SEMINOLE ROCK AND THE SEPARATION OF POWERS

Under the longstanding precedent of *Bowles v. Seminole Rock & Sand Co.*,[1] a court will defer to an agency's interpretation of its own regulation unless that interpretation "is plainly erroneous or inconsistent with the regulation."[2] The Supreme Court reaffirmed this principle in *Auer v. Robbins*,[3] and has confidently applied it ever since.[4]

But *Seminole Rock* deference has also faced significant criticism. In one critique, Professor John Manning argues that *Seminole Rock* creates perverse incentives by unifying the powers of lawmaking and law-exposition.[5] According to Manning, this characteristic distinguishes *Seminole Rock* deference from its more famous cousin, *Chevron* deference.[6] *Chevron* respects the basic constitutional structure by maintaining the separation between "lawmaking" and "law-exposition."[7] Under *Chevron*, Congress makes the laws that the executive agency interprets.[8] Under *Seminole Rock*, the agency itself writes the rules that the agency interprets.[9] By erasing the separation between lawmaking and law-exposition, *Seminole Rock* creates bad incentives: an agency can grant itself power and flexibility by promulgating vague rules.[10]

In this Note, I contend that separation of powers arguments have a limited domain: only *some* statutes allow an agency to unify the powers of lawmaking and law-exposition. Many

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1. 325 U.S. 410 (1945).
2. *Id.* at 414.
3. 519 U.S. 452 (1997).
4. *See, e.g.*, PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2575–76 (2011); Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2260–61 (2011); Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880–81 (2011).
5. *See* John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612, 655 (1996) [hereinafter Manning, Constitutional Structure].
6. *Id.* at 619; *see also* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
7. *See* Manning, *Constitutional Structure*, *supra* note 5, at 638.
8. *Id.* at 638–39.
9. *Id.*
10. *Id.* at 655; *see also* Thomas Jefferson Univ. Hosp. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

statutes already lay out the substantive basis for agency action. When agencies act under such statutes—whether by rulemaking or otherwise—they are interpreting the law, not creating new obligations.

This clarification has important implications. First, separation of powers arguments have been gaining traction. Justice Scalia, the author of *Auer* and a once-staunch defender of *Seminole Rock* deference,[11] recently confessed doubts about *Seminole Rock*'s validity in an opinion drawn from Manning and Montesquieu.[12] If proponents of this view are successful in abolishing *Seminole Rock* deference, interpretive authority will inevitably shift away from agencies and toward courts.

Second, the discussion sheds light on the broader methodological question of whether constitutional values or congressional intent serves as a better organizing principle for deference doctrine. Professor Manning seeks to derive values from the Constitution and to apply them in a distinctive context. Certain aspects of this program are surely beyond reproach. Judges would be well-advised to draw upon the many wise policy decisions incorporated into the Constitution; unlike academic articles or legislative history, the document is also an unquestionably legitimate external source of guidance. But the lessons of the Constitution are not always clear, and never self-applying. Correctly understood, the separation of powers argument does not support a total rejection of *Seminole Rock*. Instead, this argument counsels in favor of a new and more careful inquiry into the structure of the particular statutory scheme at issue. Thus, constitutional values may be a less useful organizing principle for this area of the law than a search for congressional intent.

I. NOT ALL RULEMAKING IS "LAWMAKING"

The process of agency adjudication is based on the executive and judicial models of decisionmaking. The notice-and-comment rulemaking process is based on a legislative model.

11. *See* Gonzales v. Oregon, 546 U.S. 243, 277–78 (2006) (Scalia, J., dissenting) (arguing against the creation of an exception to *Auer* deference).

12. Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2256, 2266 (2011) (Scalia, J., concurring). Justice Scalia's opinion was cited with approval by the majority in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

But despite their beguiling forms, the mechanism that the agency uses to make decisions is imperfect evidence of the true nature of the power that the agency is exercising. When an agency engages in rulemaking, it is not necessarily exercising lawmaking power, in the sense of creating new substantive duties for individuals outside the agency. New rules do not always create new opportunities for regulated entities to get into trouble. Indeed, many rules actually reduce the potential for trouble by clarifying existing, vague duties imposed by statute.

Consider the National Labor Relations Board's (NLRB's) reluctance to promulgate rules. Since 1935, the NLRB has possessed the authority to make rules under the National Labor Relations Act.[13] It failed, however, to promulgate a single significant substantive rule in the fifty years that followed.[14] Few, if any, commentators saw this period as a remarkable stretch of self-restraint or self-abnegation. Indeed, NLRB's "congenital disinclination"[15] to promulgate rules is better seen as a form of self-aggrandizement. The agency remains free to bring and adjudicate claims under the National Labor Relations Act itself, and the agency's *refusal* to promulgate rules under the statute has had the effect of *increasing* the agency's power to decide each case as it sees fit.

At least in the case of NLRB, rulemaking would not be an assertion of "lawmaking" power. The NLRB already has plenty of law to enforce, in the form of duties imposed by the National Labor Relations Act. Rulemaking would simply commit the NLRB to a particular *interpretation* of those existing statutory duties. Such rules would serve the same function as the "strict rules" that Alexander Hamilton predicted the judiciary would impose on itself: "b[i]nd[ing] down" the agency to "avoid an arbitrary discretion" in the exercise of its power.[16]

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13. *See* National Labor Relations Act, ch. 372, 49 Stat. 449, 452 (1935) (codified at 29 U.S.C. § 156 (2006)).

14. *See* Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991) (rejecting challenge to NLRB's first substantive rule); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991).

15. Bell Aerospace v. NLRB, 475 F.2d 485, 497 (2d Cir. 1973), *rev'd* 416 U.S. 267 (1974).

16. THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the nature of the judicial branch).

Of course, selecting an interpretation of the statute entails a policy choice.[17] But there is nothing peculiarly legislative about making such choices. The NLRB is free to implement its policy choices through adjudications alone,[18] and adjudication is

17. The *Chevron* Court relied on this fact when it assigned interpretive labor to the political branches. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984); Manning, *Constitutional Structure*, *supra* note 5, at 625–27.

18. *See* NLRB v. Bell Aerospace, Co., 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion"). Although most agencies have adjudicative power, not all do. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991). For example, the Occupational Safety and Health Act gives the Occupational Safety and Health Administration (OSHA) rulemaking authority, but gives the Occupational Safety and Health Review Commission (OSHRC) the authority to adjudicate contested enforcement actions. *See id.* at 151–58. OSHA receives *Seminole Rock* deference on its interpretations of regulations, *id.* at 152–58, despite strong arguments that deference ought to be given to OSHRC's interpretations instead. *See* Matthew Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1497–1503.

