

Revisiting *Seminole Rock*

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ABSTRACT

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

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INTRODUCTION

Judicial deference to administrative agencies is under attack. The most besieged beachhead of judicial abnegation is the doctrine that requires courts to defer to agencies' interpretations of their own regulations. Critics contend that this doctrine, often associated with the 1997 Supreme Court decision *Auer v. Robbins*,¹ violates the separation of powers, gives agencies perverse regulatory

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1. 519 U.S. 452 (1997).

incentives, and undermines the judiciary's duty to say what the law is.² This Article offers a different argument as to why *Auer* is literally and prosaically bad law, namely that it is literally, and more prosaically, bad law.

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

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

I. AUER DEFERENCE AND ITS DISCONTENTS

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

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

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

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

5. See generally *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

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

7. See *infra* Part III.

8. 519 U.S. at 461.

quoting, without analysis, *Bowles v. Seminole Rock*.⁹ In other words, any justification for *Auer*'s rule of deference rested on *Seminole Rock*.

But what does *Seminole Rock* mean? It is not obvious the *Auer* Court had a very clear idea about that at the time.¹⁰ Indeed, *Auer*'s author, the late Justice Antonin Scalia, later regretted his opinion and observed that the Court has "not put forward a persuasive justification for *Auer* deference." He described *Seminole Rock*'s deferential doctrine as resting on a brute "*ipse dixit*."¹¹

There is no shortage of justifications, however. Professor Richard Pierce claims that "common sense" justifies the doctrine: the agency is in a superior position to identify what the rule meant, its supposed application, and the "interpretation of the rule that makes the most sense given the agency's purposes in issuing the rule."¹² As discussed below, this intentionalist justification of *Seminole Rock/Auer* is not far from the mark, though textualists like Justice Scalia would reject grounding the doctrine in uncodified authorial intent.¹³ Furthermore, authorial intent hardly justifies the categorical rule that *Auer* seems to contemplate. It is far from clear, for example, that an agency has a leg up on a reviewing court in terms of identifying the meaning of a regulation codified thirty years ago.¹⁴ Nor may an agency be a necessarily reliable narrator: should we trust a presidential agency to report faithfully the historical meaning of a regulation authored by an administration of the opposite political party?¹⁵

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

9. 490 U.S. 332, 359 (1989).

10. It is possible that Scalia, a former D.C. Circuit judge, just took the doctrine for granted based on his familiarity with a strong *Seminole Rock* doctrine that expanded (also without much explanation) at the court of appeals level. See Knudson & Wildermuth, *supra* note 6, at 86 ("As the late 1960s gave way to the 1970s, the final transformation of *Seminole Rock* was on full display in both the lower courts and the Supreme Court. As before, courts continued to expand the doctrine without providing guiding principles or a rationale. Notably, the continued expansion of *Seminole Rock* was consistent with the judicial restraint that emerged in the late 1970s and 1980s when courts reviewed administrative actions.").

11. *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part). On Justice Scalia's regret, see generally Aaron Nielson, Cf. *Auer v. Robbins*, 21 TEX. REV. & POL. 303, 305–06 (2017).

12. 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.11 at 532 (5th ed. 2010).

13. See *Decker*, 568 U.S. at 618 (Scalia, J., concurring) ("The implied premise of [such an] argument—that what we are looking for is the agency's *intent* in adopting the rule—is false. There is true of regulations what is true of statutes. As Justice Holmes put it: '[w]e do not inquire what the legislature meant; we ask only what the statute means.'").

14. See Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. U. L. REV. 1449, 1455 (2011) (noting this limit on the "originalist" rationale for *Auer* deference).

15. For a thoughtful exploration of intentionalist justifications of *Auer*, see Stephen M. DeGenearo, Note, *Why Should We Care About an Agency's Special Insight*, 89 NOTRE DAME L. REV. 909 (2013).

16. Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 299 (2017).

administrative agencies are far better suited than courts to balance the policy considerations intertwined with resolving ambiguities in regulations.¹⁷ Sunstein and Vermeule therefore favor *Auer* for the same reasons they support *Chevron*'s fictive presumption that ambiguity is a congressional delegation of interpretive authority to agencies.¹⁸

While the *Auer* decision does not invoke this rationale, it is consonant with the courts' expanding practice of deferring to agency interpretation of regulations in the decades before *Auer*. As Professors Knudson and Wildermuth's history of *Seminole Rock*'s development demonstrates, judicial concerns about the "magnitude and complexity" of the programs at issue helped push the doctrine beyond its original confines.¹⁹ Contemporaneous academic exhortations also encouraged courts to stay their hands when interpretive choices came "to resemble a political process of weighing the claims of competing interest groups."²⁰ By 2017, Sunstein and Vermeule's *Chevron*-inflected justification of *Seminole Rock/Auer* is not so much an innovation as a cogent account of the doctrine's standard justification.²¹

Tellingly, the doctrine's critics also have attacked the doctrine on *Chevron*'s own terms. Professor Manning's seminal critique of *Seminole Rock/Auer* draws critical differences between the two doctrines. *Chevron*, which Manning does not challenge, implicates a delegation from Congress to administrative agencies. An implied delegation on those terms does not offend classical conceptions of separation of powers: Congress can always defend itself by writing more precise text and therefore delegating less authority to administrative agencies. *Seminole Rock/Auer* deference, however, implicates self-delegation: the agency drafting an unclear regulation confers on itself the power to create more law down the road.²² Drawing on Manning—as well as Blackstone, Locke, and Montesquieu—Justice Scalia's and Justice Clarence Thomas's challenges to

17. *Id.* at 306–07.

18. *See id.* at 307 (“Just as, on Scalia’s view in 1989, *Chevron* is the best fictional default rule for statutory construction, so too *Auer* is the best fictional default rule for interpretation of agency regulations.”); *see also* Stephenson & Pogoriler, *supra* note 14, at 1456 (identifying this *Chevron*-like “pragmatic” justification for deference).

19. Knudson & Wildermuth, *supra* note 6, at 84 (quoting *Boesche v. Udall*, 373 U.S. 472, 484 (1963)); *see also id.* at 83–84 (discussing the D.C. Circuit’s “hands-off” to complex cases implicating such deference in the 1960s).

20. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1787 (1975) (quoted in Knudson & Wildermuth, *supra* note 6, at 84).

21. *See* *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (grounding *Seminole Rock* deference in the agency’s capacity to administer a “complex and highly technical regulatory program”); Stephenson & Pogoriler, *supra* note 14, at 1457 (“As between these two justifications for *Seminole Rock* deference, the pragmatic justification is as ascendant, while the originalist rationale is in decline.”). Notably the *Thomas Jefferson University* Court relies on *Pauley v. BethEnergy Mines*, 501 U.S. 680 (1991), a *Chevron* case, for its appeal to administrative expertise. *See* 512 U.S. at 512.

22. *See* John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996).

such deference spotlight this self-delegation objection to the doctrine.²³

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

This worry is also interwoven in the concerns surrounding *Chevron*. As Professor Matthew Stephenson and Miri Pogoriler have noted, standards of review could affect the agency's calculus. After *United States v. Mead*, courts are far more likely to confer *Chevron* deference to interpretations offered through reasonably formal procedures.²⁶ An unqualified version of *Seminole Rock/Auer* could allow agencies to arbitrage differing standards of review by promulgating vague regulations through notice-and-comment rulemaking and do the real policy work through less formal interpretations of the regulations.²⁷ Stephenson and Pogoriler argue that this concern counsels for limits on *Auer*, though they do not think courts should wholly abandon it. Rather, they think that, like *Chevron*, the doctrine needs a more fine-tuned test for when it applies.²⁸ In short, Stephenson and Pogoriler seek to build a *Mead* analogue for *Seminole Rock/Auer* to the extent such translation is germane.²⁹

