Beyond *Seminole Rock*

Aaron L. Nielson*

Seminole Rock *deference—which requires courts to defer to an agency's interpretation of its own ambiguous regulations—may be living on borrowed time. Although it might seem harmless, many worry that* Seminole Rock *violates the maxim that the same hands should not both make and interpret the law. Indeed, the fear is that this combination of powers may create incentives for agencies that value flexibility to promulgate ambiguous rules that they can later clarify retroactively to the detriment of regulated parties who lack notice regarding their legal obligations. The upshot is that several Justices of the Supreme Court have called for* Seminole Rock *to be revisited.*

What has been overlooked, however, is that overruling Seminole Rock *would have unintended consequences. This is because another case,* Chenery II*, enables agencies to put parties in a similar bind simply by not promulgating rules at all. Under* Chenery II*, an agency has discretion whether to promulgate rules or instead give meaning to statutes by case-by-case adjudication. Because the doctrines are substitutes for each other, albeit imperfect substitutes, if the Court were to overrule* Seminole Rock*, agencies that place a high value on their own future flexibility could achieve it by pivoting to* Chenery II*. Yet for regulated parties, this substitution sometimes could be worse than the status quo because even an ambiguous rule generally provides more notice than an open-ended statute. Equally troublesome, because overruling* Seminole Rock *would discourage rulemaking, it would reduce public participation in the regulatory process.*

The insight that Seminole Rock *and* Chenery II *are interconnected—meaning what happens to one affects the other—may counsel in favor of stare decisis. Importantly, however, if the Supreme Court is inclined to overrule* Seminole Rock*, it could also revisit aspects of* Chenery II *to prevent problematic substitution. For instance, the Court could begin affording* Skidmore *rather than* Chevron *deference to statutory interpretations announced in adjudications and could also bolster the fair notice doctrine. Each of these mitigation devices, moreover, finds support in the Court's cases. Absent such revisions, overruling* Seminole Rock *may harm the very people the Justices hope to help.*

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"Because Chenery *establishes the right to forgo rulemaking altogether, the agency's ability to flesh out an imprecise or vague rule through adjudication arguably only gives the agency discretion that it already has."*[1]

—Professor John Manning

"This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as of those who are subject to authority."[2]

—Justice Robert Jackson

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INTRODUCTION

The days of *Bowles v. Seminole Rock & Sand Co.*[3] may be numbered. At least as it has come to be understood, *Seminole Rock* deference—also commonly called *Auer* deference—commands courts to defer to an agency's interpretation of its own ambiguous regulations.[4] Such deference may sound innocent. After all, who knows better than the agency that drafted them what its own regulations mean? And, in any event, shouldn't the same sort of pragmatic administrability and accountability notions that underlie *Chevron*[5] apply with at least equal force when it comes to interpreting regulations? Yet the U.S. Supreme Court in recent years has questioned this deference.[6] Indeed, the Court cast doubt on

3. 325 U.S. 410 (1945).
4. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (restating *Seminole Rock*).
5. *See generally* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
6. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 n.4 (2015) (Sotomayor, J.); *id.* at 1211 (Scalia, J., concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring); *id.* at 1339–42 (Scalia, J., dissenting); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 67–69 (2011) (Scalia, J., concurring); *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

Seminole Rock in a majority opinion in 2012.[7] And in 2015, Justice Sonia Sotomayor, writing for the Court, "expressed clear reservations about *Seminole Rock*."[8] Nor is this skepticism limited to the judiciary. Prominent scholars have also called for *Seminole Rock* to be overruled outright, or at least better controlled.[9]

What is it about deferring to an agency's interpretation of its own rules that triggers such reactions? It cannot be hostility to deference generally. *Chevron* deference, for instance, may have had no more forceful friend than the late Justice Antonin Scalia[10]—who also happened to be the Court's most vocal critic of *Seminole Rock*.[11] Nor are *Seminole Rock*'s detractors driven by distrust of rulemaking. Justice Clarence Thomas has questioned whether notice-and-comment rulemaking is always (or even often) constitutional,[12] but the rest of the Court accepts it, even while questioning other aspects of the administrative state.[13] Why then the animosity for *Seminole Rock*?

The reason is that many have come to believe that *Seminole Rock* is uniquely problematic. With *Chevron*, one actor—Congress—makes the law while another actor—an agency—interprets it. But with *Seminole Rock*, the same actor—an agency—makes law and then interprets the very law it made.[14] This dynamic, many fear, creates incentives for regulators to promulgate "vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process."[15] In other words, the worry is that agencies that do not want to pin themselves down today (that is, agencies that value having options going forward) may seize such flexibility for themselves by promulgating ambiguous rules. This strikes many as problematic. Indeed, *Seminole Rock* may "contravene[] one of the great rules of separation of powers: He

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7. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167–68 (2012); *see also* Kevin M. Stack, *The Interpretive Dimension of* Seminole Rock, 22 GEO. MASON L. REV. 669, 670 (2015) (noting the potential implications of *Christopher*).

8. Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 52 (2015) (citing *Perez*, 135 S. Ct. at 1208 n.4). Of course, this should not be overstated; although Justice Sotomayor did not wholeheartedly embrace *Seminole Rock*, neither did she call for it to be overruled. *See infra* Section I.C.

9. *See* Manning, *supra* note 1, at 681; Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1452–53 (2011) (rejecting some potential modifications and urging others).

10. *See, e.g.*, Lisa Schultz Bressman, Chevron*'s Mistak*e, 58 DUKE L.J. 549, 562 n.51 (2009) (noting that Scalia has been described as "*Chevron*'s strongest defender") (alterations omitted) (citing Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 871–72 (2001)); *see also* City of Arlington v. FCC, 133 S. Ct. 1863, 1868–75 (2013) (Scalia, J.); United States v. Mead Corp., 533 U.S. 218, 239–41 (2001) (Scalia, J., dissenting).

11. *See, e.g.*, *Decker*, 133 S. Ct. at 1339–42 (Scalia, J., concurring in part and dissenting in part).

12. *See* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring).

13. *See, e.g.*, *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting).

14. *See, e.g.*, *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

15. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

who writes a law must not adjudge its violation."[16] As John Manning has explained, the maxim that the "same hands" who make the law must not determine what it means has a pedigree going all the way back to "Locke, Montesquieu, and Blackstone" and was endorsed during the constitutional founding.[17] Accordingly, the theory goes, walking back from *Seminole Rock* may encourage "self-restraint" on the part of regulators—thus upholding "a separation of powers tradition designed to promote government by law and limit government by discretion."[18] For such reasons, Justice Thomas has aggressively called for *Seminole Rock* to be overruled, and others on the Court have suggested their willingness to consider the issue.[19]

At the same time, of course, others have defended *Seminole Rock*. Cass Sunstein and Adrian Vermeule, for instance, contend that nothing in the Constitution or statutory law forbids *Seminole Rock* and that, in fact, this form of deference is both good law and policy.[20] Nor is retroactivity necessarily fatal; indeed, Congress *already* sometimes authorizes retroactive rulemaking.[21] Moreover, there are other examples of the "same hands" both creating and applying legal rules.[22] And finally, even assuming *Seminole Rock* may allow agencies to promulgate skeletal rules that can be fleshed out later,[23] should that possibility overcome stare decisis? Suffice it to say, which side has the better of the spirited fight over the merits of *Seminole Rock* is a question that may be decided by the Supreme Court.

What has been overlooked, however, is that there is another reason why overruling *Seminole Rock* might be a mistake: it may harm the very people the Justices hope to help. The reality is that agencies that value flexibility can obtain it either by promulgating an ambiguous rule (hence the criticism of *Seminole Rock*), or, instead, by falling back on another venerable administrative

16. *Decker*, 133 S. Ct. at 1342 (Scalia, J., concurring in part and dissenting in part); *see also id.* at 1341 ("[T]he power to write a law and the power to interpret it cannot rest in the same hands.") (citing BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6, at 151–52 (Oskar Piest ed., Thomas Nugent trans. 1949).

17. Manning, *supra* note 1, at 644–46 (collecting citations).

18. *Id.* at 648.

19. *See infra* Section I.C.

20. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, U. CHI. L. REV. (forthcoming 2017); *see also* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1310 (2012) (explaining that many criticisms of *Seminole Rock* reflect "free-floating normative and functional concerns" without a tie to the statutory text).

21. *See, e.g.*, Nat'l Petrochemical & Refiners Ass'n v. EPA, 630 F.3d 145, 158 (D.C. Cir. 2010) (noting Congress authorized retroactive rulemaking), *reh'g denied*, 643 F.3d 958 (D.C. Cir.), *cert. denied*, 132 S. Ct. 571 (2011); Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002) ("An agency may not promulgate retroactive rules *absent express congressional authority*.") (emphasis added) (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)); 26 U.S.C. § 7805(b) (explicitly authorizing certain types of retroactive rulemaking).

22. *See, e.g.*, Jason Marisam, *Constitutional Self-Interpretation*, 75 OHIO ST. L.J. 293, 307–30 (2014) (discussing examples of self-interpretation including impeachment hearings, federal common law, and federal rules of procedure).

23. *See, e.g.*, Stephenson & Pogoriler, *supra* note 9, at 1486, 1494.

law precedent: the Supreme Court's 1947 decision in *SEC v. Chenery*.[24] In terms of providing notice of legal obligations to regulated parties, however, this latter precedent—dubbed *Chenery II*[25]—can be even worse than *Seminole Rock*. And if *Seminole Rock* were off the table, agencies may rely more often on *Chenery II*.

To see why overruling *Seminole Rock* may create this unintended consequence, it is important to understand *Chenery II*. *Chenery II* also represents a "fundamental principle of administrative law"[26]—that agencies can choose to interpret the statutes they administer by promulgating rules or, if they prefer, by simply enforcing the statutes directly through case-by-case adjudication.[27] For instance, as in *Chenery II* itself, if a statute commands companies to act in "fair and equitable" ways consistent with "the public interest," the agency tasked with administering that law can choose to engage in notice-and-comment rulemaking to prospectively define what that statutory obligation means, or, instead, retroactively apply the statute against a regulated party in an "ad hoc" enforcement proceeding, thereby also defining what the statute means.[28] This discretionary power to create policy either through rulemaking or adjudication often is defensible.[29] Sometimes, for instance, statutes themselves are reasonably clear so there is no need for a regulation. Nonetheless, despite its utility, *Chenery II* can be dangerous because ad hoc adjudication may not provide regulated parties with sufficient notice of their legal duties, thus raising fair notice concerns.[30]

Put these pieces together and the following picture emerges: rulemaking in the shadow of *Seminole Rock* and adjudication via *Chenery II* are, in a sense, "substitute" ways to make policy, at least for agencies that place a high value on retaining future flexibility. *Ex ante*, an agency seeking to preserve flexibility for itself faces a choice: Should it promulgate an ambiguous rule (for which it will later receive deference) or instead not promulgate a rule at all but simply wait to bring an enforcement action under the statute? To be sure, the two options are not *perfect* substitutes. Both have strengths and weaknesses, and all else being

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24. *Chenery II*, 332 U.S. 194 (1947).

25. *See* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 955 n.3 (2007).

26. *Id.* at 961 n.27; *see also* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1405 (2004) ("The core of the principle that an agency is free to choose its policymaking form was established long ago . . . ."); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 485–86 (1970).

27. *See Chenery II*, 332 U.S. at 203; *see also* NetworkIP, LLC v. FCC, 548 F.3d 116, 123, 127 (D.C. Cir. 2008) (explaining the importance of *Chenery II*).

28. *Chenery II*, 332 U.S. at 204 (citations omitted).

29. *See, e.g.*, Russell L. Weaver & Linda D. Jellum, Chenery II *and the Development of Federal Administrative Law*, 58 ADMIN L. REV. 815, 825 (2006) ("A holding requiring agencies to create advance rules might have forced agencies to commit themselves to specific rules with particular courses of action without knowing all the facts in advance.").

30. *See, e.g.*, *Chenery II*, 332 U.S. at 217 (Jackson, J., dissenting).

equal, agencies may prefer one to the other. Even so, as tools, they are *imperfect* substitutes.[31] Yet because the two forms of policymaking are least somewhat substitutable, it follows that adjudication (under *Chenery II*) sometimes would become more attractive if rulemaking for some reason were to become less attractive.[32] This substitution insight matters because overruling *Seminole Rock* would make rulemaking less attractive to an agency seeking to preserve flexibility. Ultimately, whether agencies in a post-*Seminole Rock* world would substitute away from ambiguous rules to clearer rules (the intended consequence) or instead to fewer rules (the unintended consequence) is an empirical question that requires understanding an agency's "cross-elasticity of demand."[33] Until the Justices have a good sense of how agencies would respond if *Seminole Rock* were no longer on the table, however, they need to know that overruling *Seminole Rock* may lead to unintended consequences. If the critics of *Seminole Rock* are correct, moreover, that agencies behave in strategic ways when it comes to these sorts of decisions, then their reason to fear substitution away from rulemaking should be especially strong.

Unfortunately, creating incentives for agencies that value future flexibility to make policy through adjudication rather than rulemaking would often put regulated parties in a worse position than they are in now. With or without *Seminole Rock*, such parties confront open-ended obligations. But even ambiguous rules provide at least *some* prospective notice of those obligations. Retroactive adjudication under the statute, by contrast, may not. Yet if *Seminole Rock* were to be overruled, agencies may cease to engage in such rulemaking, or at least may do so less frequently, because rulemaking would become relatively less effective for preserving flexibility. Thus, overruling *Seminole Rock* would encourage agencies to substitute adjudication for rulemaking, with the result being less overall notice. Equally bad, if a flexibility-valuing agency in a post-*Seminole Rock* world *did* elect to provide notice, such notice would be more likely to come through informal paths like guidance documents, because such informal paths also provide flexibility to agencies. Yet regulated parties value the structured process that notice-and-comment rulemaking provides.[34] Accordingly, overruling *Seminole Rock* may, on one hand, lead to less notice

31. *See, e.g.*, ABA, 1 ANTITRUST LAW DEVELOPMENTS 577 (7th ed. 2012) (explaining difference between perfect and imperfect substitutes and how even imperfect substitutes can exert competitive pressure, albeit less pressure than perfect substitutes); United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1115 (N.D. Cal. 2004) ("Differentiated products are imperfect substitutes representing as they do different features or characteristics that appeal variously to different customers.").

32. *See, e.g.*, JOSEPH E. STIGLITZ, ECONOMICS 405–06 (3d ed. 2002) (explaining imperfect substitutes).

33. *See, e.g.*, DAVID A. BESANKO & RONALD R. BRAEUTIGAM, MICROECONOMICS 47–49, 206–07 (3d ed. 2008) (explaining cross-elasticity).

34. *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312 (1992) ("With one exception, the answer to the question in the title is 'no.'"). Guidance documents and other informal devices are discussed below. *See infra* Section II.A.1.

overall or, on the other, to a less participatory regulatory process. Either outcome may be worse than the status quo.

The question is what to do? One answer may be "nothing." That overruling *Seminole Rock* would have unintended consequences cuts in favor of stare decisis. Because overruling *Seminole Rock* could make things worse, perhaps the Court should leave well enough alone on the theory that the first precept of stare decisis, like medicine, is "do no harm."[35] Indeed, at least for those contexts governed by *Chenery II* (that is, those in which an agency can choose between rulemaking and adjudication), overruling *Seminole Rock* may be worse than doing nothing.[36]

But there is another option. In particular, as part of revisiting *Seminole Rock*, the Court could also revise aspects of *Chenery II*. It would not be necessary, moreover, to overrule *Chenery II* to prevent its misuse; indeed, overruling *Chenery II* would itself have unintended consequences.[37] Even so, modifying the *Chenery II* framework could mitigate the most problematic consequences of eliminating *Seminole Rock*. And, at the same time, importantly, such modifications find support in the Court's cases.

First, for the same sorts of reasons that the Court is concerned about *Seminole Rock*, the Justices could hold that *Skidmore* rather than *Chevron* deference should apply to statutory interpretations announced in adjudication.[38] Switching to *Skidmore* deference would encourage agencies to engage in rulemaking. Under *Chevron*, courts "must accept an agency's 'reasonable' interpretation of a gap or ambiguity in a statute the agency is charged with administering," whereas under *Skidmore*, courts decide what the statute means while considering "the 'thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.'"[39] In other words, unlike *Chevron* deference, *Skidmore* deference is "nonbinding."[40] Shifting to this lesser form of deference would allow agencies to continue to set

35. *Cf.* Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015) (stating that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles") (citing Payne v. Tennessee, 501 U.S. 808, 827–29 (1991)).

36. As discussed in this Article, some regulatory contexts are not governed by *Chenery II* because Congress has determined that no regulatory obligations exist until after the agency has promulgated a rule. *See infra* Section I.E. In that context, overruling *Seminole Rock* is more straightforward because there is no need to fear substitution effects. However, "[t]he typical agency . . . can rely on the quasi-legislative process of rulemaking to flesh out its delegated authority" or "use its power to adjudicate cases (in the first instance) as a way of developing common law refinements of a broadly worded organic act." John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 895–96 (2004).

37. *See, e.g.*, *id.* at 909–10 (detailing line-drawing problems).

38. As discussed below, this revision may be especially attractive because agencies do not just write the open-ended *rules* they administer, but also sometimes the open-ended *statutes* they administer. *See, e.g.*, Brigham Daniels, *Agency as Principal*, 48 GA. L. REV. 335, 340–41 (2014).

39. Manning, *supra* note 1, at 613, 618 (first quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843, 844 (1984); then quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

40. *Id.* at 686.

policy in adjudication, but only if their reading of the statute can be sustained without *Chevron* deference. Otherwise, they would have to promulgate a rule.

And second, as it has begun to do with regard to *Seminole Rock*, the Court could clarify and more vigorously enforce the fair notice doctrine—that is, the idea that agencies cannot *retroactively* impose obligations on regulated parties when doing so is sufficiently unfair.[41] With these revisions, agencies would still have discretion as to whether to promulgate rules or engage in adjudication, the core of *Chenery II*, but at least at the margins, they would have to pay greater attention to retroactivity and hue more closely to the statute if they forego rulemaking.

In short, because *Seminole Rock* and *Chenery II* are substitutes, if the Court were to overrule *Seminole Rock*, agencies would more often turn to *Chenery II*. This is because *Seminole Rock* does not exist in a vacuum, but rather as part of an interconnected network of administrative law doctrines. When one part of the network is changed, that change reverberates across administrative law as a whole. Prudence suggests that the Supreme Court should understand those interconnected consequences *before* changing important doctrines.