The argument advanced in the body text is less applicable to such arrangements. However, such arrangements may be somewhat less threatening to separation of powers norms. Admittedly, the Court's decision to accord deference to OSHA's interpretations allows OSHA to combine lawmaking power with law-interpretation power.

OSHRC's control over adjudication, though, means that *fact-finding* is outside of OSHA's control. *Martin*, 499 U.S. at 148. Fact-finding is a key aspect of the judicial function; more cases are won on the facts than on obscure points of law. *See* Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 294 (1990). OSHRC's control over fact-finding also places a meaningful check on agency arbitrariness. It would be difficult for OSHA to vary its interpretations on a case-by-case basis without attracting attention, but control over fact-finding would allow OSHA to engage in such case-by-case variation. In essence, an agency with control over fact-finding can find whatever facts are needed to justify the outcomes it wishes to reach.

Courts are limited in their ability to police such agency fact-finding. In a case governed by the Administrative Procedure Act, courts must respect an agency's factual finding if it is supported by "substantial evidence," a standard that permits the factual conclusion to stand if on the record assembled "it would have been possible for a reasonable jury to reach the [agency's] conclusion." Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366–67 (1998). Agencies that combine fact-finding with policymaking functions may have stronger incentives to abuse this lack of oversight, because they have clear and declared policy objectives that they wish to achieve. Such agencies also have an additional tool to frustrate judicial review, as they can confusingly cloak factual findings in the language of policy elaboration and vice versa. *See id.* at 377–78. This tool may have been on display in *Allentown Mack*, where a bare majority of the Supreme Court appeared to regard the agency's decision as faulty fact-finding, subject to "substantial evidence" review, *id.*, whereas a minority regarded it as driven by the

clearly law-*exposition*, not lawmaking.[19] As a result, NLRB rulemaking is better described as "law-exposition" than "lawmaking." The outcomes that the NLRB could achieve through rulemaking are already available to the NLRB through *adjudication* of claims directly under the National Labor Relations Act.[20] For the NLRB, adjudication and rulemaking are merely alternative processes for making decisions. The agency's process for deciding how to wield its power can hardly alter the nature of the power being wielded.

What is true for the processes of rulemaking and adjudication is no less true for the hybrid process that gives rise to *Seminole Rock* cases. In a *Seminole Rock* case, the agency provides some content through rulemaking and leaves the remainder for activities that are expositive in nature.

Though this discussion may seem abstract, it has concrete consequences. Regulated entities experience uncertainty under the National Labor Relations Act—they are at some risk of having their present conduct adjudicated as a violation of the statute. Although a vague rule would not alleviate their uncertainty, it could not increase their uncertainty: The NLRB cannot achieve anything through a rule that it could not achieve under the statute itself. Of course, it is not desirable for agencies to

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agency's reasoned elaboration of its regulations, worthy of *Seminole Rock* deference, *id.* at 389–90 (Breyer, J., concurring in part and dissenting in part).

19. *See* Manning, *Constitutional Structure*, *supra* note 5, at 617 n.31 (defining "law-exposition" as "the executive power to enforce the law and the judicial power to adjudicate claims"). Doctrine reinforces the sense that adjudication is about discovering or elaborating on *existing* duties and not creating new ones. For example, the plurality opinion in *NLRB v. Wyman-Gordon* asserted that adjudications cannot be used to announce new rules that would only apply prospectively. 394 U.S. 759, 765 (1969) (Fortas, J., plurality). *But see* Retail, Wholesale & Dep't Store U. v. NLRB, 466 F.2d 380, 390–91 (D.C. Cir. 1972) (suggesting that after rule has been announced and applied in a first case, it need not be applied retroactively in subsequent cases if equitable and practical considerations counsel against it).

20. This conclusion presumes that a legal position adopted in an adjudication will receive the same deference from courts as a legal position adopted through notice-and-comment rulemaking. If this presumption does not hold, the agency would not be able to achieve certain outcomes without rulemaking, as the courts would reject the legal rationale unless it comes in the form of a rule. At least where formal adjudications are concerned, the assumption of deference is reasonable. *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001) (noting that "the overwhelming number of [the Court's] cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."). These points are developed in greater detail below. *See* notes 37–39 and accompanying text.

simply "replace[] statutory ambiguity with regulatory ambiguity."[21] But the most troubling outcome that the NLRB can achieve through rulemaking is to *replace* statutory ambiguity with regulatory ambiguity. The NLRB cannot *create* ambiguity where none exists in the National Labor Relations Act.

Sections 4 and 5 of the Securities Act of 1933 furnish a similar example of a statutory scheme under which agency rulemaking constitutes interpretation instead of lawmaking.[22] Section 5 directly forbids sales of and attempts to sell securities unless a registration statement has been filed for those securities.[23] Section 4(2) exempts "transactions by an issuer not involving any *public offering*,"[24] a provision that the Supreme Court has given an amorphous, purposive definition.[25] To help issuers cope with this statutory uncertainty, the Securities Exchange Commission adopted Regulation D, a package of rules creating safe harbors within section 4(2).[26] Rule 506, for example, provides a safe harbor under section 4(2) to issuers that sell restricted securities to a small number of sophisticated purchasers.[27] A vague safe harbor would be useless, but it could not create liability that was not authorized by the statute. Issuers that do not qualify for a regulatory safe harbor are free to argue that they fall within the statutory exemption.[28]

Not every statute limits the implementing agency to mere interpretation in this way. Many statutes do not provide a legislative basis for action, and instead require an agency to engage in lawmaking before the statute becomes operational. For example, section 14(b) of the Securities Exchange Act of 1934 makes it unlawful for certain persons "to give, or to refrain from giving a proxy" "in contravention of such rules and regulations as the [Securities Exchange] Commission may prescribe."[29] The statute itself does not provide a legal norm for the agency to

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

22. 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a–77aa).

23. 15 U.S.C. § 77e (2006).

24. *Id.* § 77d(2) (emphasis added).

25. *See* SEC v. Ralston Purina Co., 346 U.S. 119 (1953).

26. C.F.R. pt. 2301 (2012).

27. 17 C.F.R. § 230.602 (2012).

