* deference is inapplicable.[115] A signal that the agency is making policy is if it relies on prescriptive reasoning for its interpretation. A purported interpretative rule that, in reality, creates new policy should be classified as a legislative rule, subject to the *Chevron* framework. In other words, there is a fundamental difference between an agency creating new policy in a gap in an ambiguous regulation and an agency clarifying an existing regulation. An implicit delegation of lawmaking power to an agency to fill in gaps in an ambiguous statute is rooted in a solid theoretical model but there is no such theoretically-justified model for Congress to assign power implicitly to an agency to interpret an existing regulation that it had itself promulgated.[116]

Notwithstanding the failure to articulate a convincing theoretical, or legal explanation for an implicit self-delegation of interpretive power to an agency for its own regulations and similar to how the *Chevron* deference model has evolved, the Court has created a preliminary step to assess whether Congress intended to delegate implicitly interpretive power to an agency to clarify agency policy decisions inherent in one of its legislative regulations.[117] For instance, in the *Perez* decision, the Court identifies situations in which *Auer* deference is not appropriate. The Court said, "*Auer* deference is inappropriate 'when the agency's interpretation is plainly erroneous or inconsistent with the regulation' or 'when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment.'"[118]

Alternatively, exceptions to *Auer* deference are accurately portrayed to address situations when it is unlikely that an agency's regulatory interpretation is truly an interpretive rule. For example, the Court created the "parroting exception" in which, if the Court finds that an agency's legislative rule merely parroted the statute, then *Auer* deference is denied to an agency's regulatory interpretation since the interpretation is not of the regulation but of the statute.[119] Accordingly, the agency regulatory interpretation is, in fact, likely making new

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114 *See Perez*, 135 S. Ct. at 1203.

115 Air Transport Ass'n v. Dep't of Trans., 900 F.2d 369, 376 (D.C. Cir. 1990), *vacated on other grounds*, 111 S. Ct. 944 (1991).

116 Hasen, *supra* note 30, at 344-45.

117 *Perez*, 135 U.S. at 1208 n.4 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)).

118 *Id*.

119 Gonzales v. Oregon 546 U.S. 243, 257 (2006) (explaining that "[s]imply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute.").

policy in a gap left by the statute and not clarifying an existing regulation. That is, the agency regulatory interpretation is not of the regulation but of the statute and should be subject to the standard of review for statutory interpretations. The agency, by parroting the statute, failed to use its policymaking skills, which should have been expressed in its prescriptive reasoning in promulgating the legislative rule, but instead applied those skills in a subsequent setting to make policy absent the procedural protections that such policymaking demands.

Auer deference is denied when the reviewing court finds that the interpretive rule is "plainly erroneous or inconsistent with the regulation."[120] First, an inconsistent interpretation suggests that rather than clarifying an existing policy, the agency has attempted to create a new regulation without use of notice-and-comment. In *Christensen v. Harris*,[121] the Court attempted to enforce the line between interpretations and amendments to existing regulations by suggesting that an interpretation that differs from the clear meaning can be viewed as an attempt by the agency, "under the guise of interpreting a regulation, to create de facto a new regulation."[122] Second, a finding of plainly erroneous indicates that the court found no logical connection between the regulation and what the agency says the regulation means. If so, the interpretation is likely to be a new policy. In each of these situations, deference is unwarranted when a court finds the agency failed to provide clarification of an existing regulation.

Other recent exceptions to *Auer* deference have little to do with whether a court finds an implicit delegation of interpretive power to an agency for its own regulations. For instance, in *Christopher v. SmithKline Beecham Corp.*,[123] the Court denied *Auer* deference because the Department of Labor changed its interpretation of a regulation that resulted in an "unfair surprise" for regulated parties. Whether there was an implicit delegation of interpretive power is irrelevant to the reason for the denial of deference. Rather the exception to deference reflects a concern on the part of the court to ensure that regulated parties have sufficient notice of the rules that govern them.[124]

There is little doubt that *Auer* deference has evolved in a manner patterned after *Chevron* deference.[125] To expand on this point, Professor Pojanowski identified two related features describing the modern view of *Auer* deference.

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120 Auer v. Robbins, 519 U.S. 452, 461 (1997).

121 Christensen v. Harris, 529 U.S. 576, 588 (2000).

122 *Id*.

123 Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2159 (2012) (discussing the Department of Labor's change in an interpretation of a regulation identifying employees that were exempt from statutory requirements regarding overtime pay).

124 Pojanowski, *supra* note 98, at 97.

125 *Id*. at 90 ("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."); *see also* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part).