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

23. See, e.g., *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 620–21 (2013) (Scalia, J., concurring in part and dissenting in part) (citing Manning, Blackstone, and Montesquieu); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1215 (Thomas, J., concurring) (citing Locke and Montesquieu for argument that *Auer* deference violates separation of powers principles). Justice Alito's more tentative concerns about *Auer* also touch on this point. See *Perez*, 135 S. Ct. at 1210 (Alito, J., concurring) (citing Manning and noting that Justices Scalia and Thomas offer "substantial reasons why the *Seminole Rock* doctrine may be incorrect").

24. Manning, *supra* note 22, at 655–57.

25. *Id.* at 655.

26. *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001) (identifying "a category of interpretive choices distinguished by [that] additional reason for judicial deference").

27. Stephenson & Pogoriler, *supra* note 14, at 1464. For an argument that worry about *Auer* introducing perverse incentives is unsubstantiated, see Sunstein & Vermeule, *supra* note 16, at 308–10.

28. See *id.* at 1504 (enumerating their suggested limits).

29. See, e.g., *id.* at 1490–91 (borrowing *Mead's* requirement of formality in interpretation).

30. See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (citing Stephenson & Pogoriler, *supra* note 14, at 1461–62).

31. *Id.* at 2168 ("[W]hatever the general merits of *Auer* deference, it is unwarranted here.").

II. *SEMINOLE ROCK* BEFORE *CHEVRON* AND *AUER*

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

Before there was *Seminole Rock/Auer* deference, let alone *Chevron* deference, there was *Skidmore v. Swift & Co.*³² Handed down in 1944, the unanimous opinion addressed how much credence reviewing courts should give to administrative agencies’ legal interpretations. *Skidmore* tells us that “the weight of [the agency’s] judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”³³

Today, in the context of reviewing agencies’ interpretations of statutes, courts invoke *Skidmore* when the more deferential *Chevron* framework does not apply.³⁴ One alternative to *Auer* deference is applying *Skidmore* to agency regulations as well. What would that look like? *Seminole Rock* shows us just that.

Seminole Rock, decided in 1945, concerned the proper interpretation of a 1942 price control regulation. The opinion stated that “the ultimate criterion” in deciding the case was “the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”³⁵ The Court cited no authority for this bold proposition, whose grant of “controlling weight” to agency interpretation appears antonymic to *Skidmore*’s proviso that agency readings “lack[] power to control.”³⁶

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

32. 323 U.S. 134 (1944).

33. *Id.* at 140.

34. See *United States v. Mead Corp.* 533 U.S. at 234–35 (2001) (holding that *Skidmore* deference applies when *Chevron* does not).

35. 325 U.S. at 414.

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

Skidmore framework was plainly in the air, in the briefs, and appears to be the basis for what *Auer*'s author later described as an otherwise "ipse dixit" assertion of deference.³⁷

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

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

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

37. *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 617–18 (2013) (Scalia, J., concurring in part and dissenting in part); cf. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U. S. 83, 101 (1991) (Scalia, J.) ("[I]t is our role to make sense rather than nonsense out of the corpus juris.")

38. See Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the Seminole Rock Opinion*, YALE J. REG.: NOTICE & COMMENT (Sept. 12, 2006) <http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/> [<https://perma.cc/ZCG6-GSTB>]; Bamzai has uploaded the brief at <http://yalejreg.com/nc/wp-content/uploads/sites/3/2016/09/Seminole-Rock-govt-brief.pdf> [<https://perma.cc/6ZEF-C8B4>].

39. See generally *Gray v. Powell*, 314 U.S. 402 (1941); see also Brief for Petitioner at i–ii, *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410 (1945) (No. 914).

40. Brief for Petitioner, *supra* note 39, at 16–20.

41. *Id.* at 20.

42. *Id.* at 20 (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 n.6 (1940)).