28. *See, e.g.*, Doran v. Petroleum Mgmt. Corp., 545 F.2d 893 (5th Cir. 1977).

29. 15 U.S.C. § 78n(b)(1) (2006).

interpret. The agency must *legislate* by promulgating substantive "rules and regulations" before it can subject entities to liability under this provision.[30] Such statutory schemes do indeed implicate the separation of powers concerns identified by Professor Manning.

II. STATUTES CONTAINING PRIMARY RULES ONLY CALL FOR LAW-EXPOSITION; STATUTES CONTAINING SECONDARY RULES REQUIRE LAWMAKING

H.L.A. Hart's work provides a useful vocabulary for describing the distinction between regulatory schemes that implicate separation of powers concerns and those that do not. In H.L.A. Hart's terminology, "primary rules" "impose duties"; under them, persons "are required to do or abstain from certain actions."[31] A statute that lays out a primary rule (a "primary statute") can be applied directly through adjudications. When an agency gives specificity to such statutory duties—whether through adjudication or rulemaking—it is simply engaged in *law-exposition*. The National Labor Relations Act and Sections 4 and 5 of the Securities Act of 1933 are thus primary statutes.

By contrast, "secondary" rules "confer powers," allowing the recipient to "introduce new rules of the primary type."[32] A statute that lays out a secondary rule (a "secondary statute") requires the agency to create new duties through rulemaking before it can hold persons liable. When an agency creates such a new duty through rulemaking, it is clearly engaged in *lawmaking*. Prior to the agency action, there was no duty; after the agency action, a duty exists. Section 14(b) of the Securities Exchange Act of 1934 is thus a secondary statute.

A. Only Rules Promulgated Under Secondary Statutes Create Self-Delegation Problems

The separation of powers argument advanced by Professor Manning clearly applies when an agency promulgates a rule pursuant to a secondary statute, but it has limited relevance to

30. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993).

31. H.L.A. HART, THE CONCEPT OF Law 81 (2d ed., 1994).

32. *Id.*

agency action under a primary statute. When an agency promulgates a rule under a secondary statute, it is engaged in law-making; when it interprets that rule, it is engaged in law-exposition. This union of powers has all of the negative consequences that Professor Manning describes. By contrast, when an agency promulgates a rule under a primary statute, it is engaged in law-exposition; when it interprets that rule, it is simply engaged in further exposition.

The concrete consequences of this distinction are easily illustrated by the plight of a lawyer evaluating whether her client's planned conduct is lawful. If the underlying statute is primary, the only answer available is: "It depends." The agency might bring an enforcement action under the statute itself, so the lawyer must evaluate the statute and guess at the interpretation that the agency will give it. If the underlying statute is secondary, however, and the agency has not promulgated a substantive rule, the answer is clear: The conduct is currently lawful.[33] Even if the agency wanted to bring an enforcement

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33. A different analysis may be appropriate in statutory schemes that encourage specific activities by conferring benefits, instead of imposing duties backed by penalties. A lawyer for a potential beneficiary may prefer a tentative yes to a certain no.

This position is susceptible to several lines of attack. First, the consequences of uncertainty in beneficial schemes can be quite similar to the consequences of uncertainty in regulatory schemes, particularly when beneficiaries make an expensive investment based on a seemingly settled understanding that they will be compensated. *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 520, 525 (1994) (Thomas, J., dissenting) (arguing that agency had altered a settled understanding of what activities will be reimbursed under Medicare, and that notice to affected parties is crucial). But uncertainty in schemes of this type may be less worrisome. The recipients of funding can always refuse to make expensive investments if the regulation involved is so vague as to make the payoff uncertain. Thus, if an agency is attempting to induce expensive investments, it will need to be relatively precise in its regulations.

Second, the distinction between subsidies and regulations may seem unstable. When an agency provides an entity with a subsidy, third-parties such as competitors may view the government action as a penalty; when an agency refuses to enforce a regulation, it is effectively providing a subsidy to regulated entities at the expense of the intended beneficiaries of the regulation. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188–92 (1992) (arguing that such distinctions are based on "conceptual confusion" and contestable background norms). These mechanisms are different in important ways, however. The decision to provide a subsidy to one entity may effectively penalize the entity's competitors, but competitors are likely to be alert monitors of the agency's decisions, and to be effective in lobbying or challenging the agency. As a result, moving decisions from the rulemaking proc-

action against the entity, there would be no substantive law for it to enforce.[34] Of course, the agency may eventually promulgate a rule banning the conduct, and that prospect may discourage the entity from engaging in it, particularly if it requires significant investment. But, although the possibility of a future rule might change the calculus for decisions made today, such a rule would change only the future characterization of the conduct; it would not ordinarily change the current lawfulness of the conduct.[35]

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ess to the less transparent interpretive process is unlikely to affect the content of the decisions. By contrast, although the decision not to enforce a regulation provides regulated entities with a subsidy at the expense of intended beneficiaries, the intended beneficiaries are unlikely to be as alert or organized. This conclusion suggests that courts should be more skeptical of agency interpretations of regulatory schemes than beneficial schemes. *Cf.* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 310–11 (2010) (noting that formal procedures for promulgating rules are particularly important in safeguarding the interests of beneficiaries); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007) (same).

34. This observation does not turn on the specificity of the secondary statute. A vague secondary statute does not create greater uncertainty about current obligations than a precise secondary statute (although it may create more uncertainty about the eventual content of the agency's implementing rules). More subtle classifications of regulatory statutes could consider the vagueness of the statutory command. *See, e.g.*, Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 382–85 (1989) (classifying statutes on a continuum from totally "intransitive"—roughly equivalent to secondary statutes here—to relatively transitive—relatively clear primary statutes). And indeed, a vague primary statute would create greater uncertainty about current obligations than a precise primary statute. But such subtleties are not relevant to the key distinction being drawn here.

35. To borrow Justice Scalia's terminology, a rule governed by the Administrative Procedure Act and promulgated under a secondary statute can have "secondary" but not "primary" retroactivity: it can affect the ongoing consequences of past actions, but it cannot "alter[] the *past* legal consequences of past actions." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 219–20 (1988) (Scalia, J., concurring).