He states,

> [f]irst, it understands *Seminole Rock/Auer* 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 typologically (with a "/") and jurisprudentially on the terms of *Chevron*.[126]

Each feature of the conventional wisdom is incorrect. First, the legal theory that underlies *Chevron* along with the justifications for judicial deference do not transfer to the *Auer* framework.[127] Second, *Seminole Rock* deference is a fundamentally different doctrine from *Auer* deference in the type of deference called for and the reasons justifying a form of deference.[128] It is time for the Court to return to *Seminole Rock*. To demonstrate this latter point, consider the view of the deference that was embodied in the original *Seminole Rock* case.

III. RETURN TO *SEMINOLE ROCK* DEFERENCE.

The *Seminole Rock* case involved an interpretation by the Office of Price Administration ("OPA"), of a regulation that it wrote to implement the directives contained in the Emergency Price Control Act of 1942.[129] Specifically, the question at issue centered on the meaning of the regulatory term "Highest price charged during March, 1942."[130] In resolving the case, the Court announced that since the legislative rule was determined to be ambiguous, deference should be given to the regulatory interpretation. The court stated, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[131] Subsequently, the rule has been interpreted to mean that an agency's interpretations of its own regulations are eligible for categorical deference if they satisfy the generous standard established by the Court in *Seminole Rock*.[132] The Court provided no legal foundation for the rule but did cite several factors that seemed to contribute to its holding: (1) the fact that the interpretation was published contemporaneously with the regulation, (2) agency personnel in the OPA had published a document that explained in detail how the OPA interpreted the

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126 Pojanowski, *supra* note 98, at 92.
127 See notes 64-73 and accompanying text.
128 Pojanowski, *supra* note 98, at 97.
129 *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 412 (1945).
130 *Id*. at 414.
131 *Id*.
132 *Id*. 413-14.

regulation's meaning, and (3) agency personnel had responded in a consistent manner to regulated parties inquiries regarding how they should go about complying with the regulation.[133] Each of these factors can be viewed as contributing to the Court's trust in the agency's understanding of the intent of the regulation, a regulation that the same agency personnel had contemporaneously constructed.

Pojanowski has argued persuasively that the decision in the *Seminole Rock* case can be viewed as the application of a judicial standard established by the Court in the previous year.[134] In *Skidmore v. Swift Co.*,[135] the Court addressed the amount of credence reviewing courts should give to agency statutory interpretations. Thus, the decision in *Seminole Rock* can be viewed as a natural extension of the Court's recently articulated view of the appropriate standard of review for agency statutory interpretations to an issue implicating an agency regulatory interpretation. Under the *Skidmore* standard, the Court holds final interpretive authority of a statute or regulation.[136] The objective of the court is to find the correct interpretation of the decisions inherent in the legal text.[137] Courts consider agencies to be a potentially highly valued source of knowledge with respect to identifying the inherent meaning of the text. Nonetheless, the reviewing court will only give considerable weight to an agency's interpretation if the court determines it to be persuasive. In making its decision, a reviewing court is instructed 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 the factors which give it power to persuade, if lacking power to control."[138] In the *Mead* decision, the Court reintroduced the *Skidmore* standard and concluded that it is the default standard of review for an agency's statutory interpretation if the court determines that the interpretation does not qualify for consideration of categorical deference.[139] A similar conclusion should be applied to an agency's regulatory interpretations, that an interpretive rule is not the result of an agency exercising delegated legislative power.

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133 Brief of Professors *supra* note 99, at 17-20; *see* Michael P. Healy, *The Past, Present and Future of Auer Deference: Mead, Form and Function in Judicial Rule of Agency Interpretations of Regulations*, 62 KAN. L. REV. 633, 636-37, 639 (2014) (explaining the deference given to agency interpretations by courts).

134 Pojanowski, *supra* note 98, at 92.

135 Skidmore v. Swift Co., 323 U.S. 134, 139-40 (1944).

136 *Id*.

137 Contrast this objective to that in *Chevron* where the agency, using delegated power, is making law in a gap in a statute because Congress did not resolve the issue. There is no congressionally-made correct answer to be found but only an interpretation that can reasonably fill the gap in a text.

138 *Skidmore*, 323 U.S. at 140.