43. The Government cautioned that the Court need not go so far as to treat its interpretation as "binding," particularly in light of its strong textual argument. See *id.* at 20.

Why would that matter? Keep in mind the methodological context of the time. Compared to today, mainstream statutory interpretation was then far more intentionalist in orientation.⁴⁴ *Skidmore* and *Seminole Rock* preceded textualism's rejection of the validity—or even the cogency—of looking to the original intentions of a historical legal author.⁴⁵ The cases also predate the consolidation at the Supreme Court of the Legal Process School's focus on a *hypothetical* reasonable legal author pursuing reasonable purposes reasonably.⁴⁶ This is not to say all the Justices were old-fashioned original intentionalists, to the extent they had any governing theory at all. The Legal Realist critique of legislative intent was well-known by then.⁴⁷ Nevertheless, it is fair to say that repair to historical intent was more prominent and respectable then than it is now.⁴⁸

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

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

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

45. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983) (drawing on the work of Kenneth Arrow to challenge the cogency of legislative intent).

46. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (Eskridge and Frickey ed. 1994).

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

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

49. Radin, *supra* note 47, at 867.

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

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

52. This is not to say some puzzles remain here. One might ask whether the relevant intent for a regulation issuing from a cabinet agency is the agency head or the President, or what to do about regulations that multi-member commissions promulgate.

Skidmore. And, as quoted above, this is in line with how Henry Hart used *Skidmore* in his *Seminole Rock* briefing. Although such deference would have less force in the agency's construction of legislation written by Congress, the interpretive logic of the time suggests great deference toward the author's own reportage.⁵³ Furthermore, this intentionalist *Skidmore* reading of *Seminole Rock* illuminates why, as Bamzai has discovered and explained, Justice Murphy's first draft of *Seminole Rock* found congressional intent irrelevant to the inquiry.⁵⁴

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

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

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

53. Brief for Petitioner, *supra* note 39, at 20.

54. See Bamzai, *supra* note 38.

55. The Government's briefing even seemed to recognize these potential limits. While noting that "[t]his Court has gone so far as to say that [such] 'interpretation is binding upon the courts,'" the Government explained that its textual interpretation was so strong that "it is not necessary to go that far here." Brief for Petitioner, *supra* note 39, at 20–21, *Bowles v. Seminole Rock*, 325 U.S. 410 (No. 914). Neither *Pottsville Broadcasting* nor the other three cases in the accompanying string cite discussed standard of review, let alone offered an alternative to *Skidmore*. *Id.*

56. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

57. *Seminole Rock*, 325 U.S. at 413.

58. See Brief for Petitioner, *supra* note 39, at 8–9.

59. See *Bowles v. Seminole Rock & Sand Co.*, 145 F.2d 482 (5th Cir. 1944); *Bowles v. Seminole Rock & Sand Co.*, 59 F. Supp. 751 (S.D. Fla. 1944).

time seemed to think the case was a big deal.⁶⁰ If *Seminole Rock* conferred extensive lawmaking authority to agencies in the way we think about it today, one would expect a fulsome dissent about separation of powers along the lines of Justice Jackson two years later in *Chenery II*.⁶¹ (Justice Jackson, I might add, authored *Skidmore*.⁶²) Here, we only have Justice Roberts issuing a one-line dissent agreeing with the court of appeals that the agency's interpretation was implausible.

Finally, as Knudson and Wildermuth note, "early cases connected *Seminole Rock* with the deference framework for an agency's interpretations under *Skidmore*."⁶³ Early appellate applications of *Seminole Rock* that did not invoke *Skidmore* also undertook rigorous review before ruling on the validity of the agency's interpretation—review that is far closer to the less-deferential *Skidmore* standard.⁶⁴ These lower courts neither explained the linkage of *Seminole Rock* and *Skidmore*, nor did they justify their rigorous review under the banner of what we now consider the very deferential doctrine of *Seminole Rock*.⁶⁵ Knudson and Wildermuth suggest that this tendency may, in part, have been a product of inattention to proper standards of review⁶⁶ or discomfort with the broad doctrine *Seminole Rock* had apparently announced.⁶⁷ That is possible. But these results are also consistent with the simpler conclusion that *Seminole Rock* was an unproblematic application of a more general framework of review that sounded in *Skidmore* principles.