A rule under a primary statute can generate consequences quite similar to primary retroactivity. A regulated entity can engage in conduct in the sincere belief that it is lawful, only to have the agency declare in a later rule that this past conduct was forbidden all along. *See* Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 953–54 (1948) (noting this, but suggesting that only a retroactive change in *settled* law can produce unjust results). Formally, however, regulated entities are subject to duties under the statute itself; when the agency promulgates a rule it is merely clarifying the content of duties that always applied. *Id.* at 949–50.

This fact merely underscores that rulemaking under a primary statute is the functional equivalent of "adjudication . . . where retroactivity is not only permissible but standard." *Bowen*, 488 U.S. at 220–21 (Scalia, J., concurring); *see also* Man-

As a result, although vague rules under a primary statute *fail to resolve* statutory uncertainty, vague rules under a secondary statute *create* uncertainty. A lawyer working with a primary statute might find a rule useless as she prepares advice for her client on the current lawfulness of proposed conduct. But a lawyer working with a secondary statute would find a rule worse than useless: it gives the agency options that did not exist prior to the rule. To the extent that the rule is vague, the lawyer must hazard a guess as to which of those options the agency will choose to exercise. This type of self-delegation—the creation of additional options by the agency—can only occur when the underlying statute is secondary. Only then does the vague rule create power-enhancing uncertainty. If the underlying statute is primary, the agency promulgating a vague regulation would merely be failing to relinquish a power given to it by Congress.

B. Chevron *Deference Does Not Change the Fact That Rules Promulgated Under Primary Statutes Do Not Create Self-Delegation Problems.*

Chevron deference may seem to allow agencies to grant themselves power by promulgating rules, even if the underlying statute is primary. Under *Chevron*, a court will defer to an agency's reasonable interpretation of a statute if the agency arrives at that interpretation through a formal process like notice-and-comment rulemaking.[36] If *Chevron* deference does real work, it expands the set of interpretations that a court will uphold. As a result, some statutory interpretations that would not be upheld if stated informally would be upheld if expressed in a rule. To this extent, a rule under a primary statute seemingly expands the set of outcomes available to the agency.

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hattan Gen. Equip. Co. v. Comm'r of Internal Revenue, 297 U.S. 129, 135 (1936) ("The regulation . . . is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand."). The Supreme Court has not hesitated in embracing this aspect of rules: Rules interpreting primary statutes receive deference, even in cases where the litigation predated the regulation. *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 221 (2002); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996); United States v. Morton, 467 U.S. 822, 835 n.21 (1984).

36. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–45 (1984); *see also* United States v. Mead Corp., 533 U.S. 218, 230 (2001).

The *Chevron*-based argument that primary statutes permit self-delegation through rulemaking is not persuasive for at least three reasons. First, *Chevron* only blesses reasonable resolutions of statutory ambiguity. Any agency action must be within the zone of uncertainty created by the statute itself; an agency cannot expand the powers given it by Congress simply by promulgating a rule.[37] Second, an agency does not *create uncertainty* (and thus, does not grant itself discretion) when it adopts a statutory interpretation that is different from the interpretation a court would adopt on its own; the agency only changes the result. Suppose that a statute is susceptible to two reasonable interpretations, *A* and *B*, and that in the absence of an agency interpretation worthy of *Chevron* deference, the courts would predictably select interpretation *A*. If the agency produces a statement worthy of deference selecting interpretation *B*, there is no increase in uncertainty; there is simply a change in the result from *A* to *B*.[38]

Third, the *Chevron* argument cannot justify special skepticism of rulemaking under primary statutes. Formal adjudications are similar in stature to notice-and-comment rules for *Chevron* purposes.[39] If *Chevron* allows an integrated agency to achieve an outcome under a primary statute by declaring an interpretation through rulemaking then enforcing that interpretation, *Chevron* would also allow the integrated agency to achieve the same outcome without rulemaking. The agency could simply bring an enforcement action asserting the interpretation and declare the interpretation correct in a formal adjudication. In short, a notice-and-comment rule cannot be a prerequisite for achieving an outcome under a primary statute. Rulemaking

37. *See Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter: for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

38. Note that if the agency produces a formal statement that could be read as adopting either A or B, its eventual choice would have to qualify for deference independently. An agency cannot obtain deference by promulgating a rule that parrots the ambiguities within a statute, then interpreting the rule. *See infra* note 53 and accompanying text.

39. *See supra* note 20; *Mead*, 533 U.S. at 230 & n.12 (suggesting that *Chevron* deference applies to "the fruits of notice-and-comment rulemaking or formal adjudication," and listing "adjudication cases").

under a primary statute does not expand the set of outcomes available to an agency.

This aspect of primary statutes distinguishes them from secondary statutes. Primary statutes permit immediate adjudications, while secondary statutes do not. A secondary statute does not itself impose any duties, so there is no law for the agency to enforce through adjudications until the agency has undertaken rulemaking. By contrast, a primary statute itself imposes a duty. The agency can immediately begin to enforce those duties through claims brought in adjudications. When an agency informally communicates its opinion on the content of those duties, it is simply giving notice of an obligation that it is free to enforce at any time.[40]

III. SKEPTICISM OF *SEMINOLE ROCK* SHOULD BE FOCUSED ON SECONDARY STATUTES

As shown above, separation of powers concerns and arguments that vague rules represent self-delegation only apply in the context of a secondary statute. As a result, deference to an agency interpretation of a rule is less problematic if the rule was promulgated under a primary statute.

A. The Balance of Mead *Can Be Preserved Without Eliminating* Seminole Rock

Even when the underlying statute is primary, other reasons appear to support refusing *Seminole Rock* deference. The fact that *Seminole Rock* permits agencies to receive deference on informal pronouncements, for example, could undermine the regime of *United States v. Mead Corp.*,[41] under which the level of judicial deference that an agency will receive on its interpreta-

40. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1111–12 (D.C. Cir. 1993); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 930 (2004) [hereinafter Manning, *Nonlegislative Rules*]. Admittedly, there are good reasons to think that an adjudication will produce better decisions than the internal agency processes that lead to informal interpretations. Adjudications arise in a concrete factual context, are subject to procedural safeguards, and include an adversarial presentation of evidence and arguments. *Id.* at 936–37. But this objection has little to do with separation of powers concerns. It is simply another variant on the emphasis on proceduralism discussed in Part III, *infra*.

41. 533 U.S. 218 (2001).

tion of its organic statute depends in part on the formality of the process that the agency used to arrive at its interpretation.[42] An agency is thus unlikely to receive *Chevron* deference on a statutory interpretation first articulated in a legal brief, but it will normally receive deference on an interpretation stated in a notice-and-comment rule or formal adjudication.