139 United States v. Mead Corp., 533 U.S. 218, 234-35 (2001).

In considering the weight a court assigns to an agency's interpretation of a legal text, the court retains final interpretive authority.[140] In contrast to the *Chevron* doctrine that provides for the possibility of a grant of categorical deference (thus, transferring interpretive power from a court to an agency), there is no need to develop a new legal theory for a doctrine that provides only for the reviewing court to determine the weight to be given to an agency legal interpretation. Rather, what is needed is a rationale to justify the weight that a court should assign to an agency interpretation. In the 1940s, a widely used approach for conducting textual interpretation focused on discerning the intentions of the author of the text, such as Congress for a statute, or an agency for a regulation.[141] For instance when considering a regulation created by an agency, it seems intuitive to give considerable weight to an agency's view of what the authors of the regulation intended for it to mean. A reviewing court would look for signs of authorial reliability or unreliability in deciding how much weight to give to the agency's regulatory interpretation.[142]

At the time of the *Seminole Rock* case, there was no conception of an interpretive model that viewed the agency as having relied on congressionally delegated lawmaking power to make law by filling gaps in ambiguous regulations. Rather, the agency regulatory interpretation was of probative value to the extent that it could help the court identify the inherent meaning of a regulation. One key indicator of a reliable author, that was present in the *Seminole Rock* case, is if the regulation and its interpretation were contemporaneously promulgated.[143] On the other hand, as is now quite frequently the case (e.g., see details of *Perez* and *Christopher* cases)[144], an agency purports to clarify the meaning of a regulation that was promulgated many years prior to the agency interpretation.[145] Such a post-promulgation

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140 White, *supra* note 88, at 353.

141 Pojanowski, *supra* note 98, at 92.

142 *Id*. at 95 ("Under *Skidmore*, an administrative author's account need not be decisive: an author's hasty, poorly reasoned, inconsistent, or plainly countertextual claim about the meaning of its legal pronouncement would raise suspicions about the sincerity or reliability of the narrator.").

143 Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979).

144 *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015); Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 153 (2012).

145 *See* Stephen M. DeGenaro, *Why Should We Care About An Agency's Special Insight*, 89 NOTRE DAME L. REV. 909, 924 (2014) ("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. 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.").

interpretation is more likely to reflect the political views of the current administration rather than the original intent of the promulgating agency.[146] However, a court is likely to assign less weight to an agency's non-contemporaneous interpretation if the court is interested in understanding the original meaning of a regulation when it decides on its regulatory interpretation. Nevertheless, because under the *Skidmore* standard, the court is instructed to consider all factors that have the power to persuade the court, there may be other factors that indicate to the reviewing court that the current agency's regulatory interpretation should be given considerable weight.[147] A court should give serious consideration to all of an agency's expository reasons (which are the appropriate kinds of reasons to support an agency's understanding of the inherent meaning of a static text). Further, the special insight that the author possesses given its authorship of the underlying regulation should be considered as an expository reason that warrants epistemological deference.[148] There is no logical justification for an agency to exercise its purported policymaking strengths in this purely interpretive endeavor. Instead, the policymaking strengths, as reflected in prescriptive arguments, are expected to be exercised when an agency fills gaps in an ambiguous text to promulgate a legislative rule since there is an absence of already-made law.

Problems critics have with modern *Auer* deference—such as self-delegation, unclear regulations, and unfair surprise—stem from the separation of the doctrine from its historical roots,[149] and its subsequent connection with a *Chevron*-inspired view of interpretation as an exercise of delegated power to fill gaps. If the doctrine was returned to its original understanding, the limitations placed on the modern *Auer* doctrine can be viewed as denying deference in situations in which the reviewing court is likely to have found the agency to be an unreliable source of what the regulation meant.[150] For example, when an

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[146] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 104 S. Ct. 2778, 2782 (1984) (The court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

[147] Skidmore v. Swift Co., 323 U.S. 134, 140 (1944).

[148] A reviewing court should also other consider pre-promulgation materials. Sources that can aid a reviewing court to discern the original meaning of an agency's regulation include (a) the statement of basis and purpose (Noah calls this the final preamble), (b) regulatory analyses, and (c) other published documents. Lars Noah, *Divining Regulatory Intent: The Place for a Legislative History of Agency Rules*, 51 HASTINGS L.J. 255, 260 (2000) ("This Article juxtaposes the contrasting judicial approaches to the interpretation of statutes and regulations in order to suggest that the courts have got it backwards when they largely ignore an agency's original intent in promulgating a legislative rule.").

[149] Pojanowski, *supra* note 98, at 97.