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

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

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

61. SEC v. *Chenery Corp.*, 332 U.S. 194, 209 (1947) (Jackson, J., dissenting).

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

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

64. See *id.* at 96 (citing *Western Union Tel. Co. v. FCC*, 217 F.2d 579 (2d Cir. 1954)); *Danz v. Reconstruction Fin. Corp.*, 193 F.2d 1010, 1016 (Emer. Ct. App. 1952).

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

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

67. *Id.* at 98.

faith in intentionalism, and the resulting doctrine begins to look incomprehensible in the eyes of a 1940's interpreter.

In short, the move from the *Seminole Rock* case to “*Auer* deference”—understanding *Auer* as a *Chevron*-like deference rule presupposing delegated authority to make policy in the gaps—creates an entirely different doctrine than envisioned in 1945. It is this retheorization, moreover, that raises the worries many have about *Auer* today. If an agency is using delegated legal authority when it interprets unclear regulations, of course some will worry about separation of powers and self-delegation,⁶⁸ the possibility of unfair surprise,⁶⁹ or agency attempts to game judicial review by seeking deference to interpretations of regulations that are either vacuous⁷⁰ or simply parrot the underlying statute.⁷¹

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

- *Self-Delegation*: Rather than making new law in the gaps it reserved for itself, an agency is reporting what preexisting law means. Although being able to offer privileged testimony about legal meaning is a non-trivial power, it depends on other measures of reliability and a court can override it.
- *Unfair Surprise*: An agency that unfairly surprises a regulated party by turning on a dime faces distinct disadvantages. *Skidmore* deference in general favors longstanding and consistent interpretations⁷² and, from an intentionalist perspective, an about-face raises doubts about the reliability of the agency testimony. This is consistent with the Supreme Court's unfair surprise exception to *Auer* it announced in *Christopher v. SmithKline Beecham*.⁷³

68. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring) (noting self-delegation concern); *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 619–21 (2013) (Scalia, J., concurring in part and dissenting in part) (noting self-delegation concern).

69. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157–59 (2012) (withholding *Auer* deference on this ground).

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

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

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

73. 567 U.S. 142, 157–59. That said, abandoning *Auer* deference does not eliminate all opportunities for unfair surprise. Agencies administering unclear statutes might just enforce them through adjudication in a format that qualifies for *Chevron* deference. See Aaron Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943 (2017). This is a serious concern, though one who is skeptical of deference for reasons beyond self-delegation, and *Chevron*-gaming might be inclined to withhold deference more generally. See Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1076 (2016) (“The theoretical

- *Parrotting Regulations*: If an agency regulation parrots a statute, it is far less plausible to say, as in *Seminole Rock*, that what matters is the agency's intention, as opposed to Congress's. Rather, it is natural to infer that the agency is simply borrowing congressional meaning, over which its epistemic authority is far more limited.⁷⁴ This is consistent with the anti-parrotting exception to *Auer* the Court deployed in *Gonzalez v. Oregon*.⁷⁵
- *Vacuous Regulations*: As with parrotting regulations, a reviewing court can rightfully be suspicious when an agency claims that a vague text it promulgated in notice-and-comment rulemaking in fact had a particular, unexpressed historical meaning.⁷⁶

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

A return to this understanding of *Seminole Rock* might also be more faithful to the Administrative Procedure Act's judicial review provisions. If the framework I described were part of the legal backdrop at the time of the APA's codification in 1946—a mere year and a week after *Seminole Rock*—this understanding should then inform what it means for a reviewing court “to decide all relevant questions of law . . . and determine the meaning or applicability of the terms of agency action.”⁷⁷

Finally, this reading deflates *Auer* in a way that renders it more vulnerable to overruling. This is so even if one accepts the contested⁷⁸ proposition that deference doctrines and interpretive frameworks like *Auer* merit stare decisis.

presuppositions underwriting a regime of non-deferential review are far more classical in cast than the moderate legal realism underwriting *Chevron*.”)