As a result, under *Mead*, an agency can either "pay now or pay later": It can undergo a relatively rigorous process when deciding upon an interpretation, or it can have the courts subject its interpretation to relatively rigorous scrutiny when it is challenged.[43] Promiscuous application of *Seminole Rock* deference would seem to defeat this balance: Agencies could simply "rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect"[44] under *Seminole Rock*. According to this argument, if the integrity of *Mead* is to be preserved, the courts must refuse to accord *Seminole Rock* deference to interpretations of such "barebones" rules.[45]

Although this critique is serious, it is ultimately unpersuasive. Not all of *Seminole Rock* needs to fall in order for *Mead* to stand. First, *Seminole Rock* deference does not destroy *Mead*'s "pay now or pay later" trade-off because agencies are already required to "pay now." The Administrative Procedure Act imposes limits on what agencies can achieve through informal statements. Although agencies can promulgate "interpretative rules" without affording notice and the opportunity to comment,[46] an attempt to do more than "derive[]" rules from the underlying substantive law will place an agency statement outside this exception.[47] In other words, the courts are prepared to

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42. *Id*. at 230–31.

43. See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491–92 (1992); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 552–53 (2006); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 225–26 (2006).

44. *Mead*, 533 U.S. at 246 (Scalia, J., dissenting).

45. *See* Stephenson & Pogoriler, *supra* note 18 at 1464–65, 1486.

46. *See* 5 U.S.C. § 553(b)(3)(A) (2006).

47. *See, e.g.*, Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 170 (7th Cir. 1996) (declaring that the content of an interpretative rule must be "derived from" the un-

limit the amount of content that the agency can provide through informal interpretation. Professor Manning and other commentators have suggested that courts cannot police such lines, and that courts would do better to abandon them in favor of a regime that simply denies any binding effect to agency statements made without notice and comment.[48] However, this

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derlying "statute or regulation," and not simply "an arbitrary choice between methods of implementation."). To the extent that agency positions in formats such as amicus briefs are not subject to such constraints, the case for according them deference is undermined.

The boundaries of the interpretative rule exception are closely related to the distinction between primary and secondary statutes drawn in the text. A secondary statute cannot provide a valid basis for an "interpretative rule"; the statute itself imposes no duties, so there is nothing for the agency to interpret. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir 1993); Manning, *Nonlegislative Rules*, *supra* note 40 at 920–21.

48. *See* Elliott, *supra* note 43, at 1491 (1992); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L.REV. 1321, 1325 (2001); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1720–21 (2007); Manning, *Nonlegislative Rules*, *supra* note 40, at 930–31.

In an argument that has echoes in the *Seminole Rock* literature, *see infra* note 53 and accompanying text, Professor Manning draws an analogy to the "nondelegation doctrine." *See* Manning, *Nonlegislative Rules*, *supra* note 40, at 896, 900–01, 909–13. In theory, the nondelegation doctrine requires Congress to make all legislative judgments. If a statute delegating authority to the Executive lacks an "intelligible principle," it allows the Executive to make a legislative judgment, and is therefore unconstitutional. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). In both the nondelegation context and in the context of ensuring that a rule qualifies as "interpretive," courts are asked to evaluate whether more legislative activity is required because the existing pronouncements left "too much" policymaking discretion to the ultimate decisionmaker. In the nondelegation context, the courts have acknowledged—in deed, if not in word—that there is no judicially manageable standard by which they can decide whether a statute is precise enough to avoid this problem. Professor Manning argues that this line-drawing problem carries over to efforts to decide whether a rule is legislative or interpretative in nature.

Professor Manning acknowledges that courts navigate difficult line-drawing problems in a number of contexts, but states that this context is different in kind. Manning, *Nonlegislative Rules*, *supra* note 40, at 911–12. He is half right. Suppose that an agency promulgates a notice-and-comment rule, then issues an informal statement that purports to be an interpretation of that rule. The key question is one of distance: Does the "interpretation" cover so much ground as to be a new rule? Though it is hardly a simple task, courts routinely distinguish between new rules and mere implications of old rules: Habeas suits and Section 1983 suits implicating official immunity require this analysis. *See generally* Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991). The lines can be drawn in different places in different fields of law, but the basic task is the same: Courts must find and apply a princi-

is not the law[49] for good reason.[50] If an agency attempts to do too much through an informal pronouncement, aggrieved parties can force the agency to pay now.

Second, *Seminole Rock* deference need not be denied across the board in order to address concerns that "barebones" rules will destroy the integrity of *Mead*. Courts are capable—or, at the very least, believe themselves to be capable—of singling out such regulations and denying deference to agency interpretations of them. For example, the Supreme Court has refused to apply *Seminole Rock* deference to an agency interpretation of a regulation that, in relevant part, merely "parrot[ed]" the text of the underlying statute.[51] Thus, the courts seem to believe that they can protect *Mead* without eliminating *Seminole Rock* entirely.

Some commentators have expressed doubts as to the courts' capacity to administer this anti-parroting principle, but it is the courts, and not the commentators, that have the better of the argument. The critical commentary centers on an analogy between the anti-placeholder or anti-parroting principle and the abandoned nondelegation doctrine.[52] On this view, the courts abandoned nondelegation doctrine because they were unable to draw a justiciable line between statutes that were valid because the key policy decisions were made and specified by Congress, and statutes that were invalid because they were too vague and thus delegated too much policymaking discretion to the Executive.[53] To the commentators, the anti-parroting principle calls for a similarly impossible line to be drawn between rules that do and do not make enough of the relevant policy decisions.

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pled line between new rules and the implications of old rules. That judges manage it in other areas of law suggests that they can manage it here.

49. *See* Franklin, *supra* note 33, at 294–304; Funk, *supra* note 48, at 1325 ("Unfortunately, the courts have not adopted this simple and accurate test.").

50. Refusing to enforce the divide between interpretative rules and legislative rules would disadvantage the intended beneficiaries of regulations, and would likely result in a regime without adequate incentives to engage in notice-and-comment rulemaking. Franklin, *supra* note 33, at 308–16.

51. Gonzales v. Oregon, 546 U.S. 243, 257 (2006); *see also* Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 584–85 (1997) (stating that agencies are not free "to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations,'" but concluding that the principle did not apply to the particular case).