This Article proceeds as follows. Part I sets the stage by explaining the *Seminole Rock* and *Chenery II* doctrines. Part II, in turn, demonstrates how substitution works in this context. Although they are only imperfect substitutes, both rulemaking and adjudication can be used to achieve the same policy ends, especially for agencies that place a high value on flexibility. Part III then demonstrates why this substitution likely would increase if *Seminole Rock* were overruled and explains why that may be worse than the status quo. Finally, Part IV offers a path forward by explaining how principles already present in existing law may allow the Supreme Court to retain *Chenery II*'s core while taming the most problematic substitution that would occur if *Seminole Rock* were overruled.

I. SETTING THE STAGE

The 1940s was a momentous decade for administrative law.[42] Most notably, in 1946, Congress—persuaded that administrative "power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use"[43]—enacted the Administrative Procedure Act (APA),[44] the "bill of rights for the new regulatory state."[45] The APA, however, is only part of the story. The 1940s also saw the Court recognize *Skidmore* deference,[46] retreat from aggressive enforcement of

41. *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012).

42. *See, e.g.*, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558 (1996).

43. Wong Yang Sung v. McGrath, 339 U.S. 33, 37 (1950).

44. *See* 5 U.S.C. §§ 500–596 (2012).

45. Shepherd, *supra* note 42, at 1558.

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

the nondelegation doctrine,[47] expand the constitutional scope of what agencies can regulate,[48] and give birth to the duty of contemporaneous explanation.[49] All of these developments are bedrocks of modern administrative law.

For purposes of this Article, however, two 1940s precedents are essential: *Seminole Rock* (decided in 1945) and *Chenery II* (decided in 1947). Both decisions grant agencies substantial discretion, albeit in ways that seem very different. Under *Seminole Rock*, agencies receive deference when interpreting ambiguities in their own regulations. And under *Chenery II*, agencies have discretion whether to give meaning to the statutes they administer through notice-and-comment rulemaking or through case-by-case adjudication. Both decisions have been applied countless times by agencies. Strangely, however, only *Seminole Rock* has come under increased scrutiny in recent years.

A. THE EMERGENCE OF *SEMINOLE ROCK* DEFERENCE

The Supreme Court in 1945 almost certainly did not intend to create what is now called *Seminole Rock* deference.[50] Nonetheless, the Court's decision has come to stand for an important doctrine: an agency's interpretation of its "own regulations" is "controlling unless 'plainly erroneous or inconsistent with the regulation,'"[51] meaning that an agency interpreting rules can expect to receive judicial deference equal to or perhaps even greater than the deference they receive under *Chevron* when interpreting statutes.[52] The story of how this expectation came to be is worth briefly recalling.

The facts in *Seminole Rock* involved a price-control regime administered by the Office of Price Administration (OPA)—in particular, the office's Price Division. The agency issued "General Max" regulations that "attempt[ed] to institute a general price freeze on 'thousands of commodities and millions of buyers and sellers to achieve the same intensive analysis of individual cases and the same detailed application of criteria that are feasible under narrower ceilings over fewer items.'"[53] To ensure coordination, OPA began providing official interpretations of these regulations. The question in *Seminole Rock* was whether those interpretations were entitled to deference. In particular, OPA "sought to enjoin Seminole Rock & Sand Company from violating the Emergency Price Control Act" by charging too much for crushed rock, in violation of "the

47. *See* Yakus v. United States, 321 U.S. 414, 425–26 (1944).

48. *See* Wickard v. Filburn, 317 U.S. 111, 124 (1942).

49. *See* SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 95 (1943).

50. *See* Knudsen & Wildermuth, *supra* note 8, at 52–53.

51. Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)) (quotations omitted).

52. *See, e.g.*, WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 392 (4th ed. 2010) ("[A]n agency's interpretation of its own regulations may receive stronger deference than its interpretation of a statutory provision.").

53. Knudsen & Wildermuth, *supra* note 8, at 57–58 (quoting Donald H. Wallace & Philip H. Coombs, *Economic Considerations in Establishing Maximum Prices in Wartime*, 9 LAW & CONTEMP. PROBS. 89, 104 (1942)).

General Max regulations, which stated 'each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942.'"[54] The rules, however, were ambiguous: what if a company entered into a contract during March 1942 but did not deliver any goods until after March 1942? In upholding OPA's order, the Supreme Court used language that has become the springboard for *Seminole Rock* deference: "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[55]

As Amy J. Wildermuth and Sanne H. Knudsen have explained, for a long time *Seminole Rock* was limited to its narrow, price-control context. Nonetheless, courts eventually "began to shed, slowly and without much fanfare, the original contextual appreciation of *Seminole Rock* as a wartime relic."[56] Indeed, the Supreme Court revisited *Seminole Rock* in *Udall v. Tallman* and held that *Seminole Rock* deference applies beyond price controls.[57] Unsurprisingly, "*Tallman*'s influence in the lower courts became apparent fairly quickly."[58]

The high-water mark of *Seminole Rock* expansion is the Court's 1997 decision in *Auer v. Robbins*.[59] There, Justice Scalia, writing for a unanimous Court, deferred to an agency amicus brief filed in the very litigation at issue. With apparently no context-specific limitations, the Court explained that when a scheme "is a creature of the [agency's] own regulations, [the agency's] interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'"[60] In fact, so strong was the Court's restatement of the principle that today the terms *Seminole Rock* and *Auer* deference are used interchangeably.[61]

B. JOHN MANNING AND THE *SEMINOLE ROCK* CRITICS

About the same time that *Auer* was decided, however, the intellectual tide began to change as scholars began questioning whether deference to an agency's interpretation of its own rules is even benign, much less beneficial. The key

54. *Id.* at 59 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413 (1945)).

55. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). A recent online symposium at the Yale Journal on Regulation about *Seminole Rock* deference provides context for this statement. *See* Jeffrey Pojanowski, *After* Auer*?*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 23, 2016), http://yalejreg.com/nc/after-auer-by-jeffrey-pojanowski/ [https://perma.cc/5W8D-AEQB]; Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 12, 2016), http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/ [https://perma.cc/T4B3-HGT8]; Aaron Nielson, *Reflections on* Seminole Rock: *The Past, Present, and Future of Deference to Agency Regulatory Interpretations*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 12, 2016), http://yalejreg.com/nc/reflections-on-seminole-rock-the-past-present-and-future-of-deference-to-agency-regulatory-interpretations/ [https://perma.cc/L6B4-MG65].

56. Knudsen & Wildermuth, *supra* note 8, at 68.

57. 380 U.S. 1, 4 (1965).

58. Knudsen & Wildermuth, *supra* note 8, at 81.

59. 519 U.S. 452 (1997).

60. *Id.* at 461 (quoting *Seminole Rock*, 325 U.S. at 414) (quotation marks omitted).

61. Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1037 n.207 (2015).

player in the anti-*Seminole Rock* movement was John Manning, who argued that such deference violates separation of powers principles that protect against the creation of perverse incentives.

In 1996, Manning published what has become one of the most significant articles in modern administrative law: *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*.[62] So influential was this article that Manning's analysis appears to have played a considerable role in flipping Justice Scalia's views. Consider the contrast. In 1997, Scalia authored *Auer*, which embraced an expansive view of *Seminole Rock*. By 2013, however, Scalia—citing Manning's article—was openly calling for *Seminole Rock* to be overruled, explaining that "for decades, and for no good reason, we have been giving agencies the authority to say what their rules mean."[63]

Manning's key insight was that *Seminole Rock* deference, unlike *Chevron* deference, only arises when the agency that promulgated a regulation also interprets it. *Chevron*, by contrast, involves one actor (an agency) interpreting what another actor (Congress) has done. According to Manning, allowing the same hands that have drafted a legal obligation to interpret what that obligation means raises separation of powers concerns. No less an authority than Montesquieu explained that "[w]hen legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."[64] Blackstone echoed these sentiments,[65] and the framers of the U.S. Constitution "rejected the British practice of using the upper house of the legislature as a court of last resort."[66]

Combining the lawmaking and law interpreting power, Manning observed, was not just historically problematic: "By providing the agency an incentive to promulgate imprecise and vague rules, *Seminole Rock* undercuts important deliberative process objectives of the APA, and it creates potential problems of inadequate notice and arbitrariness in the enforcement of agency rules."[67]

To be sure, this "bad incentive" argument is contested. Cass Sunstein, for instance, has argued that, in his years of government service, he has never seen an agency intentionally promulgate a vague rule in order to obtain deference.[68] Who has the better argument is an important question beyond the scope of this

62. Manning, *supra* note 1.

63. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J., dissenting); *see also id.* at 1341 (citing, *inter alia*, Manning, *supra* note 1).

64. Manning, *supra* note 1, at 645 (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6, at 157 (Anne Cohler et al. eds. & trans., 1989) (1768)).

65. *See Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting) (citing 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 58 (1765)).

66. Manning, *supra* note 1, at 644.

67. *Id.* at 618.

68. *See* Sunstein & Vermeule, *supra* note 20, at 13 n.37; *see also* Ronald M. Levin, Auer *and the Incentives Issue*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 19, 2016), http://yalejreg.com/nc/auer-and-the-incentives-issue-by-ronald-m-levin/ [https://perma.cc/98PJ-5NLN].

Article. But even if the "strong" form of the argument is not so (that is, agencies are intentionally promulgating ambiguous language for the strategic purpose of obtaining deference), it seems reasonable to think that agencies, like all other actors, sometimes may accept ambiguous regulations because obtaining specificity requires expending more resources.[69] Agencies, like other rational actors, no doubt can breathe easier about making that tradeoff because they know they will obtain deference when interpreting the rule.

Manning's solution was to shift to *Skidmore* deference.[70] Likewise, Matthew Stephenson and Miri Pogoriler have proposed a number of checks.[71] For instance, they explain the "pay me now or pay me later" worry that *Seminole Rock* creates: when agencies promulgate regulations that do not tackle the hard problems, the agency does not "pay" upfront, and when the agency later issues an interpretative rule to tackle those problems—even though interpretative rules are not subject to the same rigorous procedure—the agency does not "pay later" either.[72] Although not urging that *Seminole Rock* be overruled, they argue:

> [C]ourts should retain the antiplaceholder principle [that is, the idea that there is no *Seminole Rock* deference for a regulation that parrots the statute or is "mush"], should strengthen antiretroactivity limitations in the *Seminole Rock* context, [and] should reserve *Seminole Rock* deference for regulatory interpretations contained in formal orders (granting *Skidmore* respect to more informal interpretations) . . . ."[73]

C. THE LAST DAYS OF *SEMINOLE ROCK*?

Taking the baton from Manning and these other scholars, Justice Scalia and later Justice Thomas have called for *Seminole Rock* to be overruled, and other Justices have indicated a willingness to consider the question.

Justice Scalia fired the first shot in his short concurrence in 2011's *Talk America, Inc. v. Michigan Bell Telephone Co.*[74] The Federal Communications Commission filed an amicus brief arguing how its rules should be read.[75] Justice Thomas invoked *Auer* as a reason to defer to the agency.[76] Justice Scalia, however, wrote separately to explain that he "would reach the same result" even

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69. *See, e.g.*, D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 OHIO ST. L.J. 609, 615 n.26 (2014) (noting that "the tradeoff between the anticipated hazards of ex post opportunism and the costs of ex ante design" are partly responsible for incomplete contracts); Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 191 (1995) ("[M]any potential ambiguities . . . are too costly to anticipate and eliminate."); *see also* Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1064 n.98 (1990) (noting agencies are subject to bounded rationality).

70. *See* Manning, *supra* note 1, at 618.

71. *See* Stephenson & Pogoriler, *supra* note 9, at 1466.

72. *Id.* at 1464.

73. *Id.* at 1504.

74. 564 U.S. 50 (2011).

75. *Id.* at 53.

76. *Id.* at 59.

without *Seminole Rock* and to observe that while he had "in the past uncritically accepted that rule, [he had] become increasingly doubtful of its validity."[77] Following that hint from Justice Scalia, scholars began reevaluating *Seminole Rock* and whether it should be overruled.[78]

Importantly, Justice Scalia's thoughts were soon endorsed, at least in part, in a majority opinion of the Court. In 2012, the Court refused to afford *Seminole Rock* deference to an agency's reinterpretation of its own regulations. The case was *Christopher v. SmithKline Beecham Corp.*, which concerned regulations under the Fair Labor Standards Act interpreting the term "outside salesman."[79] While litigation was pending, the Department of Labor filed an amicus brief arguing, contrary to past practice, that the term "encompasses pharmaceutical sales representatives whose primary duty is to obtain nonbinding commitments from physicians to prescribe their employer's prescription drugs in appropriate cases."[80] The Court refused to defer to the agency's brief, explaining that doing so "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[81] The Court then declared that *Seminole Rock* "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit."[82]

In 2013, Justice Scalia returned to *Seminole Rock*, but this time to urge that it be overruled. In *Decker v. Northwest Environmental Defense Center*, the Court—with Justice Kennedy writing—granted *Seminole Rock* deference to an Environmental Protection Agency (EPA) interpretation because, unlike in *Christopher*, the agency's interpretation was not "a change from prior practice or a *post hoc* justification adopted in response to litigation."[83] Scalia, however, dissented in part because the agency's reading was "not the most natural one" and, in his view, the Court should not accept a strained reading "simply because EPA says that it believes the unnatural reading is right."[84] Importantly, the Chief Justice

77. *Id.* at 67–68 (Scalia, J., concurring).

78. *See, e.g.*, Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 OHIO ST. L.J. 813 (2015); Conor Clarke, *The Uneasy Case Against* Auer *and* Seminole Rock, 33 YALE L. & POL'Y REV. 175 (2014); Michael P. Healy, *The Past, Present, and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 KAN. L. REV. 633 (2014); Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227 (2013); Daniel Mensher, *With Friends Like These: The Trouble with* Auer *Deference*, 43 ENVTL. L. 849 (2013); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515 (2011); Sunstein & Vermeule, *supra* note 20; Derek A. Woodman, Note, *Rethinking* Auer *Deference: Agency Regulations and Due Process Notice*, 82 GEO. WASH. L. REV. 1721 (2014).

79. 132 S. Ct. 2156, 2161 (2012).

80. *Id.*

81. *Id.* at 2167 (quoting Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)).

82. *Id.* at 2168.

83. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337 (2013).

84. *Id.* at 1339 (Scalia, J., concurring in part and dissenting in part).

and Justice Alito agreed that *Seminole Rock* may warrant reevaluation.[85]

Next, the entire Court cast some doubt on *Seminole Rock* in *Perez v. Mortgage Bankers Ass'n*,[86] with two justices—Scalia and Thomas—announcing that *Seminole Rock* should be overruled. In *Perez*, the Court confronted the so-called *Paralyzed Veterans* doctrine, which required agencies—in the context of interpretative rules—to use notice-and-comment rulemaking before reinterpreting a rule.[87] The Court held that the *Paralyzed Veterans* doctrine "is contrary to the clear text" of the APA because interpretative rules never have to go through notice and comment.[88] *Seminole Rock*, however, made an appearance in the Court's analysis. Writing for the Court, Justice Sotomayor rejected the notion that interpretative rules "have the force of law" even though "an agency's interpretation of its own regulations may be entitled to deference" by explaining that *Seminole Rock* is not a blank check: "Even in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, *Auer* deference is *not an inexorable command in all cases*."[89]

Most recently, the Supreme Court in May 2016, following Justice Scalia's death, denied a certiorari petition asking the Court to overrule *Seminole Rock*.[90] Justice Thomas dissented, reiterating the same themes from his prior opinions.[91] Some speculate that the Court will eventually reconsider *Seminole Rock*, perhaps when the Court again has nine justices.[92]

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85. *See id.* (Roberts, C.J., concurring) ("The issue is a basic one going to the heart of administrative law.").

86. 135 S. Ct. 1199 (2015).

87. *Id.* at 1203.

88. *Id.* at 1206.

89. *Id.* at 1208 n.4 (emphasis added) (citing Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012)); *see also* Knudsen & Wildermuth, *supra* note 8, at 51–52 (reading this statement as suggesting some concern with *Seminole Rock*).

90. *See* United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607 (2016).

91. *See id.* (Thomas, J., dissenting).

92. *See, e.g.*, Jonathan H. Adler, *Supreme Court Declines to Reconsider Deference to Agency Interpretations of Agency Regulations*, WASH. POST: VOLOKH CONSPIRACY (May 16, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/16/supreme-court-declines-to-reconsider-deference-to-agency-interpretations-of-agency-regulations/ [https://perma.cc/FWV9-EWGL]. Judge Neil Gorsuch was recently nominated to replace the late Justice Antonin Scalia. Gorsuch has expressed skepticism about deference to agencies. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (explaining that *Chevron* deference "is a problem for the people whose liberties may now be impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible—the decisionmaker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day"). Some expect that he may be willing to revisit *Seminole Rock*. *See, e.g.*, Zoe Tillman, *Neil Gorsuch Wants The Supreme Court To Rethink Agency Power—And That Could Hurt Trump*, BUZZFEED (Feb. 15, 2017, 4:17 pm), https://www.buzzfeed.com/zoetillman/neil-gorsuch-wants-the-supreme-court-to-rethink-agency-power [https://perma.cc/K3GT-N5JE] ("Gorsuch would also likely be another vote in favor of revisiting the *Auer* doctrine, which he hasn't written about to the same extent as *Chevron*, but would represent a chipping away at the latitude agencies get in court.").

D. THE TWO-PART *CHENERY* SAGA

At around the same time that the 1940s Supreme Court was considering *Seminole Rock*, it was also addressing another important administrative law case: *Chenery*. To be more specific, it was considering two separate *Chenery* cases. Both *Chenery I* and *Chenery II* are pillars of administrative law, although pillars holding up very different propositions. *Chenery I* sets forth the principle that judicial review of agency action must be based on the reasons given by the agency.[93] By contrast, *Chenery II* establishes that agencies have discretion whether to regulate by promulgating prospective regulations or case-by-case adjudications with retroactive effect.[94]

1. *Chenery I*

During the late 1930s, a company called the Federal Water Service Corporation—the Supreme Court just called it "Federal"—sought permission from the Securities and Exchange Commission (SEC) to reorganize. The SEC approved reorganization, but also ordered that "preferred stock" acquired by certain "officers, directors, and controlling stockholders" while reorganization plans were before the Commission could not "participate in the reorganization on an equal footing with all other preferred stock."[95] The SEC issued this order under its statutory power to determine what is "fair and equitable" or "detrimental to the public interest or the interests of investors."[96] Unhappy, the affected shareowners sought judicial review.