74. Perhaps the agency could argue that it intended something quite particular when parrotting legislative language, but that raises the question of why it didn't say so. Again, and consistent with *Skidmore*, the circumstances allow the reviewing court to doubt that agency's reliability.

75. 546 U.S. at 257

76. Cf. *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165, 167–68 (7th Cir. 1996) (requiring an eight-foot-high fence cannot be understood as an “interpretation” of a more general rule requiring that animal enclosures “shall be structurally sound and shall be maintained in good repair”).

77. 5 U.S.C. § 706 (1966). For an argument critiquing *Chevron* in light of the background principles the APA incorporated, see Aditya Bamzai, *The Origins of Judicial Deference to Executive Precedent*, 126 YALE L.J. 908, 986 (2016). Bamzai argues that the APA repudiated then-recent, deferential developments regarding agency statutory interpretation in favor of a more classical, less deferential approach that deferred only if the interpretation “reflected a customary or contemporaneous practice under the statute.” *Id.* This fits *Seminole Rock* like a glove.

78. For a recent argument that deference doctrines do not merit stare decisis, see RANDY J. KOZEL, SETTLED VERSUS RIGHT 155–57 (2017); see also *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1214 n.1 (2015) (Thomas, J., concurring in the judgment) (questioning whether the Court should give “agency deference regimes” stare decisis effect).

From this perspective, *Auer* is neither a foundational doctrine nor a carefully considered sea change in the constitution of the administrative state, but rather is an unreasoned misreading of an unremarkable case.⁷⁹ In fact, by withholding *Auer* deference in the context of parroting regulations and unfair surprise,⁸⁰ the Court, as a practical matter, is already backing into its original approach to *Seminole Rock*.⁸¹

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

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

CONCLUSION

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

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

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

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

82. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

83. See *Pliva, Inc. v. Mensing*, 564 U.S. 604, 615–16 (2011).

84. Cf. *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting) ("One can hardly grieve for the shoddy treatment given today to *Humphrey's Executor*, which, after all, accorded the same indignity (with much less justification) to Chief Justice Taft's opinion 10 years earlier in *Myers v. United States*.").

concepts that originated in an understanding of human nature and goods that we no longer accept or even comprehend.⁸⁵ A parallel pattern may have unfolded with our deference doctrine, which was once rooted in an intellectual milieu less skeptical of intentionalism and less likely to understand legal uncertainty as a policy space.

Now, as noted, this is a generalization. Not everyone in 1945 was an intentionalist, and Legal Realists had already been working to weaken faith in that form of legal craft. Similarly, today sophisticated work seeks to revive intentionalism in general⁸⁶ and to think about it more rigorously in the *Auer* context.⁸⁷ Nevertheless, the deference *Auer* invokes appears to be a fragment from an earlier legal era detached from the original suppositions which made its originating decision, *Seminole Rock*, unremarkable in the first place. Small wonder, then, that the Court's abstraction and expansion of the doctrine in a different jurisprudential climate has proven controversial.