52. *See* Stephenson & Pogoriler, *supra* note 18 at 1469–71.

53. The doctrine is discussed in greater detail *supra* note 48.

The analogy between nondelegation and anti-parroting is inapt. In the nondelegation context, courts are given a statute and asked whether it is unnecessarily vague given the problem being addressed. It is indeed quite difficult to articulate a standard for how much precision is required. By contrast, in the *Seminole Rock* context, courts are given a statute, a rule, and an informal interpretation; they are then asked whether the content of the interpretation is derived from the statute (in which case it would likely be denied deference under *Mead*) or derived from the rule (in which case it would attract deference under *Seminole Rock*). Thus, policing *Seminole Rock*'s domain requires courts to inquire into the *source* of the material being interpreted, not the precision of the underlying pronouncement. Courts can and do approach this question by asking whether the interpretation turns on some difference between the rule and the statute: if it does not, it is merely an informal interpretation of the statute; if it does, it is a valid interpretation of the agency's rule.[54] A barebones regulation that parrots the statute will obviously lack differences that could generate interpretations worthy of deference. As a result, the anti-parroting principle is a workable approach to defending *Mead* without sacrificing the benefits of *Seminole Rock*.

Finally, protecting the integrity of *Mead* is only important to those who accept *Mead*. In her academic writings prior to her elevation to the bench, then-Professor Kagan sharply criticized the *Mead* Court's efforts to encourage agencies to undertake additional procedures.[55] Justice Scalia has staked out a more aggressive position, stating that the procedure followed is irrelevant to deference and that he would apply the *Chevron* framework to an agency's interpretation of its organic statute even if the agency first took the position in a legal brief before the Supreme Court.[56] For these Justices, at least, protecting *Mead* would not be a valid reason for dispensing with *Seminole Rock*.

54. *See Gonzales*, 546 U.S. at 257 (refusing to give deference in part because the interpretation at issue did not "turn[] on any difference between the statutory and regulatory language").

55. David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 228–32.

56. Nat'l Cable & Telecom. Assoc. v. Brand X, 545 U.S. 967, 1014–16 (2005) (Scalia, J., dissenting); United States v. Mead Corp., 533 U.S. 218, 258–59 n.6 (2001) (Scalia, J., dissenting). It is not entirely clear that Justice Scalia's position is correct.

In sum, *Mead*'s goal of encouraging agencies to formulate policy through formal processes can be achieved without eliminating *Seminole Rock* deference. The Administrative Procedure Act limits what agencies can accomplish without using the rulemaking process, and courts are capable of limiting *Seminole Rock* deference in cases where the agency's rulemaking has been empty. Even if the courts were faced with a choice between *Mead* and *Seminole Rock*, it is not clear that courts following the lead of Justice Kagan or Justice Scalia would choose to save the *Mead* regime's connection between procedure and deference.

B. A Doctrine Applying Skepticism to Rules Promulgated Under Secondary Statutes Would Harmonize Justice Scalia's Positions

Indeed, Justice Scalia's position on the irrelevance of procedure to deference would *require* him to defer to an agency's interpretation of a rule promulgated under a primary statute. Justice Scalia has suggested that he would defer even if the agency covered the whole distance from a vague statute to a precise command using an entirely informal process like writing a brief.[57] Promulgating a rule under a primary statute and then informally interpreting that rule is just another process for interpreting the primary statute; the agency would simply have

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In *Christensen v. Harris County*, a case that foreshadowed *Mead*, Justice Scalia suggested that Congress had made informal processes available to agencies precisely because Congress believed the products of such processes would not receive deference: "[T]he 1946 Administrative Procedure Act [] exempted 'interpretative rules' (since they would not be authoritative) from the notice-and-comment requirements applicable to rulemaking." 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part, and concurring in the judgment) (quoting 5 U.S.C. § 553(b)(A)). Thus, by attacking the *Mead* Court's position that deference is tied to agency procedure, Justice Scalia is urging that the Court abandon the background judicial understandings that Congress legislated against. This move is highly questionable. Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008) (arguing that stability in interpretive methods is necessary to allow statutory language to serve its coordinating function); *cf.* Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2881 (2010) (Scalia, J., majority opinion) (noting the importance of "preserving a stable background against which Congress can legislate with predictable effects"). However, Justice Scalia has made similar moves for the Court in the past. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (Scalia, J., majority opinion) (refusing to apply the "*ancien regime*" of interpretive background norms under which a statute was enacted).

57. *Brand X*, 545 U.S. 967, 1014–16 (2005) (Scalia, J., dissenting); *Mead*, 533 U.S. at 258–59 n.6 (Scalia, J., dissenting).

covered some of the distance through a formal procedure. If Justice Scalia would defer to an interpretation in a legal brief, it is difficult to see why he would refuse to defer if some of the interpretive groundwork for the brief had been published in a notice-and-comment rule.

But this observation applies only when the underlying statute is primary. When the underlying statute is secondary, the agency's rulemaking is not part of any process of interpretation; it is an act of lawmaking. Although Justice Scalia's position on *Mead* requires him to defer to agency interpretations of regulations promulgated under primary statutes, it does not require him to defer when the underlying statute is secondary.[58]

This analysis suggests that Justice Scalia can reconcile his established position on deference with the separation of powers concerns that troubled him in *Talk America v. Michigan Bell Telephone Co.*,[59] the case that prompted him to write a striking concurrence emphasizing Professor Manning's views. In *Talk America*, the Supreme Court considered a Federal Communication Commission (FCC) regulation[60] promulgated under a primary statute, 47 U.S.C. § 251(c)(2), that required established local telephone carriers to provide "interconnection" at cost based rates.[61] According to the FCC, this regulation required the incumbent carriers to allow competitors to use "entrance facilities" for interconnection purposes.[62] The FCC's interpretation attracted *Seminole Rock* deference and was upheld.[63] As discussed above, Justice Scalia's established positions on the scope of *Chevron* would commit him to such deference here.

58. Since the separation of powers concerns that troubled Justice Scalia in his concurrence in *Talk America, Inc., v. Michigan Bell Telephone Co.*, 131 S. Ct. 2256, 2266 (2011), only apply to secondary statutes, it is possible for him to maintain a perfectly consistent position on these issues.

59. 131 S. Ct. at 2265–66 (2011) (Scalia, J., concurring).