Before the Supreme Court, Federal contended that the SEC erroneously applied common law principles. The Supreme Court agreed in an opinion authored by Justice Frankfurter that announced what has come to be known as the *Chenery I* principle. Although an appellate court can generally affirm a lower court for any reason supported in the record, when it comes to administrative law, "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."[97] This means that if an agency says it is acting because of reason X, a court generally must vacate or remand the agency's decision if reason X is not supportable, even though reason Y would be. Under *Chenery I*, it generally is not for a court to say that the agency was right for the wrong reasons.[98]

Applying the *Chenery I* principle, the Court ruled against the SEC. It concluded that the supposed common law doctrine of fiduciary law invoked by

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93. *Chenery I*, 318 U.S. 80, 95 (1943); *see also* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 526 (1985) ("The origins of the hard look doctrine can be traced to the Supreme Court's holding in [the first] *SEC v. Chenery Corp.*"); Stack, *supra* note 25, at 958–59.

94. *Chenery II*, 332 U.S. 194, 203 (1947); *see also* NetworkIP, LLC v. FCC, 548 F.3d 116, 123, 127 (D.C. Cir. 2008) (explaining the importance of *Chenery II*).

95. *Chenery I*, 318 U.S. at 81.

96. *Id.* at 82 n.1.

97. *Id.* at 87.

98. *See Chenery II*, 332 U.S. at 196.

the SEC simply did not exist, at least not in the context cited by the agency.[99] Thus, the SEC's order could not stand.

The Court noted, however, that the SEC is not "bound by settled judicial precedents" in all instances and can "express[] a more sensitive regard for what is right and what is wrong."[100] Yet "*before* transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards."[101] Here, the Court observed that "Congress itself did not proscribe the respondents' purchases of preferred stock in Federal. Established judicial doctrines do not condemn these transactions. Nor has the Commission, acting under the rule-making powers delegated to it by § 11(e), promulgated new general standards of conduct."[102]

Justice Black, joined by Justices Reed and Murphy, dissented because he believed the SEC *had* exercised its independent judgment and had not simply relied on common law principles.[103] He also prophesied that the agency would simply change the labels, but not the outcome, of what it had done.[104] Nor did Black believe that the SEC must act by rulemaking.[105] Rejecting the dissent's arguments, however, the *Chenery I* majority remanded "for such further proceedings, not inconsistent with this opinion, as may be appropriate."[106] Respondents thus appeared to have beaten the SEC.

2. *Chenery II*

After the Supreme Court's remand, the agency reached the same result as in *Chenery I*, but for different reasons. Whereas the agency had initially relied on erroneous interpretations of judicial precedents, on remand it drew "heavily upon its accumulated experience in dealing with utility reorganizations" to conclude that regardless of what the common law required, this particular transaction still should be forbidden as contrary to the public interest.[107] The SEC thus determined that the transaction could not proceed as respondents hoped—even though no law at the time of the stock purchases expressly forbade such purchases and, in fact, the common law allowed them. Respondents successfully sought judicial review in the D.C. Circuit, which concluded that *Chenery I* "precluded such action by the Commission."[108]

This time, however, the Supreme Court disagreed. Justice Murphy—joined by Justices Black, Reed, and Rutledge (Rutledge having joined the Court after

99. *See Chenery I*, 318 U.S. at 85–90.
100. *Id.* at 89.
101. *Id.* at 92–93 (emphasis added).
102. *Id*. at 93.
103. *Id.* at 97 (Black, J., dissenting).
104. *Id.* at 99 (Black, J., dissenting).
105. *See Chenery I*, 318 U.S. at 100.
106. *Id.* at 95.
107. *Chenery II*, 332 U.S. 194, 199 (1947).
108. *Id.*

Chenery I)—authored the opinion of the Court. Because two Justices were recused, these four could issue a binding opinion. The majority concluded that *Chenery I* did not preclude the SEC's action on remand and, moreover, that the SEC's action was lawful. In so doing, it rejected the argument that "the Commission would be free only to promulgate a general rule outlawing such profits in future utility reorganizations; but such a rule would have to be prospective in nature and have no retroactive effect upon the instant situation."[109] Though acknowledging that *Chenery I* "explicitly recognized the possibility that the Commission might have promulgated a general rule dealing with this problem under its statutory rule-making powers," the *Chenery II* Court explained that the *Chenery I* Court "did not mean to imply thereby that the failure of the Commission to anticipate this problem and to promulgate a general rule withdrew all power from that agency to perform its statutory duty in this case."[110] Allowing the agency to only "formulat[e] . . . general rules . . . for use in future cases of this nature . . . would . . . stultify the administrative process. That we refuse to do."[111] Indeed, the majority stressed that "[t]he absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties in relation to the particular proposal before it."[112]

Although encouraging the SEC "to make new law prospectively through the exercise of its rule-making powers,"[113] the Court rejected that rulemaking was the *only* way to make policy.[114] Instead, agencies need flexibility. "In performing its important functions in these respects . . . an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity."[115] Accordingly, there is "a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[116] The Court noted this may result in retroactivity concerns but gave such concerns little weight, explaining that new interpretations are always, in a sense, retroactive.[117] Thus, although agreeing that retroactivity *can* be unfair,[118] the Court stressed that retroactivity need not

109. *Id.* at 199–200.

110. *Id.* at 201–02.

111. *Id.* at 202.

112. *Id.* at 201.

113. *Chenery II*, 332 U.S. at 202.

114. *Id.* ("[A]ny rigid requirement . . . would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.").

115. *Id.*

116. *Id.* at 203.

117. *See id.* ("Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency.").

118. *See id.* ("[S]uch retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the

be fatal.[119]

Justice Jackson dissented, sternly, in an opinion joined by Justice Frankfurter (the author of *Chenery I*).[120] Jackson opened his dissent by lamenting the change in the Court's personnel,[121] after which he attacked the Court for its "lawlessness."[122] As he saw it, although "[b]oth the Commission and the Court admit that these purchases were not forbidden by any law, judicial precedent, regulation or rule," the SEC nonetheless "ordered these individuals to surrender their shares to the corporation at cost, plus 4% interest, and the Court now approves that order."[123] In his view, upholding such an order "makes judicial review of administrative orders a hopeless formality" because the Commission's order "literally takes valuable property away from its lawful owners for the benefit of other private parties without full compensation and the Court expressly approves the taking."[124]

Nor was Jackson persuaded that he should defer to the SEC's expertise. Even if he agreed that the agency was the expert, he did not think it followed that the new policy had to be enforced *retroactively*. Indeed, as Jackson saw it, "to uphold the Commission by professing to find that it has enunciated a 'new standard of conduct' brings the Court squarely against the invalidity of retroactive law-making."[125] Jackson concluded by warning that *Chenery II* "is an ominous [case] to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as of those who are subject to authority."[126]

E. THE MODERN *CHENERY II* DOCTRINE

Chenery II is now a settled principle of law.[127] As the Supreme Court explained in *NLRB v. Bell Aerospace Co.*, an agency "is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board's

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ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.").

119. *See Chenery II*, 332 U.S. at 203.

120. *Id.* at 209. Justice Burton—who also joined the Court post-*Chenery I*—concurred in the result without an opinion. *Id.*

121. *Id.* at 210 (Jackson, J., dissenting) ("There being no change in the order, no additional evidence in the record and no amendment of relevant legislation, it is clear that there has been a shift in attitude between that of the controlling membership of the Court when the case was first here and that of those who have the power of decision on this second review."); *cf.* Transcript of Opinion Announcement, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (No. 05-908) (Breyer, J., dissenting) ("It is not often in the law that so few have so quickly changed so much.").

122. *Chenery II*, 332 U.S. at 217 (Jackson, J., dissenting).

123. *Id.* at 210–11 (Jackson, J., dissenting).

124. *Id*. (Jackson, J., dissenting).

125. *Id.* at 213 (Jackson, J., dissenting).

126. *Id.* at 217 (Jackson, J., dissenting).

127. *See, e.g.*, Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 824 (2015).

discretion."[128] And so long as an agency has power to engage in rulemaking and adjudication, "adjudication [can] operate[] as an appropriate mechanism not only for factfinding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation."[129] Nor is this power merely theoretical, particularly within some agencies.[130] In fact, "[t]he National Labor Relations Board, uniquely among major federal administrative agencies, has chosen to promulgate virtually *all* the legal rules in its field through adjudication rather than rulemaking."[131]

Of course, *Chenery II* is not always relevant. Sometimes Congress "establish[es] a system in which the agency lacks the power to act until it first promulgates a valid set of legislative rules."[132] In that sort of system, an agency cannot enforce the statute directly like the SEC was able to do in *Chenery II*. Nonetheless, despite these exceptions, the *Chenery II* scenario is common. Indeed, it is "typical" that an agency has power to either make policy through rulemaking or adjudication directly under the statute.[133] (As discussed below, in situations that do not fit this "typical" pattern, the Court could overrule *Seminole Rock* with more confidence because the agency in response could not simply begin to apply the statute directly.)[134]

Since *Chenery II* was decided, moreover, the Supreme Court has decided that interpretations of statutes announced in agency adjudications can receive *Chevron* deference. In *United States v. Mead Corp.*, the Court explained that a grant of "power to engage in adjudication" is itself evidence that *Chevron* applies.[135] Although some interpretations announced in informal adjudications do not receive *Chevron* deference, especially if the scheme seems far removed from a run-of-the-mill regulatory framework, those interpretations announced in formal adjudications effectively always do.[136]

Similarly, courts have continued to recognize that policy announced in agency adjudication can be enforced retroactively. In particular, lower courts

128. 416 U.S. 267, 294 (1974).

129. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 154 (1991).

130. *See, e.g.*, Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 808 (2013) (explaining that "the authority to proceed through adjudication is common").

131. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998) (emphasis added); *see also* Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 508 (2016) ("The National Labor Relations Board, for example, is notorious for announcing its policies in the course of deciding individual cases rather than by issuing substantive rules. In its 80-year history, the Board has issued just two rules: a rather trivial one in 1989 and another in 2011 that was struck down by two circuits and abandoned by the Board in 2013.") (citations omitted). This Article, of course, cannot explore exhaustively why any particular agency might choose one form of procedure over another. For a helpful introduction to the subject, *see* Magill, *supra* note 26.

132. Stephenson & Pogoriler, *supra* note 9, at 1481.

133. Manning, *supra* note 36, at 895–96.

134. *See infra* Section II.B.3.

135. *See* 533 U.S. 218, 227 (2001).

136. *See id.* at 230.

generally apply the following factors (or others like them) from the en banc D.C. Circuit to evaluate retroactivity:

> (1) Whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[137]

These open-ended factors, however, do not impose a rigid test.[138] And at least in some courts, it appears judges are more willing to find retroactivity impermissible when an agency is interpreting a rule rather than a statute.[139] The D.C. Circuit, moreover, has held there is a "presumption of retroactivity for adjudications," meaning that an agency's *failure* to apply a policy retroactively can itself be arbitrary and capricious.[140] And the D.C. Circuit has stressed that "a mere lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct."[141] To be sure, not all retroactivity is permissible—"[t]hough agencies are entitled to deference, they may not retroactively *change* the rules at will."[142] This is especially true when the agency's view departs in an extreme way from what an ordinary person would expect[143]—for instance, because the policy reflects an unexpected change from what was understood to be the law—or when fines are at issue.[144] But if the agency has not *changed* its policy in an extreme way, it is difficult to successfully raise a retroactivity argument.[145] In other words, if the status quo under the statute is simply unclear, an agency has a freer hand to declare the law and apply that declaration retroactively.[146]

In short, *Chenery II* is an important piece of modern administrative law. Because of it, agencies administrating a statute generally have discretion whether to engage in rulemaking or adjudication to create policy under that statute. This matters when assessing *Seminole Rock* because an agency's willingness to use

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137. Velásquez-García v. Holder, 760 F.3d 571, 581 (7th Cir. 2014) (quoting NLRB v. Wayne Transp., 776 F.2d 745, 751 n.8 (7th Cir. 1985)).

138. *See id.* ("Like most such unweighted multi-factor lists, this one serves best as a heuristic; no one consideration trumps the others.").

139. *See* Stephenson & Pogoriler, *supra* note 9, at 1479 (collecting citations).

140. Qwest Servs. Corp. v. FCC, 509 F.3d 531, 539–40 (D.C. Cir. 2007).

141. *Id.* at 540.

142. NetworkIP, LLC v. FCC, 548 F.3d 116, 122 (D.C. Cir. 2008) (emphasis added).

143. *See, e.g.*, Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1330–31 (D.C. Cir. 1995).

144. *See, e.g.*, Kieran Ringgenberg, United States v. Chrysler: *The Conflict Between Fair Warning and Adjudicative Retroactivity in D.C. Circuit Administrative Law*, 74 N.Y.U. L. REV. 914, 926 (1999).

145. *See, e.g.*, *Qwest Servs. Corp.*, 509 F.3d at 540.

146. *Id.* at 539.

one form of procedure over the other to make policy no doubt is influenced by the respective costs and benefits of each procedure.

II. *SEMINOLE ROCK* AND *CHENERY II* ARE IMPERFECT SUBSTITUTES

Despite the attention that has been paid to *Seminole Rock* in recent years, few have reflected on *Chenery II*,[147] at least not during this generation.[148] This is curious. A moment's reflection confirms that the two doctrines are related and, in fact, can be used to achieve similar ends. This is especially true for an agency that values regulatory flexibility. Although such agencies are not indifferent between proceeding by rulemaking or adjudication, either doctrine can do the trick. This section illustrates how *Chenery II* and *Seminole Rock* are substitutes, and then explains why these doctrines being only imperfect substitutes does not mean that there is no substitution between them. As explained in Part III, that there is substitution matters because it suggests that if the Court were to overrule *Seminole Rock*, thereby making rulemaking relatively less attractive, the result would be greater use of *Chenery II* and case-by-case adjudication.

A. *SEMINOLE ROCK* AND *CHENERY II* CAN BE SUBSTITUTE DOCTRINES

At the outset, it is essential to understand that, in a sense, rulemaking with *Seminole Rock* and adjudication via *Chenery II* are substitutes, that is, they "at least partly satisfy the same needs" of agencies and "therefore can be used to replace one another."[149] This point is not well understood in the literature. For instance, although Manning observed "[b]ecause *Chenery* establishes the right to forgo rulemaking altogether, the agency's ability to flesh out an imprecise or vague rule through adjudication arguably only gives the agency discretion that it already has," few others have made that connection, nor has Manning pursued it.[150] Nevertheless, because they are substitutes, albeit imperfect ones, either rulemaking with *Seminole Rock* or adjudication via *Chenery II* can be used to achieve future flexibility for the agency.

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147. To be sure, some have expressed concern about *Chenery II*. *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 535 (2003) ("*Chenery II* is troubling. It is inconsistent with subsequent cases . . . that demand more transparency and rationality for discretionary agency decisions. Moreover, in the context of modern agency decisionmaking procedures, it provides far more opportunities for abuse than it did in 1947."). Yet few have adopted this position. *See id.* ("*Chenery II*, though decided during the reign of the expertise model, has enjoyed enduring support . . . . When push comes to shove, few scholars want to reduce agency flexibility.").

148. *See, e.g.*, Manning, *supra* note 36, at 901–14 (explaining past criticism).

149. *Subsitute*, THE PENGUIN DICTIONARY OF ECONOMICS (8th ed. 2003).

150. *See* Manning, *supra* note 1, at 665; *see also* Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 102 (2000) ("If *Seminole Rock*'s only effect were to postpone some lawmaking from rulemaking to adjudication, it might not be so objectionable. Under a line of cases wholly distinct from *Seminole Rock*—most notably, *SEC v. Chenery* and *NLRB v. Bell Aerospace Co.*—agencies already may choose between rulemaking and adjudication when deciding how best to exercise their delegated powers." (footnotes omitted)).

To see why, consider three scenarios. The first is simplest and is intended to illustrate basic substitution between *Seminole Rock* and *Chenery II* (the Simple Scenario). The next two are more complicated. The second scenario, for instance, is one in which the statute itself contains some direction, albeit with ambiguous terms (the *Chevron* Scenario), while the third is one in which the statute does not provide any meaningful direction, for example, the agency can regulate in the "public interest" (the Non-*Chevron* Scenario). Both the *Chevron* and Non-*Chevron* scenarios, in a sense, present *Chevron* questions because at an abstract level, a court always must decide if the agency has stayed within the lines. For purposes of this analysis, however, it is useful to distinguish them.

1. The Simple Scenario

Let's begin with a simple scenario. Imagine a general counsel who works for an agency that Congress has entrusted with both rulemaking and adjudication authority, as in *Chenery II*. This general counsel must decide how best to use her agency's authority. Imagine further that she places a high value on flexibility going forward. After all, she realizes it may be difficult to anticipate all the ways in which the agency may wish to exercise power in the future, especially because the industry her agency regulates is a dynamic one.[151] She also knows her agency is often subject to litigation, so whatever it does, it has to be careful.

What does this general counsel do?

According to the critics of *Seminole Rock*, an agency in this situation may elect to promulgate an ambiguous rule, knowing that in a future adjudication it could flesh out the meaning of the rule with retroactive effect. In other words, an ambiguous rule, on this telling, allows an agency to avoid pinning itself down. At the same time, even if ambiguous, the agency may reason that a rule has at least *some* ability to direct the activities of regulated parties, especially because a rule can cover a multitude of issues, only some of which the agency concludes may benefit from future flexibility (that is, only portions of a rule need to be ambiguous). Thus, this general counsel may think that an ambiguous rule is the way to go; it will provide some guidance but not overly constrain the agency's discretion.[152] And when the agency decides how unresolved policy questions should be answered, it could at that point enforce the ambiguous rule with confidence because of *Seminole Rock*.

But then this general counsel realizes something else: rulemaking is not always easy to do.[153] It takes time and effort to promulgate a rule. When it comes to rulemaking, after all, Congress pays attention—and sometimes newspa-

151. *Cf. Chenery II*, 332 U.S. 194, 202 (1947) ("Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.").

152. *See, e.g.*, Stephenson & Pogoriler, *supra* note 9, at 1459 ("[I]t might sometimes be desirable for agencies to build a bit of flexibility into their rules by writing them in somewhat open-ended terms and fleshing them out as the agency gains experience with implementing the regulatory program.").

153. *See* Manning, *supra* note 1, at 664 (explaining difficulty of rulemaking); *see also* Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to* Testing the Ossification Thesis, 80 GEO.

pers do too. And if the rule has enough economic significance, the burdens are even heavier. So imagine this general counsel asks herself: "Isn't there another way?" She then remembers *Chenery II*. In *Chenery II*, the SEC was able to announce a new, important policy without promulgating a rule at all. Could her agency do that too? Even better, why couldn't the agency wait to initiate such an adjudication until it is ready to bind itself?[154] All the while, of course, the agency could issue guidance documents and make other informal communications (like speeches) regarding issues it is confident about, but say nothing about the issues upon which it wants to retain flexibility.