[150] *Id*. (replacing categorical deference with epistemological deference means that an agency is not given the power of self-delegation. The court holds ultimate authority to determine the meaning of an ambiguous regulation with the agency's interpretation likely to

agency promulgates a regulation that parrots the statute,[151] the reliability of the agency's interpretation can be questioned since the agency is not the author of the interpreted text.[152] When an agency's interpretation of a regulation creates an unfair surprise,[153] this raises concerns about the reliability of current agency in understanding the original, inherent meaning of the regulation.[154] Further, proper use of an interpretive rule should not incorporate the current political considerations of the current agency to give new meaning to a regulation promulgated by a previous agency and administration. Flip-flops in interpretive rules raise exactly this suspicion. Pojanowski concludes that "[i]n fact, by withholding *Auer* deference in the context of parroting regulations and unfair surprise, the Court, as a practical matter, is already backing into its original approach to *Seminole Rock*."[155]

IV. CONCLUSION.

The APA distinguished between two types of rulemakings, an interpretive rule, which is an interpretive effort intended to clarify existing law and a legislative rule, which is the policymaking effort intended to create new law.[156] *Chevron* blurred the conceptual difference between these two efforts in the case of an agency delegated interpretive power to resolve statutory ambiguities. However, while "*Chevron* does not make agency 'interpretation' of statutes binding on the courts, it does require acceptance of agency lawmaking."[157] Courts should retain ultimate interpretive power to clarify a decision that Congress made in *Chevron* cases. If a case proceeds to step two, the deference

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be given considerably weight when determined by the court to be a reliable source of meaning).

151 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.").

152 Pojanowski, *supra* note 98, at 98.

153 Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156, 158 (2012).

154 Pojanowski, *supra* note 98, at 95.

155 *Id*. at 99.

156 *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1215 (2015) ("The Administrative Act (APA) establishes the procedures federal administrative agencies use for 'rule making,' defined as the process of "formulating, amending, or repealing a rule."); 5 U.S.C. § 551(5). The APA distinguishes between two types of rules: So-called "legislative rules" are issued through notice-and-comment rulemaking, *see* §§ 553(b), (c); and have the "force and effect of law," Chrysler Corp. v. Brown, 441 U.S. 281, 302-03 (1979). "Interpretive rules," by contrast, are "issued . . . to advise the public of the agency's construction of the statutes and rules which it administers," Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995), do not require notice-and-comment rulemaking, and "do not have the force and effect of law." *Perez*, 135 S. Ct. at 1201-02.

157 Herz, *supra* note 25, at 187 n.3, 190.

step, courts must ensure that the reasoned decision-making requirement is satisfied. If an agency uses expository reasoning to justify its interpretation of a statutory ambiguity, it does not deserve categorical deference but should instead be considered for epistemological deference. In fact, any interpretive effort by an agency, whether of a statute or a regulation, should not be a candidate for categorical deference. If resolving legal uncertainty requires technical and political choices, rather than legal craft, then an agency's interpretive effort, which should correctly be called a legislative effort, should be a candidate for categorical deference. For such a rule, there is no role for modern *Auer* deference, only *Chevron* deference. Unfortunately, a failure to distinguish the mode of reasoning an agency uses has led to a failure to follow the instructions Congress provided. This is true in general of the APA and specifically in its statutory commands to a specific administrative agency.

Although while it might appear that the theory underlying the models for *Chevron* deference and *Auer* deference are similar, they are fundamentally different. *Chevron* deference involves agencies, using their superior subject matter expertise (compared to courts) and congressionally delegated authority to fill gaps in the statute by making law in the form of legislative rules. In this scenario, *Chevron* calls upon courts to give categorical deference to the agency's statutory interpretation, which should be expressed through prescriptive reasoning. *Auer* deference involves agencies, using their special insight into understanding the intentions of the promulgator of the regulation, that is, the agency itself, should be viewed as a convincing source of what an ambiguous regulation actually means. The agency presents its understanding of the legislative rule, expressed using expository reasoning and in the form of interpretive rules, which warrant epistemological consideration from the reviewing court. Relying on prescriptive reasons to clarify the meaning of an existing legislative rule is irrational.

This conception of interpretation requires reviewing courts to distinguish between interpretation and policymaking. This implies that, in practice, there are some interpretive questions, ambiguous but not indeterminate, that can be resolved using law finding skills (i.e., legal craft) while others require lawmaking or policymaking skills. Agencies, by the expression of the actual kinds of reasons they provide for their interpretive choice and by what they say they are attempting to achieve with the interpretive choice, warrant epistemological deference (i.e., *Skidmore* deference) for regulatory interpretation questions and categorical deference for statutory interpretation questions that are supported by prescriptive reasoning. There is neither any place for nor theoretical justification for *Auer* deference. Agency interpretive rules should be subject to a lesser form of deference which matches the original concept of *Seminole Rock* deference.