60. 47 C.F.R. § 51.321 (2012).

61. The underlying statute establishes that each incumbent local exchange carrier has a "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(2) (2006). The FCC's order interprets the statute to extend to "any technically feasible method of obtaining interconnection." 47 C.F.R. § 51.321(a) (2012).

62. *Talk America*, 131 S. Ct. at 2261.

63. *Id.* at 2265.

The FCC has been far less successful defending its positions on 47 U.S.C. § 251(c)(3),[64] a secondary statute that obligates incumbent carriers to share elements of their networks only if the FCC has made specific, statutorily mandated findings about those particular elements.[65] Most likely it was this troubled history that prompted Justice Scalia to remark in *Talk America* that *Seminole Rock* deference seemed particularly inappropriate "in cases such as these, involving an agency that has been repeatedly rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends."[66] By recognizing the distinction between primary and secondary statutes, Justice Scalia can give agencies deference where he once believed it to be due, while still giving effect to his legitimate concerns about agency overreach.[67]

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64. *See* U.S. Telecom Assn. v. FCC, 290 F.3d 415, 421–28 (2002), *cert. denied*, 538 U.S. 940 (2003); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 392 (1999).

65. *See Iowa Utils. Bd.*, 525 U.S. at 391–92 (requiring FCC to conduct particularized, element by element analysis to impose obligations under this statute).

66. *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring).

67. Justice Scalia's position may have evolved. Without writing a separate opinion to explain his views, Justice Scalia joined the majority in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), in which the Court refused to defer to an agency interpretation advanced in a legal brief. In *Christopher*, the Court considered a provision of the Fair Labor Standards Act of 1938 (FLSA) stating that employees must receive one-and-a-half times their normal wage for hours worked in excess of forty in a week. *Id.* at 2162. The FLSA provision does not apply to an employee who qualifies as an "outside salesman," a term that the Department of Labor has rulemaking power to define. *Id.* Since the 1950s, the pharmaceutical industry has employed "detailers"—individuals who provide doctors with information about various drugs—but has characterized them as outside salesmen under FLSA and the relevant regulations, and has not paid them one-and-a-half times their ordinary wage for overtime. *Id.* at 2163–64. The Department of Labor did not challenge this characterization until 2009, when it filed an amicus brief in the Second Circuit articulating its test for outside salesman status and asserting that detailers did not qualify. *Id.* at 2165–66. When comparable litigation in the Ninth Circuit came before the Supreme Court, the Department altered its position on the appropriate test but continued to insist that detailers did not qualify as outside salesmen. *Id.* at 2166. The Supreme Court held that the Department of Labor's position did not warrant *Seminole Rock* deference, citing the Department's longstanding acquiescence in pharmaceutical industry practices and the unfair surprise to regulated entities. *Id.* at 2168–69. The Court went on to hold that the Department's position was not persuasive under *Skidmore*, noting that the agency had written its briefs without the benefit of public comment. *Id.* at 2169. It then concluded on the merits that detailers were outside salesmen within the meaning of FLSA. *Id.* at 2174. The dissent agreed that *Seminole Rock* deference was unwar-

IV. A BETTER FRAMEWORK FOR EVALUATING *SEMINOLE ROCK*

The distinction between primary and secondary statutes would allow judges to remain true to separation-of-powers values without eliminating *Seminole Rock* deference entirely. But it is far from clear that separation-of-powers values provide the most useful framework for deference doctrine. Obedience to the signals sent by statutory structure provides a far more useful organizing principle.

The flaws of the separation of powers approach are easy to enumerate. First, it is not clear that the concept of separation of powers has enough analytical content to do the work being asked of it. As Professor Manning himself has demonstrated, "legislative," "executive," and "judicial" power are not self-defining terms, and the Constitution does not endorse any "single formula" for identifying and distinguishing them.[68] A jurisprudence that attempts to classify agency activities by more than their mere form is bound to encounter difficulties.

Second, using separation-of-powers values to set administrative law doctrine might lead to surprising conclusions. Stepping back from the need to separate lawmaking from law-exposition *within* the agency, separation of powers would also demand a

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ranted, noting that the Department had changed its position in the course of the litigation. *Id.* at 2175 (Breyer, J., dissenting).

Justice Scalia's silence in *Christopher* was somewhat surprising. Although the Court cited Justice Scalia's concurring opinion in *Talk America*, and the article by Professor Manning that it drew upon, the Court did not embrace the opinion's deep logic. *Id.* at 2168 (majority opinion). The Court merely acknowledged that unhesitating application of *Seminole Rock* could create incentives to write vague regulations, and used this observation as a reason for generalized skepticism. The Court did not apply the logic of Justice Scalia's opinion to the specific case. *Id.*

The simplest explanation may be that *Christopher* was an easy case. The Department of Labor's long delay in asserting that detailers were not outside salesmen deeply undermined its position, as did its sudden shift in position just as the case reached Supreme Court. *Christopher* also did not implicate separation of powers concerns very deeply. Indeed, the Department's long delay in pressing its current interpretation makes it less likely that the Department was acting in bad faith when it first promulgated its regulations; if it had deliberately created uncertainty in its regulations, it surely would have taken advantage of that uncertainty much earlier. *See* Stephenson & Pogoriler, *supra* note 18 at 1473. As a result, *Christopher* may not have been the best vehicle for Justice Scalia to use in pressing his views.

68. John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1993 (2011).

high wall between congressional lawmaking and agency law-exposition.[69] But it may be easier for Congress to manipulate the agency rulemaking process than the process of formal adjudication. Though agencies might respond to congressional pressure by bringing or failing to bring certain claims,[70] adjudications themselves are protected from interference by members of Congress in a way that notice-and-comment rulemakings are not.[71] Thus, if separation of powers is the concern, it might be sensible for courts to encourage decision making by adjudication rather than rulemaking; a deference scheme designed to channel agency decisionmaking into the rulemaking process would obviously be inimical to this objective.[72]

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69. *See* Manning, *Constitutional Structure*, *supra* note 5 at 651–53. Professor Manning convincingly contrasts cases demonstrating Congress's inability to delegate power to its own agents with Congress's ability to delegate power to executive officials.

70. *See id.* at 679–80.