The story is imaginary, though it mirrors the imagery and rhetoric used by Justice Scalia and other *Seminole Rock* critics.[155] But might there be at least a kernel of truth to it? If an agency really wants to preserve flexibility, couldn't it do so either by promulgating an ambiguous regulation or by not promulgating a regulation at all and instead waiting for the right time, if necessary, to adjudicate the contested issue under the statute itself? No doubt, there are many circumstances in which agencies do not care about flexibility; indeed, how often they value flexibility, and how much, are empirical questions that have not been answered.[156] But is it unthinkable that there may be some instances in which flexibility is important enough to drive this sort of analysis?

For purposes of this section, assume that there are such circumstances.[157] As explained above, however, one can accept the thesis of this Article without accepting the "strong" version of this story; agencies may not deliberately *create* ambiguity with the goal of obtaining deference, but yet may *tolerate* ambiguity because the costs of drafting a specific rule are significant and it is not yet prepared to consider every issue in detail. An agency's willingness to tolerate ambiguity presumably is influenced by the consequences of that ambiguity, at least at the margins.[158] Substitution thus still matters. If ambiguity in either rulemaking or adjudication becomes relatively more "costly" from an

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WASH. L. REV. 1493, 1493 (2012) (noting the commitment of agency time and resources required for notice-and-comment rulemaking).

154. *See, e.g.*, Norton v. S. Utah Wilderness All., 542 U.S. 55, 62 (2004) (explaining that agencies often have flexibility not to act).

155. *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.").

156. *See infra* Part III (explaining the importance of this empirical question).

157. *See, e.g.*, Aneil Kovvali, Note, Seminole Rock *and the Separation of Powers*, 36 HARV. J. L. & PUB. POL'Y 849, 851 (2013) ("NLRB's 'congenital disinclination' to promulgate rules is better seen as a form of self-aggrandizement."); *cf.* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1756 (2013) (explaining how agencies will strategically try to avoid presidential review).

158. Of course, it is important to remember that an agency is a "they" and not an "it." *See, e.g.*, Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036–38 (2011). One can speculate, for instance, that the political leadership, who are there only temporarily, may have a stronger preference for an inflexible rule because they will not have another shot to create policy. *Cf. id.* at 1038 ("[T]he basic points are simple: agencies contain identifiable constituencies that affect policymaking, and these constituencies can, and do, come into conflict over the proper function-

agency's perspective for whatever reason, then at the margins the other form of policymaking procedure becomes relatively more attractive.

This simple example shows that it is possible to use either *Seminole Rock* or *Chenery II* to obtain flexibility. Hence, for an agency that values such flexibility, these two doctrines are substitutes. To be sure, this general counsel may prefer rulemaking to adjudication, or vice versa, because each procedure has its own respective pros and cons that are not related to flexibility. For instance, the agency may want to learn from the regulated community, and so prefer notice-and-comment rulemaking. Or the agency may think rulemaking is too labor-intensive and so prefer adjudication. Such considerations will influence what path the agency takes, but at least in terms of flexibility, the agency can use either *Seminole Rock* or *Chenery II*.

2. The *Chevron* Scenario

Now to continue with our story, but with more detail, imagine the statute at issue says the "agency can regulate discharges of noxious pollutants from power plants." The general counsel knows that some readings of the statute are unlawful because they exceed the power Congress has delegated. The agency, for instance, could not regulate ordinary bottled water because, even with *Chevron* deference, that is not a reasonable reading of "noxious pollutant." Nor could the agency regulate pollution discharges, even if noxious, from a restaurant because restaurants are not "power plants." She also knows that a court would conclude that there is an interpretation (or zone of interpretations) that is the "best," that is, what the court would choose if it were interpreting the statute de novo rather than with *Chevron* deference. Finally, as a savvy official, this general counsel also knows that despite some readings being impermissible, there is also a great deal of ambiguity in this statute; what constitutes a "discharge" may not be entirely self-defining, nor what constitutes a "power plant" or "noxious pollutant." Also imagine that the agency has a preferred policy now but that it is not sure if it will continue to prefer that policy in the future.

This agency has to decide what to do. There is a menu of options. It could promulgate a clear rule, an ambiguous rule, a rule that is co-extensive with the statute, or not promulgate a rule at all. (As will become clear, there are other options too, which can be used in conjunction with each of these options; for instance, rather than act formally, the agency could use less formal devices like guidance documents.[159]) Consider each option.

First, the agency might choose to promulgate a "clear" rule. Although absolute clarity is impossible, it is possible to promulgate a regulation stating the agency's views in some detail. Substantively, for instance, the agency may

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ing of the agency."). For purpose of this Article, it is not essential to dwell on how agency preferences are formed.

159. *See, e.g.*, Magill, *supra* note 26, at 1386–90 (listing menu of options).

prefer a policy within the total field of regulatory space that is not the "best reading" of the statute but also not an impermissible reading because of *Chevron* deference. Assume the agency's ideal policy would be something like, "The only permissible discharges are less than ten parts per million of Agent 243 from facilities that were designated as power plants under Department of Energy regulations as of January 1, 2014." In this stylized example, assume that this is a clear regulation that would be understood by the regulatory community.

What is the result of picking this option? In the future, the agency's discretion will be limited. Promulgating a "clear" regulation constrains the scope of regulatory power. Regulated parties, after all, would know exactly what they have to do to avoid liability: stick within the clear confines set out by the agency. Because it is difficult for agencies to promulgate regulations (and to undo regulations already promulgated), once an agency has done so, regulated parties can have more confidence in the stability of the scheme and thus participate in the market with greater confidence.[160] But the flipside is also true; a clear rule makes it harder for an agency to change its policy in the future. After all, agencies must follow their own rules[161] and can only eliminate a rule through another round of rulemaking.[162] To be sure, there are other benefits of rulemaking: clear rules make it "less expensive for an agency to prove noncompliance" and "may also help an agency to exert centralized control over field officials" or "bind subsequent administrations."[163] But if future flexibility is especially important, a clear rule is a bad strategy.

So consider the next option: the agency could promulgate an "ambiguous" rule (realizing, of course, that the line between clear and ambiguous is a question of degree more than kind). Today, the agency still prefers the same policy of "less than ten parts per million," but the agency wants flexibility for tomorrow. Thus, the agency could promulgate a rule that says something like: "We will not allow excessive rates—as compared against industry standards—of discharge of Agent 243 or like pollutants from any commercial facility that, directly or indirectly, generates power." The agency could then issue a guidance document calming any fears about what this means in practice, encouraging investors to participate in the market—or those who are already in the market to stay in the market over the long run—so long as their emissions

160. *Cf.* Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 903 (2009) (explaining agency commitment mechanisms); Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1037–60 (2007) (similar).

161. *See, e.g.*, Panhandle E. Pipe Line Co. v. FERC, 777 F.2d 739, 749 n.15 (D.C. Cir. 1985) ("The Commission's own regulations guaranteed to Panhandle recovery of six months of prudently incurred carrying charges. The Commission's present interpretation of the order would deny Panhandle recovery of these charges in violation of the familiar rule that an agency must follow its own regulations.") (citations omitted).

162. *See, e.g.*, A GUIDE TO THE RULEMAKING PROCESS, OFF. FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/9L7P-9SVD] ("If an agency decides to amend or revoke a rule, it must use the notice and comment process to make the change.").

163. Manning, *supra* note 1, at 655–56.

(say, five parts per million) are within a certain range of the agency's preference. And if any regulated party were to violate the agency's ultimate "less than ten parts per million" preference, the agency could bring an enforcement action with confidence that it would receive *Seminole Rock* deference if the issue were challenged before a court.

Again, what is the result? The agency's preferred policy is the same, but it has more discretion going forward. To be sure, there are downsides to an ambiguous rule. If the agency wants a ten parts per million standard, for instance, there is a risk that its informal assurances will not be enough to persuade companies to invest or, if applicable, to stay in the market.[164] This is a real cost from the agency's perspective that this general counsel would consider in her internal cost–benefit analysis of what procedure to recommend. But if flexibility is of high value, this is a good strategy.

This general counsel might think, however, that if an ambiguous rule creates flexibility, it would create even more flexibility to promulgate a rule that is coterminous with the statute, that is, a rule that "parrots" the statute or, similarly, is simply "mush."[165] That sort of rule would maximize flexibility because every policy available under the statute would also be available under the regulation, without having to go through a new round of notice-and-comment rulemaking. Moreover, a rule that "parrots" the statutory language would, by definition, allow the agency to achieve its preferred policy right now, again, with guidance documents and other informal devices serving as tools to assuage concerns of those who may worry about the breadth of the rule. This type of rule may provide the most flexibility.

This option now, however, has no upside. Just over ten years ago, the Supreme Court held that *Seminole Rock* deference does not apply if a rule just parrots statutory language.[166] Because there is wiggle room about what counts as "parroting" or "mush," some judge might conclude that the rule's language is different enough from the statute's to obtain deference.[167] But there is a

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164. *See, e.g.*, Masur, *supra* note 160, at 1024 ("[A]n agency will have difficulty convincing regulated parties to invest resources or take other actions that may well be critical to the success of a regulatory initiative when it cannot assure the private actor that the agency rule—upon which these investments depend—will remain in place for an appreciable amount of time.").

165. To be sure, the line between "mush" and "non-mush," "parroting" and "non-parroting" is a hard one to draw. *See, e.g.*, Stephenson & Pogoriler, *supra* note 9, at 1469 ("All regulations are at least somewhat open ended. What, then, counts as 'mush'? Many regulations that interpret statutes do not use identical language, but do use similar language or alternate phrasings. When, then, is the agency guilty of 'parroting'?" (footnotes omitted)).

166. *See* 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."). For thoughtful discussions of the anti-parroting doctrine, *see* Stephenson & Pogoriler, *supra* note 9, at 1467–71; Hanah Metchis Volokh, *The Anti-Parroting Canon*, 6 N.Y.U. J.L. & LIBERTY 290 (2011).

167. *See, e.g.*, Stephenson & Pogoriler, *supra* note 9, at 1471 (explaining that "some opinions appear to suggest that the prohibition on agencies' promulgating mush means that, so long as the agency rule is not so vague as to be meaningless, applying *Seminole Rock* deference is unproblematic").

significant risk that a court would deny *Seminole Rock* deference, especially if, per this stylized example, the rule's language is exactly the same as the statute's or is utterly "mush." Adopting this sort of parroting regulation would not provide additional flexibility.

Finally, what if the agency does not promulgate a regulation at all? This is the *Chenery II* situation. Although there would be downsides (for example, the downsides associated with promulgating an ambiguous rule, only more potent, plus potentially the costs of multiple adjudications, etc.[168]), this option would allow the agency all of the flexibility as the parroting option, but, unlike the parroting option, this strategy would not require a rule. Because agencies can receive *Chevron* deference for interpretations announced in adjudications, the agency would have the entire space of lawful interpretations to play with should it ever change its mind about its preferred policy. By definition, the policy space available to an agency even with *Seminole Rock* deference cannot exceed the policy space available under *Chevron*, for any regulation that falls outside of the statute is *ultra vires*.[169] Again, the agency may have to inform regulated parties through guidance documents and the like about its enforcement priorities, and as before, some parties may not trust the agency's assurances. But in terms of maximizing flexibility, this is also a very attractive option.

3. The Non-*Chevron* Scenario

Now consider another, related scenario. Imagine that everything is the same as in the *Chevron* Scenario (same general counsel, same agency, same policy preference today, and same desire for flexibility tomorrow), but with one important variation: the statute says something different. Rather than itself prohibiting any conduct, albeit in ambiguous ways, imagine now that the statute says something like, "within its jurisdiction, the agency should ensure that those it regulates act in the public interest."[170] In a sense, this also is a *Chevron* question because, in theory, a court could conclude that the agency's conduct is not directed towards a "public" end or that some policy is not within the agency's "jurisdiction." But for purposes of our analysis, assume there is not a "best" reading of this statutory language in any meaningful sense. Instead, any dispute boils down to a policy question, not an interpretation question.[171] Why it is necessary to distinguish this scenario from the *Chevron* Scenario will

168. Some of the reasons why an agency may prefer rulemaking are set out in Section II.B.

169. Suffice it to say, a regulation that purports to regulate more than the statute it implements is void. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *cf. Gonzales*, 546 U.S. at 256 ("In *Auer*, the underlying regulations *gave specificity to a statutory scheme* the Secretary of Labor was charged with enforcing . . . ." (emphasis added)).

170. *Cf. Chenery II*, 332 U.S. 194, 204 (1947) (authorizing the agency to regulate in "fair and equitable" ways consistent with "the public interest") (quotations and citations omitted).

171. *See* Manning, *supra* note 1, at 622 (noting that some statutes "make[] no pretense of specifying precisely the level of permissible hazardous emissions").

become apparent in Part IV. As a preview, replacing *Chevron* deference with *Skidmore* deference would have little effect in terms of mitigating substitution away from rulemaking if *Seminole Rock* were overruled for a "pure policy" statute like this.

Our imaginary general counsel again must decide what to do. She has the same options as before: her agency can issue a "clear" rule, an "ambiguous" rule, or no rule. The "parroting" option is also unhelpful in this scenario and so that analysis need not be repeated.

First, what happens if the agency issues a clear rule? Once again, the agency would have limited flexibility. Regulated parties would know how to avoid liability, and the agency could not easily change its policy in the future. The only difference between this option and the first option from the *Chevron* Scenario is that the concept of a "best" reading is not relevant here. But in terms of flexibility, there is no real change. Accordingly, as in the *Chevron* Scenario, if flexibility is especially valuable, this is a bad strategy.

Next, what happens if the agency issues an ambiguous rule? As in the *Chevron* Scenario, it again has increased flexibility. To be sure, this flexibility comes at a cost for all the reasons explained above; for instance, it is harder for an agency to credibly commit to a policy if it does not have a clear rule in place, plus a rule would help it better direct its own employees. Again, guidance documents may help mitigate some of these concerns, but they do not provide the same stability as a clear regulation. But if flexibility is valued highly, this is a good option.

Finally, what happens if the agency does not promulgate a rule at all? Every policy available to it under a clear or ambiguous rule is also available here. As before, this flexibility also comes at a cost. Indeed, not promulgating a rule in this scenario might result in even less stability than in the *Chevron* Scenario because the scope of what the agency can regulate under the statute standing alone is so much wider. This means that those potentially subject to this statute may try to escape, for instance, by not investing in a regulated market or, having already invested, deciding to leave the market. But once again, if flexibility is the goal, this approach also has considerable upside.

As should be apparent from these examples, an agency that puts a high value on future flexibility can do many of the same things with *Chenery II* as it can with *Seminole Rock*. Granted, there are tradeoffs. Without a rule, for instance, it is harder for the agency to communicate its policy and the agency's commitment to that policy is less credible, which may influence who participates in the market. These tradeoffs are conceded. But if flexibility is a priority, both *Chenery II* and *Seminole Rock* can do the trick. Once more, it is not necessary to accept the "strong" version of the anti-*Seminole Rock* criticism for this to be true. Instead, it is enough that if the consequences of ambiguity are less costly, an agency will be more willing to accept ambiguity. And to be clear, the real world is more complex than these stylized examples. Even so, these examples

illustrate conceptually how agency flexibility can be obtained either through *Seminole Rock* or *Chenery II*.

B. IMPERFECT SUBSTITUTES ARE STILL SUBSTITUTES

The substitutability between *Seminole Rock* and *Chenery II*, of course, has not been entirely overlooked. Most notably, Manning has acknowledged that because "an agency can typically implement its delegated authority through adjudication rather than rulemaking, then perhaps it makes little sense to worry that an imprecise or ambiguous regulation reserves discretion to an agency to make policy through adjudication."[172] After acknowledging this point, however, Manning moved on by explaining that "[a]gencies are not institutionally indifferent to the choice between rulemaking and adjudication."[173]

This sort of "indifference" observation is correct—as far as it goes. As the three scenarios set out above illustrate, there are important differences between rulemaking and adjudication and agencies no doubt have their preferences.[174] But even if an agency is not "indifferent" about which procedure it uses, it does not follow that in some circumstances its preference for one cannot be overcome because of its greater preference for other benefits like flexibility.

Put another way, even though adjudication under *Chenery II* and rulemaking with *Seminole Rock* deference are not *perfect* substitutes, they can still be *imperfect* substitutes from an agency's perspective. Imperfect substitution, for instance, explains why coal and natural gas can be in the same market, even though they are different products and the switching costs between them can be expensive.[175] After all, despite those differences, someone looking for energy could, if need be, switch between the two fuel sources, even though it would be costly to do so. Differences alone, in other words, do not per se defeat substitution so long as the two options meet similar needs. Of course, some substitutes are more imperfect than others because the switching costs are greater. For instance, in theory, a company looking for power could use another type of fuel altogether, like solar power or ethanol. The specific dynamics that go into determining just how perfect or imperfect a potential substitute is are hard to list in the abstract because almost every situation is different. But the principle is straightforward: as one substitute becomes more or less attractive, the demand for the other substitutes changes as they too become relatively more

172. Manning, *supra* note 1, at 665.

173. *Id.*

174. *See, e.g.*, Magill, *supra* note 26, at 1396 ("An agency's selection of a policymaking tool thus matters for self-evident reasons. Each form should be thought of as a package with specific features—the procedure the agency must follow; whether and how the agency's action binds private parties; whether and when the agency's action can be challenged in court; and the standard that a court will apply when that suit is brought. The choice among them is likely to have an effect on policy formulation and, in any event, is a consequential choice from the perspective of parties who follow the agency's activities.").

175. *Cf.* Little Rock Cardiology Clinic, P.A. v. Baptist Health, 573 F. Supp. 2d 1125, 1143 (E.D. Ark. 2008) (explaining this antitrust concept using fuel as an example).

or less attractive in response. How much demand changes depends on the degree of substitutability. In economics jargon, the question is one of "cross-elasticity of demand."[176]

Applying this economic insight, although flexibility must be important before an agency would trade rulemaking (without *Seminole Rock*) for adjudication (via *Chenery II*), that does not mean that an agency would never make that trade. Even imperfect substitutes exert a gravitational pull—substitution effects—when the first preference is no longer available.[177] Accordingly, although the benefits of rulemaking are real (as discussed below), particularly for certain types of situations, those benefits can be outweighed by other considerations. Moreover, as explained below, many reasons why agencies may be reluctant to substitute between rulemaking and adjudication can be overstated.