71. *Compare* Sierra Club v. Costle, 657 F.2d 298, 409–10 (D.C. Cir. 1981) (concluding that post-comment period meetings with members of Congress did not violate Administrative Procedure Act's notice-and-comment *rulemaking* provisions), *with* Pillsbury Co. v. FTC, 354 F.2d 952, 963 (5th Cir. 1966) (congressional questioning regarding particular *adjudication* violated due process rights of participants in the proceedings). *See also* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 130 (2006). Professor Beermann draws precisely the opposite inference from this observation, suggesting that rulemaking proceedings pose less of a constitutional concern because Congress is able to exercise greater control over the law. *Id.* at 147–48.

Of course, although the interpretations involved in the *Seminole Rock* context can be operationalized through formal adjudications, they are issued through informal processes that lack these safeguards. However, such informal pronouncements are normally produced by relatively insulated members of the bureaucracy. Barron & Kagan, *supra* note 55 at 242–44. Deference may be less appropriate where this insulation has been compromised. And indeed, courts seem especially hesitant to accept informal interpretations when their production seems to have been driven more by politics than expertise. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51, 93–94 (describing *Gonzales v. Oregon*, 546 U.S. 243 (2006), in these terms).

72. To give another example of a counterintuitive potential implication of separation-of-powers values, separation-of-powers values may suggest that special deference is owed to agency amicus briefs. Some have argued that Article II values are threatened by private suits to enforce regulatory statutes on the ground that they transfer the power to enforce the law away from the President and toward the courts. *See* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case For Expanding The Role of Administrative Agencies*, 91 VA. L. REV. 93, 144–45 (2005) (describing but rejecting this view); *cf.* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000) (pointedly reserving the question of whether private suits under the False Claims Act violate the Article II Take Care Clause). On this account, the Executive should be able to decide

Given the difficulty of evaluating these concerns,[73] it is hard to imagine courts convincingly balancing them in a policy-driven common law approach to deference. Instead, courts should seek to draw inferences about Congress's commands from the statutory structure.[74]

The distinction between primary and secondary statutes accords with this approach. Despite the benefits of rulemaking, including greater input from and notice to regulated entities, courts normally do not force agencies to proceed by rulemaking rather than adjudication.[75] This refusal to require agencies to refine policy through new rules is at least arguably based on the belief that the *judiciary* is incapable of determining whether a more precise rule is possible.[76] If it is not possible to state a

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whether an enforcement action is brought against a regulated entity. If private suits are allowed, the Executive is stripped of this choice—unless the courts readily defer to agency amicus briefs on whether the suit has merit.

This is particularly true of amicus briefs urging that the law was not violated. In a regime of purely public enforcement, the executive agency would have essentially unreviewable authority not to bring an enforcement action. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985). Thus, if no private suits were permitted, an agency's determination that the alleged conduct did not violate its regulation would be outcome-determinative. If private suits do not fit comfortably within constitutional norms, the availability of private suits should not be allowed to curtail this power radically.

For its part, the Supreme Court has sent mixed signals on amicus briefs. The Supreme Court has suggested that agency amicus briefs are more likely to be worthy of *Seminole Rock* deference, on the ground that when an agency is not a party to litigation, its litigating position is not an attempt to rationalize its own prior actions. Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 881 (2011). However, it has also indicated that when *Seminole Rock* deference does not apply, positions taken in amicus briefs are less likely to be persuasive than positions taken through procedures that allowed for greater public participation. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2169 (2012).

73. *Cf.* Barron & Kagan, *supra* note 55, at 222–23 (rejecting for similar reasons an approach based on legislative self-interest).

74. *Cf.* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1848 (2011) (Scalia, J., concurring in part and concurring in the judgment) ("Congress prescribes; and where Congress's prescription is ambiguous the Executive can (within the scope of the ambiguity) clarify that prescription; and if the product is constitutional the courts obey."); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543–44 (1978) (courts should limit themselves to congressionally imposed administrative law requirements instead of inventing new ones in response to felt needs).

75. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).

76. Manning, *Nonlegislative Rules*, *supra* note 40, at 896 (comparing judicial inability to determine whether a more precise rule is possible to the lack of a judi-

principle precisely in advance, the only way for the agency to articulate and enforce the principle is through adjudications after the fact.

When Congress enacts a secondary statute, however, it implicitly finds that a more precise rule is possible. Congress's decision to enact a secondary statute instead of a primary statute amounts to a decision to require the agency to undertake rulemaking—under a secondary statute the agency must make a rule before it can begin enforcement activities. Requiring the agency to undertake rulemaking would be senseless if Congress did not believe that a precise rule was possible: If no precise rule is possible, the agency will inevitably promulgate a vague rule and give content to the law through adjudications, and there would be no reason for Congress to insist that the agency must go through an empty rulemaking before beginning its real work of bringing and deciding cases.[77]

Thus, 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 command* by forcing the agency to put content through the rulemaking process, instead of relying on later informal interpretive processes.[78] Judicial deference law is ultimately built on fictions about congressional intent,[79] and this fiction would have an unusually firm grounding in statutory structure.

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cially manageable standard in the nondelegation context). But that concern is less relevant when Congress has made the determination.

77. Of course, there may be some slippage. Reasons of political economy might lead Congress to select secondary rules where a vague primary rule would be more efficient; with a secondary statute, legislators can take credit for having solved the problem while disclaiming any responsibility for the rule that is ultimately promulgated. Stephenson & Pogoriler, *supra* note 18 at 1461 n.52. When constructing a presumption about congressional intent, however, it seems sensible to proceed on the assumption that Congress had good motives for its choices, even if there is reason to suspect that its members did not. In this connection, it is worth noting that the regime proposed in the text would have the effect of enhancing accountability, by having the courts clearly state which decisions have been made by Congress and which have been left to the agency.

78. *Cf.* Gonzales v. Oregon, 546 U.S. 243, 262–63 (2006) (denying *Seminole Rock* deference to informal interpretation where Congress had "painstakingly described" the process by which the agency was to exercise its authority).

79. For statements to this effect by members of Supreme Court, *see* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370

CONCLUSION

There are good reasons for separating "lawmaking" from "law-exposition." A desire for separation, however, cannot justify jettisoning *Seminole Rock* deference entirely. Under many statutes, agency rulemaking does not make new law; instead, it simply commits the agency to a particular exposition of existing law. Paying greater attention to such statutory differences would allow reviewing courts to accord appropriate weight to separation of powers concerns while enforcing Congress's legitimate decisions.

Aneil Kovvali[*]

(1986); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2379-80 (2001); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

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