1. The "Specific Versus General" Objection

Scholars have explored why agencies choose rulemaking over adjudication. One reason is that a rule may be broader in scope than an adjudicative order.[178] Manning notes, for example, that "[a]lthough *Chenery* does give agencies a presumptive legal right to implement their delegations through adjudication, practical or legal concerns may induce them to use rulemaking in particular contexts."[179] In particular, "[r]ulemaking gives agencies opportunities for generic resolution of issues that might otherwise have to be developed through costly and repetitive case-by-case adjudication," and though "an agency can announce a broad legal principle through adjudication, it must be prepared in every subsequent case to consider whether that principle should be distinguished or overturned."[180]

176. *See, e.g.*, BESANKO & BRAEUTIGAM, *supra* note 33, at 47–49 (explaining cross-price elasticity); James A. Keyte & Kenneth B. Schwartz, "*Tally-Ho!": UPP and the 2010 Horizontal Merger Guidelines*, 77 ANTITRUST L.J. 587, 604 (2011) ("If the two goods are substitutes, then the cross-elasticity of demand will be positive—in other words, as the price of one product rises, the demand for the other also will rise (all else remaining constant). In the case of perfect substitutes (for instance, commodity products), cross-elasticity is equal to positive infinity. For imperfect substitutes (like differentiated products), cross-elasticity will remain positive but may fall within a range of values that reflect the relative 'closeness' of competition between the products.").

177. Indeed, Manning himself seems to acknowledge that substitution would occur. *See* Manning, *supra* note 1, at 693–94 (noting that if *Seminole Rock* deference were eliminated agencies might respond by relying more on adjudication than rulemaking for administrative decisions).

178. *See, e.g.*, Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1482 (1992) ("Case-by-case adjudication is inefficient . . . ; it threatens not only expense but also undesirable variation in individual cases—and particularly so in the staff negotiations that will inevitably set the table for any formal proceeding."); Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121, 127 (1990) ("Lawmaking by adjudication is likely to require litigation before the agency in a multiplicity of cases, whereas a single rulemaking may settle the policy questions involved in many cases without need for future litigation before the agency to resolve them.").

179. Manning, *supra* note 1, at 665.

180. *Id.* at 665–66 (footnotes omitted).

This observation is true. It is easier for an agency to regulate broadly with a rule than an order. Yet the sorts of policies that emerge from rulemaking and adjudication are not different in kind.[181] "An agency *can* announce a broad legal principle through adjudication" if it is willing to bear the cost of doing so.[182] After all, "[t]he same policies an agency can formulate by formal or informal rule are also generally susceptible of adjudication."[183] As Glen Robinson has explained, "though it may be true that, in general, rulemaking is likely to be more efficient and uniform than adjudication, the generality is not as widely applicable as it sometimes is asserted to be."[184]

In terms of preserving flexibility, from an agency's perspective, if the benefits of ambiguous rules are reduced, then the cost of switching to adjudication might be justified. All else being equal, an agency might prefer to issue a rule that, although still open-ended, is nonetheless more specific than the open-ended statute (thus obtaining some of the benefits of rulemaking). But a preference is just that—a preference. Preferences are subject to cost–benefit analysis. If the perceived benefits to the agency of flexibility are weighty, and if *Seminole Rock* deference were no longer an option, then one could imagine adjudication, on net, becoming more attractive.

One also must not overstate that if an agency announces a broad rule in adjudication, it "must be prepared in every subsequent case to consider whether that principle should be distinguished or overturned."[185] This is true as a doctrinal matter. But it is also true that many regulated parties are wary of pushing the line, especially if they think the agency will not back away from its decision. Regulated parties, like everyone else, make decisions in the shadow of the law, with the "law" here being Holmesian in character—that is, one of "prediction."[186] If parties "predict" that the agency will not "distinguish" or "overturn" the policy, many regulated parties will continue to obey it. As Stephenson and Pogoriler explain in an analogous context, "[i]f an agency consistently adheres to its [position] when imposing requirements, evaluating permit applications, levying sanctions, and the like, then the formal status of the rule may not matter much."[187]

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181. *See, e.g.*, Stephenson & Pogoriler, *supra* note 9, at 1494 ("[N]otwithstanding that such orders are ostensibly focused on the individual parties to the dispute, the agency order may state a broad interpretative principle that would clearly affect many other cases, and that would serve as an administrative precedent and authoritative announcement of the agency's position.").

182. Manning, *supra* note 1, at 665 (emphasis added).

183. Forsyth Mem'l Hosp., Inc. v. Sebelius, 652 F.3d 42, 44 (D.C. Cir. 2011) (Brown, J., dissenting).

184. Robinson, *supra* note 26, at 517.

185. Manning, *supra* note 1, at 665–66.

186. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) ("[O]ur study, then, is prediction, the prediction of the incidence of the public force . . . ."); *see also id.* at 459 ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

187. Stephenson & Pogoriler, *supra* note 9, at 1462–63.

At the same time, this sort of "one fell swoop" argument does not account for agencies having other means to announce how "generic" issues should be resolved that are neither rulemaking nor adjudication.[188] For instance, agencies can issue guidance documents for certain issues; they also can just pick up the phone and call, especially in industries with few players.

To be sure, these other means of communicating agency positions have costs of their own.[189] Most important, informal instruments cannot bind the agency; the agency, as a formal matter, must consider the issue anew.[190] Yet if an agency announces a policy through informal means, often there will never be a need for adjudication at all.[191] Many regulated parties do not lightly cross the agencies that regulate them—hence the use of what Tim Wu has dubbed "agency threats."[192] If a party believes, with a reasonable degree of certainty, that its regulator is going to interpret the law one way, for instance, according to what the agency has already said in an informal way, it often will not push the envelope even if, as a formal matter, it could.[193]

2. The "Information Deficit" Objection

Rulemaking, unlike adjudication, also as a general matter "facilitates agency efforts to accumulate the information and policy analysis necessary to formulate broad or complicated public policy."[194] Indeed, "[g]oing beyond the facts of the particular case requires investigation into additional factual and policy issues, and private litigants will rarely want to spend money on issues that are not of immediate interest."[195] Thus, "when agencies proceed by adjudication, they

188. *See, e.g.*, Magill, *supra* note 26, at 1386–90 (explaining menu of options).

189. *See id.* at 1396–97.

190. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015) (explaining that "[i]nterpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process'") (citation omitted); Ass'n of Flight Attendants v. Huerta, 785 F.3d 710, 716 (D.C. Cir. 2015) (applying this principle to guidance documents and all other informal devices).

191. *See, e.g.*, William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1340 (2001) ("Agencies act with the knowledge that their nonlegislative rules may escape pre-enforcement review, and they may count on the coercive (extortionate) effect of the unreviewable rule to achieve compliance even when they might be very reluctant to test the validity of their rule in an actual enforcement action.").

192. *See* Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1842 (2011) ("Under conditions of uncertainty, absent the threat mechanism, the agency would have two options: to make law—through a rulemaking or adjudication—or to ignore the area altogether. Neither is particularly satisfying. The former forces the agencies to make law likely to last a long time based on poorly developed facts, and it invites long periods of uncertainty created by the judicial review process. The latter surrenders any public oversight or input during what may be a critical period of industry development.").

193. *See, e.g.*, *id.* at 1852–53.

194. Manning, *supra* note 1, at 666.

195. *Id.*; *see also id.* ("Indeed, a litigant seeking prompt results has a keen interest in minimizing the scope of investigation.") (quoting Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 403–04 (1981)). A potentially useful analogy could be drawn here to the relative unsuitability of the judicial branch to make policy because of justiciability doctrines. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 43–44 (6th ed. 2012) (explaining that "justiciability doctrines define the judicial role," and that because of such doctrines, "federal courts have limited ability to conduct

must rely 'more on the accident of litigation than on conscious planning.' Conversely, rulemaking permits an agency to control the subject matter and scope of its own policymaking."[196] All of this is true. But again, this truth should not be overstated.

The notice-and-comment process can serve important acquiring functions.[197] Yet it is still possible for an agency to prioritize other things. This is especially so if the agency can obtain much of the information it wants other ways, such as by "targeted outreach" to the most relevant communities.[198] This can be done even without rulemaking; in fact, this sort of outreach occurs for guidance documents—sometimes in ways that raise concerns about the openness of the process.[199]

Moreover, for certain types of policy decisions, some suspect that the agency may not really care all that much what is said in the comments anyway.[200] Indeed, in some rulemakings, agencies may use comments to "dress up" decisions already made.[201] This is especially true because sometimes responding to comments can be a bother; a common lament is that agencies must respond to comments and do those other acts necessary to satisfy "hard look" review.[202] Sometimes adjudication may be quicker.

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independent investigations" but instead "must depend on the parties to fully present all relevant information").

196. Manning, *supra* note 1, at 666–67 (footnote omitted).

197. *See, e.g.*, 1 ADMIN. L. & PRAC. § 2:12 (3d ed.) ("[T]he rulemaking procedures assure broad participation and create record support for generalized pronouncements.").

198. *See, e.g.*, Reeve T. Bull, *Market Corrective Rulemaking: Drawing on EU Insights to Rationalize U.S. Regulation*, 67 ADMIN. L. REV. 629, 666 (2015) (noting possibility of "targeted outreach" and observing that "agencies may wish to explore a range of early public participation mechanisms" such as "gaug[ing] the reaction of various interest groups to a proposed regulatory action, in which case the agency might merely informally reach out to key players who might not otherwise take the initiative to submit public comments"); *see also* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) ("No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties.").

199. *See, e.g.*, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 427–29 (2007).

200. *See, e.g.*, Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 514 (2002) ("[T]he thrust of some rules, if not the details, are preordained. This is especially true when an agency institutes a rulemaking proceeding to satisfy demands for a particular outcome from the White House or political appointees at the top of the agency."); *cf.* Ad Hoc Telecomms. Users Comm. v. FCC, 680 F.2d 790, 798 (D.C. Cir. 1982) ("The Commission evaluated the customer input with a preconceived bias that caused it to interpret, discount or ignore the comments in such a manner as to make them consistent with its own views.") (MacKinnon, J., concurring); Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 86 (2013) (explaining that some believe that "commenting is futile because the agency has already made up its mind on the direction it plans to take").

201. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 777 (2010); *see also* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 267 (2014) (discussing some of the problems with informal rulemaking).

202. *See, e.g.*, Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1415 (2012) (noting that ossification concerns can be overstated, but agreeing that some rules do

Finally, this information-gathering argument may be too categorical. In industries with few players, everyone is aware of what is happening in an important adjudication, even if they are not parties to it.[203] Because everyone knows the stakes, companies pipe up, even if the adjudication does not formally involve them. After all, the agency's legal precedent will impact their business because of the assumption that the agency will apply it again. This is is why the D.C. Circuit has held that a party can seek pre-enforcement judicial review of an agency's imminent application of an *adjudicatory* precedent involving *different* parties.[204] Reflecting this reality, agencies can and do sometimes solicit comments in adjudications, not only in rulemakings.[205]

3. The "Congressional Preferences" Objection

Because Congress values rulemaking, sometimes it may encourage agencies to do it. That this congressional preference exists also arguably suggests that agencies will not shift to adjudication if *Seminole Rock* were overruled.[206]

No doubt, sometimes Congress wants agencies to engage in rulemaking. Congress, for instance, may require agencies to do so, including by declaring that no legal obligation exists until after the agency has promulgated a rule.[207] For example, the EPA can only issue National Ambient Air Quality Standards by rulemaking.[208] In such circumstances, there is no reason to worry about *Chenery II* because substitution is impossible. The Supreme Court could therefore overrule *Seminole Rock* in this context with more confidence that unintended consequences would not result. Indeed, that Congress has withheld authority to regulate except through rulemaking arguably creates a structural inference that the agency should not be able to make policy through adjudication.[209]

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take a long time to promulgate); Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 764–65 (2006).

203. *Cf.* Robinson, *supra* note 26, at 517.

204. *See, e.g.*, Conference Grp., LLC v. FCC, 720 F.3d 957, 963 (D.C. Cir. 2013) (explaining that there are circumstances where the court has "allowed a party to challenge in advance an agency policy adopted via adjudication when the prospect of impending harm was effectively certain") (quoting Teva Pharm. USA, Inc. v. Sebelius, 595 F.3d 1303, 1314 (D.C. Cir. 2010)).

205. *See, e.g.*, *Teva*, 595 F.3d at 1306.

206. Manning, *supra* note 1, at 667 (noting "the demand for agency rulemaking may reflect external political or legal requirements" and that "[e]ven where Congress has not [formally required rulemaking], agencies have at times reacted to their informal political environments by moving toward more broadly participatory agency lawmaking").

207. *See, e.g.*, Stephenson & Pogoriler, *supra* note 9, at 1481 (explaining that Congress may "establish[] a system in which the agency lacks the power to act until it first promulgates a valid set of legislative rules").

208. *See* 42 U.S.C. § 7409(a)(1)(B) (2012) (the agency "shall by regulation promulgate such proposed national primary and secondary ambient air quality standards").

209. *See* Kovvali, *supra* note 157, at 871 ("Congress's decision to enact a secondary statute should be understood as a congressional command to promulgate a specific rule. Refusing *Seminole Rock* deference when the underlying statute is secondary helps to police the integrity of this *congressional*

Yet it is common for agencies to have discretion to choose whether to act by rulemaking or adjudication.[210] In this typical situation (that is, one like *Chenery II*), that Congress may prefer rulemaking—albeit not enough to require it—is only one value the agency must consider. If flexibility is particularly important to the agency, it is possible to imagine the benefits of adjudication under *Chenery II* "winning out" despite Congress' preference. Again, imperfect substitutes are still substitutes; the more imperfect the substitute, the less substitution that takes place, meaning that if Congress wants rulemaking, that congressional preference makes adjudication a more imperfect substitute. But at the margins, there still would be substitution.

4. The "Adjudication is a Pain" Objection

Finally, agencies may prefer rulemaking because, within their authority, rulemaking may be less difficult than adjudication—potentially for a host of idiosyncratic reasons. So far this Article has elided what exactly is meant by "adjudication."[211] However, adjudication comes in many flavors, involving different types of industries and regulatory standards, and different agencies have different institutional practices and priorities.[212] Some agencies may prefer rulemaking because adjudication can be difficult—especially if, as sometimes is required, the adjudication must be formal and on the record.[213] Likewise, perhaps, if there is a large volume of disputes, a rule might make more sense. Or an agency may not have the infrastructure in place to readily start using adjudication; path dependency is real. Or perhaps the agency is irrationally biased in favor of rulemaking; alarm bells should sound when we start assuming perfect rationality. In short, there are countless possible reasons why some agencies may prefer to issue a rule.

This Article does not pretend to go into all of the preferences and practices of individual agencies.[214] Nor does it need to. It is enough to observe that some agencies may think that adjudication is onerous and so, all else being equal, tend to prefer rulemaking. But all that means is that for those agencies,

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command by forcing the agency to put content through the rulemaking process, instead of relying on later informal interpretive processes.").

210. *See, e.g.*, Datla & Revesz, *supra* note 130, at 808–12 (listing agencies with power to act through adjudication and explaining the pros and cons of doing so rather than through rulemaking).

211. *See, e.g.*, Manning, *supra* note 36, at 901–14 (discussing *Chenery II* and policymaking in adjudication without getting into the details of what adjudication entails).

212. *See, e.g.*, Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 72, 74 (1996) (explaining the "balkanization" of agency adjudication procedures across agencies and arguing that "the initial trial level in federal agency adjudication is becoming almost as variegated as the agency appellate structures—which have always been 'unregulated' by the APA").

213. 5 U.S.C. §§ 556–557 (2012).

214. For instance, an agency may believe that acting through adjudication is less legitimate than rulemaking, especially for policies of wide applicability. On the other hand, some argue that adjudicative procedures increase legitimacy. *See, e.g.*, Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1279–80 (1975) (noting the argument).

competing values must be weightier before they would be willing to substitute away from rulemaking. It does not mean that even if there are other weighty values, these agencies would never substitute. In fact, by the same token, presumably there are some agencies that are relatively indifferent between rulemaking and adjudication, and so need much less to push them from one to the other. And there are other agencies that prefer to act by adjudication, which of course has benefits of its own (for example, little to no review by the White House Office of Information and Regulatory Affairs, the agency can pick the target, there are fewer comments, etc.).[215] Sometimes agencies have a strong preference for one form of procedure over another. Yet there still may be substitution when the benefits of doing so are substantial.[216]

C. REAL WORLD EXAMPLES

This "substitution" discussion thus far has largely been theoretical—it has demonstrated why we would expect substitution to occur between rulemaking and adjudication if the value of one increased relative to the other. To be sure, there are pros and cons of each, so substitution is not costless. But if the value of one increases enough compared to the other, substitution should occur. In the next section of the Article, I will show why this substitution point is relevant to *Seminole Rock*: for agencies that value flexibility, overruling *Seminole Rock* will make rulemaking relatively less attractive, thus encouraging adjudication via *Chenery II*. Before doing so, however, it is useful to offer a few real-world examples of agencies choosing to substitute between rulemaking and adjudication. That these examples exist suggests that agencies that place a high value on flexibility also would be willing to substitute away from rulemaking if *Seminole Rock* were overruled. This is especially true because there are also examples of agencies acting in ways to preserve their own flexibility. Put these two categories of real-world examples together and there is reason to think that agencies that value flexibility may be willing to substitute away from rulemaking if rulemaking were to become less flexible.

The first example is *Qwest Services Corp. v. FCC*.[217] There, the D.C. Circuit confronted a complicated telecommunications case involving two different types of prepaid calling cards. One type "uses internet protocol ('IP') technology to transport part or all of a telephone call" while the other "offers a

215. This Article does not purport to be a comprehensive examination of rulemaking versus adjudication. As this discussion shows, no doubt there are many reasons why agencies choose the form of policymaking that they do. *See, e.g.*, Magill, *supra* note 26, at 1398 (noting that it is hard to explain why agencies choose the forms of procedures that they do).

216. Empirical analysis of these questions would be valuable. As it is now, little if any scholarship has been devoted to understanding empirically why agencies choose to make policy through certain mechanisms rather than others. Indeed, the analysis presumably should be agency-specific because agencies vary widely across multiple dimensions. An agency that places a high value on immediate and direct regulatory conduct, for instance, may value flexibility less than an agency that is less certain about how it wants to proceed.

217. 509 F.3d 531 (D.C. Cir. 2007).

menu-driven interface through which users can either make a call or access several types of information."[218] The Federal Communications Commission (FCC) ultimately determined that both types of cards are "subject to access charges" as "telecommunications services."[219] How the agency reached that decision, however, is noteworthy. Initially, the FCC issued a notice of proposed rulemaking and began to solicit comments because it determined that adjudication was a poor fit for the question.[220] Yet when the FCC issued its final decision, it not only issued a rule, but it also issued "a declaratory ruling" that "announced that IP-transport and menu-driven cards 'are telecommunications services and that their providers are subject to regulation as telecommunications carriers,' and thus subject to the obligation to pay access charges to local exchange carriers."[221] The FCC further declared "that a declaratory ruling was, notwithstanding the proceedings' launch as a rulemaking, 'a form of adjudication' and recognized that '[g]enerally, adjudicatory decisions are applied retroactively.'"[222] The agency then determined that it would retroactively apply its decision to "IP-transport cards," but that it would only apply its decision prospectively to "menu-driven cards."[223] The D.C. Circuit held that this midstream shift from rulemaking to adjudication was proper but that the FCC erred by not giving its adjudication retroactive effect for both types of cards.[224]

This case is a good illustration of substitution because the FCC was able to fairly seamlessly substitute rulemaking for adjudication. Indeed, it did so in the middle of a rulemaking. Although it is impossible to know for certain why the agency acted as it did, it seems fair to suppose that the FCC opted to substitute between the two policymaking mechanisms because, at least in part, it wanted to avail itself of one of the benefits of adjudication: retroactivity.[225] Rules are generally prospective-only but adjudication can be retroactive.[226] *Qwest Services Corp.* thus suggests that agencies may decide which policymaking tool to use based on the legal doctrines surrounding it.[227]

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218. *Id.* at 534.

219. *Id.*

220. *See id.* at 535 (explaining that the FCC "stated that '[r]ather than try to address each possible type of calling card offering through a declaratory ruling,' the Commission was initiating a rulemaking 'to consider the classification and jurisdiction of new forms of prepaid calling cards.'" (alteration in original) (quoting AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, 20 FCC Rcd 4826, 4826 ¶ 2 (2005))).

221. *Id.* (quoting In re Regulation of Prepaid Calling Card Services, 21 FCC Rcd 7290, 7293 ¶ 10, 7300 ¶ 27 (2006)).

222. *Id.* (alteration in original) (quoting 21 FCC Rcd at 7304–05 ¶ 41).

223. *Qwest Servs. Corp.*, 509 F.3d 531, 535 (D.C. Cir. 2007).

224. *Id.* at 536–37, 541.

225. *See id.* at 535 ("Turning to the issue of remedy, the Commission said that a declaratory ruling was, notwithstanding the proceedings' launch as a rulemaking, 'a form of adjudication' and recognized that '[g]enerally, adjudicatory decisions are applied retroactively.'" (citations omitted)).

226. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208–09 (1988).

227. Along the same lines, another case worth mentioning is *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010), which rejected the FCC's efforts to create a "network neutrality" scheme—which has nationwide importance—through adjudication.

Another example of substitution comes from immigration law. Alberto Gonzales has recently explained how the United States can make immigration policy using the Attorney General's "referral authority"—a form of adjudication—rather than "the more traditional avenue of rulemaking."[228] The Attorney General has authority to review immigration decisions, and in so doing can "pronounce new standards for the agency."[229] Importantly, this form of adjudication can "provid[e] nearly identical benefits in the form of clear guidance on policy issues."[230] Accordingly, Gonzales and his co-author Patrick Glen argue that rather than using rulemaking, which can take a long time and require more bureaucratic effort, the government should more often use adjudication,[231] and they list specific examples of important policies that were created in precisely this manner.[232] To be sure, this power is not used often (suggesting that the other benefits of rulemaking can be significant), but Gonzales and Glen argue that it has been used in many important contexts and that it can and should be used in more still.

This is another good illustration of substitution—in this context, "nearly identical" policies can be created by rulemaking or adjudication, and as the cost of rulemaking increases (for example, the time required to do so), the regulator may shift to adjudication. Given that Gonzales served as Attorney General and exercised this very discretion, this example is notable evidence that substitution is real.

At the same time, there are examples of agencies placing a high value on future flexibility. Indeed, *Chenery II* presupposes that some agencies have this preference[233] and flexibility is one of the driving forces behind the widespread use of guidance documents.[234] Agencies have also openly admitted that they value flexibility—which makes sense because there are many valid reasons to want to "wait and see" what happens. For instance, the FCC has invoked flexibility as a reason for not promulgating a rule to govern "a dynamic and constantly changing industry."[235]

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228. *See* Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 897 (2016).

229. *Id*. at 847 (quoting Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 640 n.89 (2012)).

230. *Id*. at 898.

231. *See id.*

232. *See, e.g.*, *id*. at 861–63 (changing policy regarding female genital mutilation); *id.* at 876 (adjudication used to "institute[] a new framework for considering when offenses qualify as 'crimes involving moral turpitude' for purposes of the immigration laws").

233. *See Chenery II*, 332 U.S. 194, 202 (1947) ("Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.").

234. *See, e.g.*, Mendelson, *supra* note 199, at 408 ("[A]gencies have several reasons to prefer using guidance documents to following the APA notice-and-comment procedure . . . . The agency also retains flexibility to change the guidance inexpensively and quickly.").

235. *See* Miscellaneous Rules Relating to Common Carriers, 46 Fed. Reg. 5984, 6001 (Jan. 21, 1981) ("As the Supreme Court has recognized repeatedly, the imprecision which necessarily accompanies any broad conferral of legislative authority serves an important purpose of permitting the

There is also evidence suggesting that agencies may value flexibility enough to take steps to obtain it. Agencies, for example, sometimes promulgate "mush."[236] This practice may be explainable by a desire to preserve flexibility. The Tenth Circuit, for instance, confronted regulatory language stating that program participants must comply with "any additional conditions" specified by the agency; the court concluded that this language was hopelessly open-ended because "the Secretary could insert *any* condition into a program participation agreement, and claim authorization for that action."[237] Similarly, the First Circuit has recently observed—in denying deference under the anti-parroting rule—that an agency's regulations "make no effort to define 'trades or businesses,' and merely refer to Treasury regulations, which, as mentioned, also do not define the phrase."[238] And in *Christopher*, the Department of Labor's regulation merely "cross-reference[d] back to the language of Section 3(k) of the Act—the very language purportedly being defined."[239] Such examples of regulatory ambiguity may also reflect agency refusals to pin themselves down.[240]

In short, it is safe to conclude that at least sometimes agencies place a high value on flexibility. This observation, combined with the observation that agencies substitute between rulemaking and adjudication, suggests that if rulemaking were to become less valuable for preserving flexibility, some agencies would sometimes shift to adjudication.

III. AGENCIES WILL SUBSTITUTE TO *CHENERY II* IF *SEMINOLE ROCK* IS OVERRULED—THEREBY HARMING REGULATED PARTIES

Administrative law is a complex network of interconnected doctrines. When one part of that network is changed, it has consequences for other parts. This Article has demonstrated that rulemaking and adjudication are substitutes, albeit imperfect ones. This cross-substitutability suggests that if *Seminole Rock* were overruled, we should expect agencies that place a high value on future flexibility to fall back on *Chenery II* more often than they do now. If that were to happen often enough, overruling *Seminole Rock* would create a world that is worse for regulated parties than the status quo because adjudication under *Chenery II* sometimes provides less notice than even ambiguous rules. And if such agencies were to provide notice in a post-*Seminole Rock* world, they would

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Commission to deal with a dynamic and constantly changing industry through case-by-case evolution and delineation of agency authority.").

236. *See, e.g.*, Stephenson & Pogoriler, *supra* note 9, at 1471.

237. Mission Grp. Kan., Inc. v. Riley, 146 F.3d 775, 778, 781 & n.6 (10th Cir. 1998).

238. Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund, 724 F.3d 129, 141 (1st Cir. 2013) (quoting 29 C.F.R. § 4001.3(a) (2016)).

239. Christopher v. SmithKline Beecham Corp., 635 F.3d 383, 394 (9th Cir. 2011).

240. *Cf., e.g.*, Thomas Chen, *Patent Claim Construction: An Appeal for* Chevron *Deference*, 94 VA. L. REV. 1165, 1177–78 (2008) ("Patent claims are often intentionally drafted with vague and ambiguous language in order to preserve sufficient maneuverability for future litigation.").

more often do so through informal means like guidance documents, thus reducing regulatory participation.

A. WITHOUT *SEMINOLE ROCK*, AGENCIES THAT VALUE FLEXIBILITY WOULD INCREASINGLY SHIFT TO *CHENERY II*

The key contention of this Article is that if *Seminole Rock* were overruled, those agencies that place a high value on flexibility should be expected to fall back on their power under *Chenery II* to make policy through adjudication more often than they do now—at least at the margins. For such agencies, one would expect that substitution would increase if *Seminole Rock* were overruled because ambiguous regulations (with *Seminole Rock* deference) and no regulations at all (adjudications via *Chenery II*) are substitutes. Accordingly, although agencies are not indifferent between adjudication and rulemaking, if agencies place a high enough value on flexibility, they may determine that the tradeoffs necessary to obtain that flexibility through adjudication are justified. Basic principles of microeconomics teach that substitution from rulemaking to adjudication should increase if rulemaking with *Seminole Rock* is no longer available.

Even today, some agencies prefer adjudication to rulemaking, despite *Seminole Rock*.[241] The National Labor Relations Board (NLRB), for instance, essentially *never* prefers rulemaking.[242] Overruling *Seminole Rock* presumably should have no effect on those decisions because the agency has already decided that the benefits of rulemaking are outweighed by the benefits of adjudication. That agencies sometimes make such decisions, however, is circumstantial evidence that the use of adjudication via *Chenery II* would increase if *Seminole Rock* were overruled. This is so because these examples illustrate that agencies sometimes prefer the benefits of adjudication despite rulemaking carrying with it all the valuable benefits set out above in section II.B. That agencies, even today, do not always promulgate rules suggests that they would be even less likely to do so if *Seminole Rock* were no longer on the table.

The economic reasoning behind this insight is not especially complicated. By definition, if one substitute becomes relatively less attractive, the other substitute becomes relatively more attractive—that is why they are substitutes.[243] As the net benefits of rulemaking (the aggregate of all the pros and cons) decrease, an agency's willingness to promulgate a rule should also decrease, even if, absent the change, the agency would have preferred to issue a rule. Overruling

241. There may be some tension between this observation and the point discussed above that "adjudication can be a pain." *See supra* Section II.B.4. But there need not be tension. Although adjudication can be difficult, some agencies may still prefer it because its benefits outweigh its costs. (Of course, rulemaking can be difficult as well.)

242. *See, e.g.*, Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998).

243. *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 7 (2010) ("Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service." (footnotes omitted)).

Seminole Rock, in turn, would make rulemaking less valuable because it would diminish one of the benefits of rulemaking—a benefit that presumably is especially important to those agencies that place a high value on flexibility. Hence, if *Seminole Rock* were overruled, agencies that place a high value on flexibility should be expected to substitute to adjudication more often than they do now.

There is, of course, an important empirical question lurking here: how often do agencies value flexibility enough to trade for it? If *Seminole Rock* were overruled, we should expect agencies to sometimes substitute to *Chenery II*, and other times to substitute to rulemaking with clearer rules. It depends on how they value flexibility compared to the benefits of rulemaking. Put another way, using technical jargon, to gauge what would happen if *Seminole Rock* were overruled, we would need to know an agency's cross-elasticity of demand for rulemaking (with *Seminole Rock*) versus adjudication (via *Chenery II*), as well as what the cross-elasticity of demand for rulemaking would be if *Seminole Rock* were overruled. If we knew this cross-elasticity information, we could determine what is more likely to happen if *Seminole Rock* were overruled: substitution to *Chenery II* (the unintended consequence) or substitution to clearer rules (the intended consequence).

Unfortunately, this empirical question is almost impossible to answer, especially because these cross-elasticities vary across agencies.[244] Indeed, no doubt, they vary within agencies, depending on the subject matter of the policy at issue. For instance, Congress may care more or less about whether the agency operates by rulemaking or adjudication depending on the subject matter; to the extent that agencies are mindful of congressional preferences,[245] the agency's cross-elasticity may also vary. Even though it is difficult to know the answer, however, focusing on cross-elasticities is the *right* question. If the Court does not even have a rough sense of these cross-elasticities, it may inadvertently make a mistake. For all the reasons explained in section III.B, if agencies shift to adjudication more than they shift to clear rules, overruling *Seminole Rock* may be worse than doing nothing. Uncertainty regarding these empirical questions may counsel in favor of stare decisis.[246]

It is worth observing, moreover, that if the most aggressive anti-*Seminole Rock* criticisms are correct that agencies, in fact, do *intentionally* promulgate vague regulations,[247] then there is strong reason to fear that such strategic actors

244. *See, e.g.*, Magill, *supra* note 26, at 1399 ("Some agencies are known to rely heavily on adjudication, others on rulemaking, and others on a rich mix of the two. The NLRB and the FTC are known for their heavy reliance on adjudication as a way of making policy. The FCC, by contrast, relies heavily on rules. And FERC relies on both adjudication and general rules.").

245. *See supra* Section II.B.3 (discussing congressional preferences).

246. *See, e.g.*, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2414–15 (2015) (refusing to overrule a precedent on the force of stare decisis because, *inter alia*, the Court lacked "empirical evidence" establishing that post-patent royalties are sufficiently pro-competitive).

247. *See, e.g.*, Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 69 (2011) (Scalia, J., concurring) ("By contrast, deferring to an agency's interpretation of its own rule encourages the agency to enact

would seek out substitutes for *Seminole Rock*. And even if agencies today are not engaging in strategic behavior when they decide whether to act by rulemaking or adjudication, perhaps that will change in the future as administrative law becomes even more weaponized.[248] Accordingly, if the *Seminole Rock* critics are correct about how agencies behave, that may be a reason to retain *Seminole Rock*, not overrule it.

To be sure, the Article's substitution analysis does not require agencies to deliberately create ambiguity. Even if agencies do not deliberately create ambiguity but rather merely tolerate it, overruling *Seminole Rock* may still lead them to engage in more adjudication because the costs of ambiguity would increase. Hence, it would still be necessary to evaluate cross-elasticities of demand. But if agencies, in fact, do act in such strategic ways, then *Seminole Rock* and *Chenery II* could be quite close substitutes indeed.

B. OVERRULING *SEMINOLE ROCK* MAY BE WORSE THAN DOING NOTHING

And now we come to the rub. If agencies began to fall back on *Chenery II* in a post-*Seminole Rock* world, that outcome could be worse than doing nothing. This is because adjudication under *Chenery II* provides no more prospective notice to regulated parties of their legal obligations than ambiguous rules under *Seminole Rock* do, and, indeed, usually provides less notice. Accordingly, to the extent *Seminole Rock*'s critics are concerned about agencies retroactively springing legal obligations on regulated parties, overruling *Seminole Rock* may not be the answer.[249] Moreover, if agencies were to provide notice to regulated parties in a post-*Seminole Rock* world, logic suggests that they would be more likely to do so through informal means like guidance documents. From the perspective of regulated parties, either of these outcomes could be worse than the status quo. Again, agencies sometimes would issue clearer rules (the intended consequence) whereas sometimes they would not issue rules at all (the unintended consequence). Unless the Supreme Court is confident that the intended consequence would win out over the unintended consequence, overruling *Seminole Rock* could be a mistake.

Once more, consider the three scenarios detailed above involving an agency general counsel. In those scenarios, almost by definition, the *Chenery II* options

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vague rules which give it the power, in future adjudications, *to do what it pleases*." (emphasis added)); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (arguing that agencies promulgate "vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication").

248. *See generally* Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012) (arguing that administrative law is increasingly becoming a battleground for policy disputes).

249. Of course, some may dislike *Seminole Rock* simply because they think it is wrong, even apart from its consequences. Often, however, being wrong is not a sufficient reason to jettison stare decisis. *See, e.g.*, Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 414 (2010). Moreover, as explained below, the animating principle of the "same hands" maxim is preventing retroactivity. *See infra* Section IV.B.1.

provide less notice to regulated parties than the *Seminole Rock* options, or at least no more notice. This is unsurprising. If an agency promulgates a rule, the amount of "policy space" that the rule can cover necessarily cannot exceed the total universe of available policies available under the statute.[250] This is especially so because an agency cannot parrot the statute's language.[251] Therefore, regulated parties reading a rule should have more notice of their obligations than regulated parties just reading the statute, even if the rule is ambiguous.[252] Of course, one can imagine a rule that is just as expansive as the statute but does not parrot the language. In that situation, the amount of notice would be equivalent. But most of the time, a rule should "narrow the scope" of policy space because a rule that exceeds the scope is *ultra vires*.[253] As a stylized example, a statute may empower an agency to regulate "the emission of dangerous substances in the public interest." But the agency's regulation implementing the statute may say "don't emit X number of particle Y over Z period of time." Such a regulation would be narrower than the statute because the statute authorizes the agency to regulate more than the agency opted to regulate. It follows then that in terms of providing prospective guidance to regulated parties, making policy in adjudication (per *Chenery II*) under the statute itself can be inferior to making policy through even ambiguous regulations. After all, subject to retroactivity concerns, the agency can avail itself of every policy choice the statute allows when it proceeds via adjudication under the statute itself, but after rulemaking, the agency's policy discretion is more limited. Hence, to the extent that overruling *Seminole Rock* creates incentives for agencies to forego rulemaking (at least to the degree that the net effect on notice is negative), the Court's decision would be at cross-purposes with its goal.

It is possible, of course, that agencies in a post-*Seminole Rock* world would still attempt to provide notice to regulated parties. The agency may be wary of tying itself down for the future, but that does not mean it does not have a preference now. And if the agency does not say anything about what the statute means, but instead simply waits until the appropriate time to bring an enforcement action, its ability to direct primary conduct during the interim is reduced. The agency thus may choose to inform regulated parties how it interprets the statute. If *Seminole Rock* were not available, however, such an agency more likely would fall back on guidance documents and other informal means of communication instead of rules. Guidance documents have some ability to

250. *See* Gonzales v. Oregon, 546 U.S. 243, 256 (2006) ("In *Auer*, the underlying regulations *gave specificity to a statutory scheme* the Secretary of Labor was charged with enforcing . . . ." (emphasis added)).

251. *See, e.g.*, *id.* at 256–57.

252. *See* Marisam, *supra* note 22, at 303 (explaining that "regulations are typically narrower than enabling statutes" because of the "anti-parroting principle").

253. *Id.* Of course, with subsequent adjudications, the agency will have to show consistency or at least explain why the original decision was wrong. But agencies also have to do the same regarding rules. This is just the duty of reasoned decisionmaking.

influence conduct, yet they can be changed much more readily than a rule. Accordingly, if *Seminole Rock* were overruled, not only should we expect agencies to rely on adjudication more under *Chenery II*, but we also should expect agencies to rely on guidance documents more than before.

The reason *why* we should expect to see more guidance documents (and other informal devices) should be obvious from the above analysis: guidance documents are also imperfect substitutes for rulemaking.[254] In other words, the analysis thus far has been too quick: there are not only two substitutes (rulemaking or adjudication), but in fact a spectrum of substitutes.[255] It is important to recognize, however, that these informal devices like guidance documents are related to *Chenery II* in a way that goes beyond the fact that both are substitutes for rulemaking. At least in part, the reason regulated parties care about guidance documents where the agency has not promulgated a rule is because *Chenery II* looms in the background. If an agency could not punish regulated parties directly under the statute, but instead could only promulgate rules, regulated parties would have less reason to worry about a guidance document when the agency has not promulgated a rule. As it is now, however, agencies can bring an enforcement action under the statute itself, thus forcing regulated parties to pay attention to the agency's guidance. To be sure, in adjudication, the agency could not simply say "the party has violated the guidance document" because the guidance document itself would not itself have legal effect. But the agency *could* say "this is how we read the statute itself," and if the reading of the statute was reasonable, the agency would be entitled to prevail under *Chenery II*. Hence, *Chenery II* is the anchor that gives many guidance documents their weight.[256]

There is a virtue, of course, to informal guidance—it provides notice. As Justice Elena Kagan recently explained at oral argument in an analogous context (jurisdictional determinations under the Clean Water Act), if we were to

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254. *See, e.g.*, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007) ("Because it is procedurally easier to issue guidance documents, there also may be an incentive for regulators to issue guidance documents in lieu of regulations.").

255. *See, e.g.*, Bressman, *supra* note 147, at 536 ("Furthermore, agencies now choose other methods instead of rulemaking for making policy. They use informal adjudications or enforcement actions against private parties. They use guidance documents or settlement negotiations."). Needless to say, there is abundant literature on guidance documents. This Article does not wade deeply into that literature. It is sufficient to observe that the existence of guidance documents and other informal mechanisms further complicates the anti-*Seminole Rock* critique, for they provide more opportunity for substitution.

256. *See, e.g.*, David L. Franklin, *Two Cheers for Procedural Review of Guidance Documents*, 90 TEX. L. REV. SEE ALSO 111, 117 (2012) ("Procedural invalidation of guidance documents is largely ineffective, Professor Seidenfeld argues, because under *Chenery II* the agency could simply apply the same policy in the course of adjudicatory enforcement. Ironically, the same doctrine underlies my own skepticism about the benefits of ex post monitoring: given that agencies may cite the policy embodied in a guidance document in support of an adjudicatory order, I have argued, they are unlikely to be deterred by the threat of being unable to 'rely' on such rules in the strictest legal sense.") (discussing Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 338 (2011)).

discourage agencies from providing guidance, the result is that regulated parties would know even *less* about their obligations.[257] So if overruling *Seminole Rock* led agencies to provide more guidance documents, perhaps any concerns about notice should fall away. Yet this leads to the second reason why substitution from *Seminole Rock* would be problematic: although providing notice through such means might reduce fair notice concerns, it would do so at the expense of public participation.

There is an important reason why many scholars prefer rulemaking to other forms of policymaking[258]: it encourages public involvement in the process in a way that, at least in theory, is better than the alternatives.[259] To be sure, adjudication can also be a platform for public participation.[260] But rulemaking is designed to allow members of the public to make their best argument in an orderly way. And if what the public has to say is material, the agency must respond in a meaningful way[261]—and the agency's response is subject to judicial review to prevent arbitrary and capricious agency action.[262] Regulated parties often prefer notice-and-comment rulemaking to informal agency behavior, especially if an Article III court is waiting in the wings to "impose a salutary discipline" on the agency that "deters casual and sloppy action."[263] Regulated parties in a recent case, for instance, challenged the Commodity Futures Trading Commission's failure to conduct a notice-and-comment rulemaking because they wanted an opportunity to confront the agency's proposed test.[264] That challenge was rejected, however, because the agency's test was only "guidance."[265] Making rulemaking less attractive, accordingly, could reduce public

257. *See* Transcript of Oral Argument at 37, U.S. Army Corp. of Eng'rs v. Hawkes Co., 136 S. Ct. 1807 (2016) (No. 15-290) ("If the JD process didn't exist, your client would be facing the exact same predicament. And indeed, . . . the JD process's reason for being is that it's supposed to help people in dealing with this predicament because it's supposed to provide them with information that they otherwise wouldn't have."); *see also id.* at 17 ("We think that this helps people, to actually know what the government thinks about particular factual situations."); *id.* at 28 ("[P]eople want to know these things.").

258. *See, e.g.*, Bressman, *supra* note 147, at 535 (noting "scholars who have recognized the advantages of notice-and-comment rulemaking for issuing general policy").

259. *See, e.g.*, Sean Croston, *The Petition Is Mightier Than the Sword: Rediscovering an Old Weapon in the Battles over "Regulation Through Guidance*,*"* 63 ADMIN. L. REV. 381, 384–87 (2011) (explaining some of the problems with guidance documents); *see generally* Anthony, *supra* note 34 (critiquing use of guidance documents).

260. *See supra* Section II.B.1.

261. *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977) ("[T]here must be an *exchange* of views, information, and criticism between interested persons and the agency." (quoting Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393–94 (D.C. Cir. 1973))).

262. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983).

263. Anthony, *supra* note 34, at 1374.

264. *See* Inv. Co. Inst. v. CFTC, 720 F.3d 370, 381 (D.C. Cir. 2013).

265. *See id.* ("As for the seven-factor marketing test, no notice and comment was required. The . . . seven factors were included in the rule only as guidance. The rule explicitly states that CFTC 'will determine whether a violation of the marketing restriction exists on a case by case basis through an examination of the relevant facts.'" (citations omitted)).

participation in the regulatory process by encouraging more ad hoc agency behavior.

At bottom, overruling *Seminole Rock* on net *could* reduce unfairness. Agencies may conclude that the costs of flexibility are too high if the only way to obtain that flexibility is through adjudication or guidance documents, and so may opt to promulgate rules with less ambiguity. Indeed, economics suggests that both would happen; some ambiguous rules in a world without *Seminole Rock* would become clear rules, whereas others would become no rules at all. Because agencies promulgate ambiguous rules, however, it appears that they sometimes put a high value on flexibility (or at least are not willing to expend the resources necessary to eliminate ambiguity, which in effect may not be that different). Yet ultimately, as explained above, this is an empirical question. It is sufficient here to observe that before overruling *Seminole Rock*, the Court should understand that doing so may result in outcomes that, on the Court's own terms, are worse than retaining the status quo. Uncertainty on this score makes stare decisis more attractive. Counterintuitively, moreover, if agencies do behave as strategically as some critics of *Seminole Rock* suggest, the argument for stare decisis may be even stronger because strategic agencies presumably would be even more willing to substitute to adjudication if *Seminole Rock* were no longer available.

IV. LOOKING BEYOND *SEMINOLE ROCK*

As explained above, administrative law must be understood for what it is: an interconnected network of doctrines. And as an interconnected network, when something changes, the repercussions are felt throughout the system. Overruling *Seminole Rock* therefore will have consequences for the usage of *Chenery II*. Because these two doctrines are, in a sense, substitutes, albeit imperfect ones, if rulemaking with *Seminole Rock* deference were removed from the menu of options, making policy through adjudication under *Chenery II* would become more attractive, at least at the margins—especially for agencies that place a high value on future flexibility. Whether the benefits of overruling *Seminole Rock* are outweighed by the costs of doing so thus depends, in large part, on the answer to this question: Would agencies, on net, promulgate clearer regulations if they could not invoke *Seminole Rock*, or would they more often fall back on ad hoc adjudication, with the lack of clarity that entails? The answer to that question is an empirical one, and sadly, no one knows it.

In light of this uncertainty about the post-*Seminole Rock* world, what should the Supreme Court do? There are at least three options. The Court could overrule *Seminole Rock* and do nothing about *Chenery II*; not overrule anything; or overrule *Seminole Rock* and do something about *Chenery II*. For all the reasons explained above, the first option could be the worst one—if *Chenery II* remains unchanged, it may be better to retain *Seminole Rock* because even an ambiguous rule is often better than no rule. At least to the extent that stare

decisis is a pragmatic doctrine, therefore, before the Supreme Court overrules *Seminole Rock*, it must consider these substitution effects.

The third option, however, may be the best one for two reasons. First, it would work. As part of revisiting *Seminole Rock*, the Court could also take steps to prevent substitution from rulemaking to adjudication. And second, these changes are themselves supported by precedent and so would not require a dramatic doctrinal overhaul.[266]

A. HOW TO MINIMIZE *CHENERY II*'S SUBSTITUTION EFFECTS

If the Court is inclined to overrule *Seminole Rock*, it must confront *Chenery II*. In particular, two changes could mitigate the substitution effects that would occur if *Seminole Rock* were overruled.[267] First, the Court could begin affording *Skidmore* deference to legal interpretations announced in adjudications, regardless of whether the interpretation involves a regulation or a statute. And second, the Court could bolster the fair notice doctrine. These two changes would allow agencies to obtain many of the benefits of *Chenery II* while at the same time mitigating its dangers. In this Part I explain why these two changes would work; in the next I explain why they would not require a significant doctrinal revision.

To be clear, however, I am not adopting a "common law" approach to administrative law. Courts cannot simply make it up as they go along based on their own judgment of how best to resolve practical concerns; because statutes are involved, the question should be one of congressional intent. The Supreme

266. Congress could also play a role in this. Indeed, Congress has recently considered legislation that would essentially eliminate *Seminole Rock* deference. *See, e.g.*, Nielson, *supra* note 55, at 63–69 (Senator Orrin Hatch's and Professor William Funk's discussion of Separation of Powers Restoration Act). As part of that effort, Congress could also make changes to the *Chenery II* framework. Because most recent scholarship and commentary has focused on the judicial branch, however, this Article does the same. But there is no conceptual reason why this analysis must be directed at courts rather than Congress.

267. Of course, other changes may be possible too. For instance, à la *Chenery I*, one could require agencies to contemporaneously explain why they opted to not promulgate a rule, with that explanation being subject to arbitrary-and-capricious review. *Cf.* Bressman, *supra* note 147, at 553 ("It is possible here, as there, to introduce a preference for notice-and-comment rulemaking to the choice of procedures. This solution would demand that an agency fill any residual or subsidiary gaps in their regulations the same way it issued the regulation—through rulemaking—*unless it justifies the use of other interpretive means*." (emphasis added)). One problem with this solution is that it may require courts to wade into waters for which they are not well suited; after all, myriad factors influence why an agency chooses one form of policy over another, *see generally* Magill, *supra* note 26, and evaluating an agency's reasoning on this score may be difficult for generalist judges. *Cf.* Manning, *supra* note 36, at 909–10 ("Whatever one thinks of the relative merits of rulemaking versus adjudication, I think it safe to doubt the possibility of devising a judicially manageable standard for triggering mandatory rulemaking. Even if one were able to identify a criterion for mandatory rulemaking . . . any effort to require an agency to use rulemaking rather than adjudication might draw the judiciary into unmanageable questions of degree . . . ."). Another possibility is that the mitigation measure should vary with the danger of substitution, that is, those agencies in which substitution appears most likely should receive *Skidmore* deference whereas others would continue to receive *Chevron* deference. Analytically, this would be worth exploring, though, at least at first blush, I fear a context-specific test would not be administrable.

Court therefore should not overrule *Seminole Rock* deference if the Justices conclude that it is good law as determined by traditional tools of statutory interpretation, And for the same reason, the Court should not modify *Chenery II* if the Justices believe it was correctly decided, again using traditional tools of interpretation. If the Justices believe, however, that *Seminole Rock*, *Chenery II*, and their progeny were not correctly decided, then the question is what can and should be done consistent with stare decisis to prevent the negative consequences created by the Court's own errors. In other words, this analysis is premised on the idea that the Justices believe that *Seminole Rock* was incorrectly decided as an initial matter and that my proposed mitigation measures are lawful. If those conditions are not met, the Court should not follow my recommendations. (That said, Congress certainly can follow my recommendations, regardless of what the Court opts to do.)

1. Replacing *Chevron* with *Skidmore* in Adjudication

The first revision to the *Chenery II* regime involves modifying the deference framework. To see why this would help curb the dangers of *Chenery II*, return again to the *Chevron* Scenario in Part II. In that scenario, if *Seminole Rock* was off the table and the agency valued flexibility, it might elect to use *Chenery II* to not promulgate a regulation at all.

The reason an agency would act this way is straightforward. Under current law, an agency acting through adjudication can pick almost any policy permitted by the statute. That is why *Seminole Rock* generally provides more notice than *Chenery II*; with *Seminole Rock*, the policy space is *somewhat* limited. Even ambiguous rules narrow the scope of policy discretion.

If the Court were to switch to *Skidmore* deference, however, the agency would be limited to adopting the reading of the statute that is most persuasive.[268] This is a lesser form of deference than *Chevron*.[269] Hence, although still providing the agency with some flexibility, a *Skidmore* standard would narrow the scope of policy discretion and therefore provide regulated parties with greater notice of their obligations. Yet at the same time, agencies would still be able to prevent parties from violating the most reasonable reading of the statute without needing to promulgate a rule—thus retaining an important part of *Chenery II*. It would only be when the agency's interpretation is not apparent even with the benefit of *Skidmore* that *Chenery II* would be curtailed.[270]

To be sure, although this revision would not eliminate the ability to make policy through adjudication, it would limit it. But some curtailment may be a

268. *See* Manning, *supra* note 1, at 618 (explaining Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

269. *See id.*

270. *See* Manning, *supra* note 36, at 938–39 ("From an agency's perspective, if *Skidmore*'s (nonbinding) form of deference appears less advantageous than that which is available under *Chevron*, then agency administrators may have at least some reason to resort to more formal modes of policy expression.").

virtue because doing so would encourage notice-and-comment rulemaking, which even *Chenery II* agrees should be the favored procedure.[271] And as explained below, a lot of agency innovation does not occur within the *Chevron* framework at all because some statutes—like those that authorize regulation "in the public interest"—do not present meaningful questions of statutory interpretation. Thus, for many of the reasons that Manning urges the Court to replace *Seminole Rock* deference with *Skidmore* deference when it comes to interpreting regulations in adjudication,[272] the Court could do the same when it comes to interpreting statutes in adjudications. Such a shift would eliminate some of the most problematic substitution while nonetheless still allowing agencies to act by adjudication to effectuate the most persuasive interpretations of their legal instruments, whether those legal instruments are statutes or rules.

Granted, shifting to *Skidmore* would have costs of its own. For instance, to the extent *Skidmore* is a lesser form of deference, shifting away from *Chevron* in favor of *Skidmore* would mean losing all the benefits of robust deference articulated in *Chevron* itself.[273] Even so, if the Court's goal is to curb substitution away from rulemaking to adjudication, this sort of shift should work. Whether it would be cost-justified is a separate question.

2. A Refined Fair Notice Doctrine

As explained in Part II, however, the Non-*Chevron* Scenario must also be considered. Some statutes do not meaningfully present "*Chevron*" questions. The statute in *Chenery II* itself, for instance, is a good example. It essentially said that the SEC could regulate "in the public interest."[274] Shifting to *Skidmore* deference for that sort of statute would not mitigate the substitution effects that would result if *Seminole Rock* were overruled. With such a "public interest" statute, at least in terms of providing notice, an ambiguous rule is superior to adjudication under the statute because a rule provides at least some insight into how the agency will use its discretion. Indeed, a standard like "generally fair and equitable"[275] provides almost no notice at all regarding how the agency at issue will actually use its delegated power.

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271. *See Chenery II*, 332 U.S. 194, 202 (1947) ("The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.").

272. *See* Manning, *supra* note 1, at 618–19.

273. *See, e.g.*, Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 CHI. L. REV. (forthcoming 2017) (explaining that in *Chevron*, "[t]he Court—per Justice Stevens—attempted to justify this deference in at least three ways: political accountability, comparative expertise, and implied delegation").

274. *Cf. Chenery II*, 332 U.S. at 204 (authorizing the agency to regulate in "fair and equitable" ways consistent with "the public interest") (citations and quotations omitted).

275. *See* Yakus v. United States, 321 U.S. 414, 420 (1944) (upholding delegation of power "to promulgate regulations fixing prices of commodities which 'in [the Administrator's] judgment will be generally fair and equitable and will effectuate the purposes of this Act'") (citation omitted).

What can be done to mitigate substitution with a statute like this? The most promising solution is to bolster the fair notice doctrine. Unfortunately, this is easier said than done. After all, *Chenery II* contains a nod toward fair notice.[276] But the Court also recognized that every adjudication, in a sense, involves making law.[277] How then to sort out "fair" and "unfair" retroactivity? The line-drawing problems created by the fair notice doctrine are real. For a moment, however, set those problems aside and assume that courts are willing and capable of more vigorously enforcing the fair notice doctrine. (This assumption, of course, is unsatisfying. Alas, the question of what an appropriate fair notice doctrine ought to look like is a challenging question far beyond the scope of this Article. For purposes here, it is sufficient to note that if the goal is to minimize substitution away from rulemaking, adjudication must be made less attractive, and making it more difficult to apply policy decisions retroactively would do that. How that should happen, or whether it would be cost-justified to do so, requires its own analysis.)

In a world with bolstered fair notice, there would be a set of policies that agencies could announce through rulemaking that they could not announce in adjudication—or at least not announce with retroactive effect. Accordingly, fair notice principles could prevent some substitution from *Seminole Rock*. In a sense, the analysis is conceptually no different than switching to *Skidmore* deference. With either mitigation device, the scope of what an agency could do in adjudication would be limited, thus encouraging the agency to engage in rulemaking. At the same time, so long as the agency's experimentation is not too extreme, it could still use adjudication to formulate policy, thus retaining the core of *Chenery II*. But the range of the experimentation would be curtailed.

B. WHY TAMING *CHENERY II* FINDS SUPPORT IN PRECEDENT

Beyond that these two revisions to *Chenery II* would mitigate the most problematic substitution from *Seminole Rock*, the other point in their favor is that their adoption would not require a dramatic overhaul of judicial doctrine. Because stare decisis is an important concern, it is significant that *Chenery II* can be revised without being overruled. For all the reasons given by the *Chenery II* Court itself, sometimes it makes sense to engage in case-by-case adjudication, and it is hard to imagine that Congress intended to categorically prevent agencies from having such power. Thus, there is a place for the *Chenery II* doctrine.[278]

Yet although *Chenery II* should not be overruled, it could be limited in such a way that preserves its core while preventing the most problematic substitution

276. *See Chenery II*, 332 U.S. at 202–03.

277. *See id.*; *see also* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 475 (2001) ("[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.") (quoting Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

278. *See, e.g.*, Weaver & Jellum, *supra* note 29, at 824–27 (explaining the advantages of the *Chenery II* doctrine).

that would occur if *Seminole Rock* were overruled.[279] Moreover, the reality is that subsequent doctrinal developments have begun to undermine any basis for a maximalist view of *Chenery II*—and it is doubtful that Congress ever authorized such maximalism. As discussed below, the Court has already begun to move away from *Chevron* deference in adjudications in favor of *Skidmore* deference and has also suggested an interest in bolstering retroactivity.

1. Applying *Skidmore* Deference in Adjudication

Revising *Chenery II* to incorporate *Skidmore* rather than *Chevron* deference finds support in existing law. To begin, there is at least a plausible historical argument for the switch. When Congress enacted the APA in 1946, *Skidmore* (arguably) was the law. At an absolute minimum, deference doctrines were not crystalized.[280] Thus, it is not obvious that *Chevron* was the law that Congress implicitly adopted for adjudications. Instead, given the APA's text, it is more likely that Congress had something like *Skidmore* in mind, if not pure de novo review.[281]

Moreover, there is good reason to think that *Chevron* should be on shakier ground when it comes to adjudications.[282] The Supreme Court's decision in *Mead* illustrates that the Court is less comfortable with *Chevron* in adjudication, especially when adjudication is informal.[283] Importantly, the Court has held that informal adjudications that do not receive *Chevron* deference receive *Skidmore* deference.[284] In other words, the Court has already begun to draw the very line that I am proposing. To mitigate the substitution effects that overruling *Seminole Rock* would prompt, all the Court would have to do is extend a line it has already drawn. This Article is not the place for a full examination of *Mead* or

279. *See, e.g.*, *Chenery II*, 332 U.S. at 202–03 ("[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.").

280. *See generally* Bamzai, *supra* note 55 (discussing history of deference doctrines).

281. *Cf.* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) (discussing the text of the APA and it how it relates to deference).

282. *See, e.g.*, Merrill & Hickman, *supra* note 10, at 879 n.239 ("Requiring that courts give mandatory deference to interpretations announced in adjudications is also open to objection on the ground that it inverts the position of the courts in a system of separation of powers. The Supreme Court does not defer to legal interpretations of courts of appeals, at least in the strong *Chevron* sense, nor do courts of appeals defer to legal interpretations by district courts. Yet, if we extend *Chevron* to legal interpretations announced by agencies in adjudications, in effect a judicial tribunal that has been given the power to review an agency tribunal is required to defer to reasonable interpretations adopted by the tribunal subject to review.").

283. *See* United States v. Mead Corp., 533 U.S. 218, 221 (2001) ("We agree that a tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore* . . . , the ruling is eligible to claim respect according to its persuasiveness.").

284. *See id.*

Chevron. But it is worth pausing to consider why the Court was less comfortable with *Chevron* deference in adjudication.

Although bolder, one could also argue that there is little reason to distinguish the "flaws" in *Seminole Rock* from the flaws inherent in a maximalist reading of *Chenery II*.[285] In particular, criticism of *Seminole Rock* boils down to the idea that it is contrary to a separation-of-powers maxim: the same hands should not both make and interpret the law. With that maxim in mind, the anti-*Seminole Rock* argument seems to proceed as follows: Because (1) the "same hands" principle is so venerable; (2) Congress has not explicitly given such power to agencies; and (3) *Seminole Rock* creates bad incentives that applying that venerable principle would prevent, courts should not presume that Congress authorized *Seminole Rock* deference—even though, presumably, it would not be unconstitutional for Congress to explicitly do so. In other words, if Congress wants such a peculiar regime, it must say so.[286]

Much of this argument, however, is not limited to *Seminole Rock*. After all, there are *other* venerable principles at play when agencies are given authority to retroactively interpret legal texts. As the Supreme Court explained in *Christopher*, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them," but "it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference."[287] Nothing about the Court's point turns on whether the agency is interpreting a regulation or a statute. The "same hands" principle thus is only an illustration of a deeper principle: "those subject to the law must have the means of knowing what it prescribes."[288]

Put another way, there arguably is no reason why violating the "same hands" principle, *in itself*, is problematic from a separation-of-powers perspective, so long as it is not tied to retroactivity. If an agency can "make law" through rulemaking, why can it not also "make law" by interpreting its own rule? The act of interpretation (sitting down and reading the rule and then issuing a declaration of what it means), after all, could be understood as just another

285. To be clear, this argument assumes that the Supreme Court would conclude that *Seminole Rock* has flaws. Whether the Supreme Court should make such a holding is a question that others have tackled and exceeds the scope of this Article.

286. *See* Manning, *supra* note 1, at 637 ("[I]f a court must assign meaning to an agency-ordaining or agency-regulating statute in the face of legislative indeterminacy, it should presume, absent a clear indication to the contrary, that the statute opts for arrangements that best conform to the basic structural commitments of our constitutional scheme of government.").

287. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012).

288. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989); *see also Chenery II*, 332 U.S. 194, 217 (1947) (Jackson, J., dissenting) ("This seems to me to undervalue and to belittle the place of law, even in the system of administrative justice. It calls to mind Mr. Justice Cardozo's statement that 'Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable.'").

form of rulemaking. For instance, Congress could create a new rulemaking procedure—call it "Rulemaking Lite"—that applies when a rule is being amended. Rulemaking Lite would not require another round of notice-and-comment rulemaking; instead, so long as the new rule does not "significantly depart from the existing regulatory text," the agency could just put the new legislative rule directly in the Federal Register. But a rule promulgated under Rulemaking Lite, like most other rules, would be prospective only.[289] Rulemaking Lite may be bad policy,[290] but would it pose a separation-of-powers problem of the "same hands" variety? It is hard to see why it would. Accordingly, the label "interpretation" may be conceptually empty.

The deep problem with *Seminole Rock*, therefore, is not that the agency is interpreting its own rule. Instead, the problem must be that the agency is doing so with retroactive effect. This matters because once we realize that the separation-of-powers concern, at its core, is retroactivity, there is no reason why the same sort of anti-*Seminole Rock* argument sketched out above (that is, that Congress has not clearly approved such deference and it is contrary to traditional principles, plus it produces bad consequences by incentivizing ambiguity) would not also apply to *Chevron* in adjudications. It is strange to focus on the idea that the same hands are making and interpreting law when the reason why we care that the hands are the same—namely, retroactivity—is not limited to that circumstance.

In any event, the overlap between *Chenery II* and *Seminole Rock* may go beyond retroactivity. Modern scholarship suggests that agencies often help author the very statutes they administer[291]—including, presumably, sometimes the ambiguities in them. Indeed, agency assistance is ubiquitous, at least for "technical" matters.[292] Yet might agency drafting go beyond mere "technical" assistance? In "friendly" situations (for instance, if the same political party controls Congress and the White House), it is obvious that the dynamics of the legislative process change.[293] Even more provocative, Brigham Daniels has argued that even in "unfriendly" situations, agencies may dictate the content of

289. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208–09 (1988) (explaining that the dividing line between rulemaking and adjudication is prospectivity).

290. That adjudication may allow an agency to avoid the procedural rigors of rulemaking may also be problematic. *See, e.g.*, Stephenson & Pogoriler, *supra* note 9, at 1464. But that is not a *separation-of-powers* problem. Congress could fix that problem by changing the procedural burdens. The "same hands" problem is different in kind.

291. *See, e.g.*, Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, GEO. WASH. L. REV. (forthcoming 2017).

292. *See generally* Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. (forthcoming 2017); CHRISTOPHER J. WALKER, FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING (Admin. Conf. of U.S. ed., 2015).

293. *See, e.g.*, Wm. Bradford Middlekauff, Note, *Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 YALE L.J. 209, 219 (1990) ("Not surprisingly, the proposal and rejection rate of rescissions is primarily a function of whether the Presidency and Congress are controlled by the same political party.").

legislation, for instance if the agency has leverage over Congress.[294] To be sure, this sort of analysis merits a full article of its own. But for purposes here, it at least begins to suggest that the anti-*Seminole Rock* argument, on its own terms, may apply to statutes too.

Finally, there are other arguments in favor of *Skidmore* deference in adjudications[295]—arguments that have nothing to do with the insights of this Article. For instance, there often is no notice-and-comment procedure in adjudication, meaning that there also is less public participation and consideration of arguments. That *Chevron*'s status in adjudication is arguably already on less sure footing than in rulemaking, combined with the retroactivity insights of this Article, may lessen the force of stare decisis.

But to be clear, an agency should still be able to enforce its statute directly when doing so is consistent with at least a *Skidmore* reading of the statute. In that sense, *Chenery II* can and should remain good law.[296] But if an agency wants to interpret a law to mean something that requires *more* than *Skidmore* deference, requiring it to go through rulemaking would mitigate *Seminole Rock*'s substitution effects while also finding support in positive law.

2. The Supreme Court Has Already Begun to Enforce Fair Notice

The more difficult scenario, however, does not involve interpretative deference. Instead, it is a scenario like *Chenery II* itself, which does not really present an interpretation question at all. Instead, such a scenario boils down to a policy question: what is in "the public interest"? For agencies that administer such open-ended statutes, adjudication under the statute itself via *Chenery II* presumably would become more attractive if *Seminole Rock* were overruled, but switching to *Skidmore* deference would do nothing to mitigate that substitution.

The best solution may be to bolster the fair notice doctrine. In *Christopher v. SmithKline Beecham Corp.*, the Supreme Court has begun to cement fair notice principles in the context of *Seminole Rock*.[297] This is right; given how venerable the fair notice principle is in American law, it is fair to assume that Congress does it set it aside lightly. Yet because *Chenery II* and *Seminole Rock* can be substitutes, such fair notice concerns should not be limited to interpretations of

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294. *See, e.g.*, Daniels, *supra* note 38, at 420 ("[T]o accept this Article's thesis all that is required is that we agree that, at some point along the spectrum, agencies are manipulating the elected branches rather than the other way around. Particularly when one uses a situational principal-agent theory model, which paints principals as those capable of exerting control, one is hard pressed to come up with a reason not to include administrative agencies as potential principals over the elected branches.").

295. *Cf.* Rapanos v. United States, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring) (suggesting greater willingness to defer to agency interpretations announced through notice-and-comment rulemaking).

296. *See, e.g.*, NetworkIP, LLC v. FCC, 548 F.3d 116, 123 (D.C. Cir. 2008) ("We have never applied the fair notice doctrine in a case where the agency's interpretation is the most natural one.").

297. *See, e.g.*, Theodore J. Boutrous, Jr. & Blaine H. Evanson, *The Enduring and Universal Principle of "Fair Notice,"* 86 S. CAL. L. REV. 193, 194 (2013).

regulations. Rather, they should sometimes apply to agency interpretations of statutes.

The difficulty, of course, is that relying on fair notice to solve this problem would present frustrating line-drawing problems. The Court tends to avoid sorting out questions of degree rather than of kind.[298] Nonetheless, the doctrinal pieces are there for the Court to begin trimming back *Chenery II*, especially if doing so does not require overruling *Chenery II* altogether. For instance, the actual judgment in *Chenery II*—though not the principle that agencies should have discretion to choose its policymaking procedure—seems suspect in light of *Christopher*'s fair notice concerns, at least if *Christopher* is read broadly. And such a broad reading of *Christopher* may be necessary if the goal is to prevent substitution should *Seminole Rock* be overruled.

Accordingly, if fair notice—like "minimum contacts,"[299] "reasonable expectations of privacy,"[300] "proportionality analysis,"[301] and other legal doctrines that necessitate tricky line-drawing—were developed into a more meaningful doctrine through repeated applications and refinements, it may offer the best path forward. This is especially so if the Court were to also recognize that clarifying uncertainty with retroactive effect—even without a *change* of agency policy—can also be problematic. The line between "change" and "clarification" is itself a question of degree more than kind, and it can be unfair to make members of the public predict what an agency will do. After all, bounded rationality limits the ability of agency officials and regulated parties alike to foresee the future, and the residual risk should not necessarily always fall on the regulated public. Likewise, perhaps it should be easier for agencies to announce policies in adjudications but not apply those policies retroactively.[302]

Whenever one discusses fair notice, of course, the problem arises that some cases of agency adjudication involve private parties on both sides. This is why it

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298. *See, e.g.*, Stephenson & Pogoriler, *supra* note 9, at 1470 ("Courts have sometimes expressed concern about agencies relying overmuch on adjudication, and some prominent judges and justices have tried to insist that certain kinds of general decisions must be made through rulemaking. But the Supreme Court has consistently rejected that suggestion, in part because of the difficulty of deciding how specific a preexisting statutory or regulatory command must be before an agency can properly give it more definite content in an individualized adjudication." (footnote omitted)); *cf.* Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 474–75 (2001) ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing . . . the law.'") (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

299. *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 753–58 (2014) (discussing evolution of "minimum contacts" test from International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

300. *See, e.g.*, United States v. Jones, 565 U.S. 400, 414 (2012) (Sotomayor, J., concurring) ("*Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it.") (referring to Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); *id.* at 421–24 (Alito, J., concurring in the judgment) (describing evolution of the reasonable expectation of privacy standard).

301. *See* Graham v. Florida, 560 U.S. 48, 59 (2010) (explaining the Court's "proportionality analysis").

302. *See, e.g.*, Manning, *supra* note 1, at 670, 670 n.281 (collecting cases).

is easier to impose a fair notice doctrine in the context of civil penalties.[303] Imagine, for instance, that there are employees on one hand and a company on the other, and each has a different view regarding how to count time for purposes of compensation. No matter what the agency decides, its decision will have retroactive effect as to *someone*.[304] This reality complicates any effort to bolster fair notice principles. Nonetheless, although the question is one of degree rather than kind, at some point a position adopted by an agency can be so far from what appeared to be likely *ex ante* that it is hard to credibly say that retroactivity is fair, even if there are private parties on both sides of the dispute.[305] Again, as with determining whether procedural due process was satisfied, this is the sort of question that may require some trial and error to get right.[306]

Put another way, perhaps neither the majority nor the dissent in *Chenery II* struck the correct balance. The *Chenery II* majority failed to adequately appreciate the dangers of retroactivity. The majority certainly did not give the venerable principle that the public should be able to know the law the weight that Congress presumably expected. But at the same time, the majority was right to recognize that agencies should be able to announce policy in adjudication when retroactivity concerns are not especially serious. The question thus should not be *whether* such retroactivity is ever permissible, but rather *how much* should be permissible, which requires a more nuanced appraisal of fair notice. By contrast, Justice Jackson erred by saying that agencies should never be allowed to make policy through adjudication, even though he was correct to worry about retroactivity.

Of course, absent the substitution effects that would result from overruling *Seminole Rock*, there is reason to leave the law of *Chenery II* alone. On the other hand, if the Court is going to overrule *Seminole Rock*, the stare decisis analysis for *Chenery II* should also change. Overruling *Seminole Rock* would increase the doctrinal pressures placed on *Chenery II*. If *Chenery II* creates unfairness now, it would create even more unfairness in the absence of *Seminole Rock*. This matters because even if one were to conclude that the total unfairness that *Chenery II* currently produces is not enough by itself to outweigh stare decisis, if that total were to increase because of substitution effects, the math

303. *See id.*

304. *See, e.g.*, *Chenery II*, 332 U.S. 194, 203 (1947) (explaining that "[e]very case of first impression has a retroactive effect"); Qwest Servs. Corp. v. FCC, 509 F.3d 531, 540 (D.C. Cir. 2007) (noting that "every loss that retroactive application . . . would inflict on [one party] is matched by an equal and opposite loss that non-retroactivity would inflict on" another).

305. *Cf.* NetworkIP, LLC v. FCC, 548 F.3d 116, 123 (D.C. Cir. 2008) (focusing on whose reading was the "most natural").

306. *Cf.* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) ("[T]he inherent difficulty of line-drawing is no excuse for not enforcing the Constitution."); Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 497 (2014) (noting the many standards in the rule of law and explaining that just because there are no bright lines does not mean there should not be enforcement).

may change.[307]

CONCLUSION

In principle, few disagree that "an agency whose powers are not limited either by meaningful statutory standards or . . . legislative rules poses a serious potential threat to liberty and to democracy."[308] Yet in application, one of the most vexing questions in administrative law is how to prevent the emergence of such agencies without hampering agencies in ways that are not cost-justified. In fact, preventing discretion from being abused without at the same time smothering it altogether may be one of the hardest questions in administrative law.[309]

Critics of *Seminole Rock* believe that overruling that form of deference is a step in the right direction. The key takeaway of this Article, however, is that it is not at all certain that overruling *Seminole Rock* would fix anything—even on those critics' own terms. Rather, depending on how agencies value flexibility, doing so may actually make the problem worse by creating incentives for agencies to use adjudication instead of rulemaking. This uncertainty may counsel in favor of stare decisis. Yet if *Seminole Rock* is to be overruled, the Court or Congress could also revisit *Chenery II* by, for instance, applying *Skidmore* deference to interpretations announced in adjudications and by bolstering the fair notice doctrine. As a practical matter, these revisions would encourage more specific rules and prevent substitution from *Seminole Rock*. As a conceptual matter, both find support in law. In short, if we hope to solve the deep problem, the time has come to look beyond *Seminole Rock*.

307. It is worth noting that taming *Chenery II* may lead agencies to look for yet *other* substitutes like guidance documents. As explained above, however, *Chenery II* serves as the anchor for many such informal devices. *See supra* Section II.A.1. Surely one reason regulated parties obey the agency's "guidance" even if the agency has not promulgated a rule is that the agency can fall back on adjudication under the statute itself via *Chenery II*. By the same token, if the agency has promulgated a rule, agencies pay heed to guidance documents in part because of *Seminole Rock*. If the regulation itself were clear, the guidance document would do no work. Thus, overruling *Seminole Rock* and limiting *Chenery II* should be expected to make it more difficult for agencies to substitute to another policymaking device.

308. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (quoting 2 K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW § 11.5, at 204 (3d ed. 1994)).

309. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2254 (2001) ("[A]dministrative law faced its perennial question of how to ensure appropriate control of agency discretion—of who could be trusted to set the direction and influence the outcomes of administration.").