Just as MacIntyre and others have attempted to rehabilitate and reconstruct virtue ethics in moral philosophy,⁸⁸ in recent years, administrative law has witnessed a neoclassical revival of sorts.⁸⁹ This has been most pronounced in the (admittedly minority) movement criticizing *Chevron* deference. The press to abandon *Chevron* appears motivated by a return to more a classical legal cast of mind, one that less readily accepts administrative law's dogma that resolving uncertain interpretive questions is a matter of policy choice as opposed to legal craft.⁹⁰ Professor Hamburger's work on judicial duty and administrative law plays a large agenda-setting role here in the academic discussion.⁹¹ Legalist criticisms are even more common among judges, with Justice Thomas⁹² and now-Justice Gorsuch criticizing *Chevron* in concurring opinions,⁹³ Chief Justice Roberts willing to narrow it due to rule of law concerns,⁹⁴ and D.C. Circuit

85. ALASDAIR MACINTYRE, *AFTER VIRTUE* 8–11 (2d ed. 1984).

86. See, e.g., RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (2012); Larry Alexander and Sai Prakash, "Is that English You're Speaking?" *Some Arguments for the Primacy of Intent in Interpretation*, 41 SAN DIEGO L. REV. 967 (2004).

87. See Stephen M. DeGenaro, Note, *Why Should We Care About an Agency's Special Insight*, 89 Notre Dame L. Rev. should be in small caps. 909 (2013).

88. See also G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958); PHILIPPA FOOTE, *VIRTUES AND VICES* (1978); ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999).

89. Cf. Jeffrey A. Pojanowski, *Neoclassical Administrative Common Law*, NEW RAMBLER (Sept. 26, 2016) <http://newramblerreview.com/book-reviews/law/neoclassical-administrative-common-law> [<https://perma.cc/2ZAB-ZPNF>].

90. See generally Pojanowski, *supra* note 73.

91. See generally PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

92. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("I write separately to note that [the agency's] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes.")

93. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1153–58 (Gorsuch, J., concurring) (making the case for de novo review of agency statutory interpretation).

94. See *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (holding that on questions of "deep 'economic and political significance,'" any delegation of interpretive authority to agencies must be

Judge Kavanaugh seeing the doctrine as something that needs to be “fixed” in statutory interpretation.⁹⁵

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

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

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

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

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

96. EKINS, *supra* note 86, at 1–3.

97. Cf. Steven D. Smith, *Law without Mind*, 88 MICH. L. REV. 104 (1989).

98. I thank Randy Barnett for emphasizing this point.

99. See Ekins, *supra* note 86, at 268–72; cf. Hillel Y. Levin, *Intentionalism Justice Scalia Could Love*, 30 CONST. COMMENT. 89 (2015) (reviewing EKINS, *supra* note 86).

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

101. Because agencies are not the authors of statutes, a more general embrace of *Skidmore* would have much less force regarding agency interpretations of legislation, even if one were amenable to intentionalist interpretation.

Tellingly, this critique of *Auer* uses a cognate method to interpret *Seminole Rock*. The gist of my argument is that later interpreters of *Seminole Rock* missed the music of the decision's words by focusing briskly and exclusively on a snippet of bare text that appears clear and categorical in isolation. A more contextual approach, which focuses on the broader legal fabric and even the shared understandings of the jointly authored opinion, is critically important in understanding the law a decision produces. To accept my argument is to be open to a more tradition- and intention-dependent way of drawing doctrine from legal texts, especially for judicial opinions, and to have faith that such an approach is worthwhile and reasonably determinate.¹⁰²

So domesticated, *Seminole Rock* is more consonant with traditional understandings of the rule of law and judicial duty than a *Chevron*-ized *Auer*. It is not a foregone conclusion that all neoclassical critics of contemporary administrative law would embrace this revisited *Seminole Rock*. Many are textualists who think legislative intent is a myth or find judicial use of authorial intentions illegitimate¹⁰³ (though, as noted above, the lines between sophisticated textualist and intentionalist methods can blur). Others will think that even this moderate dose of epistemic deference introduces undue bias to the proceedings.¹⁰⁴ We might also worry about courts' abilities to smoke out insincere professions of intent by agency litigators. All of these concerns might press for *de novo* review of agency interpretations of regulations or exclusion of agency intent from the *Skidmore* inquiry.¹⁰⁵

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

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

103. See, e.g., *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 617–19 (2013) (Scalia, J., concurring) (rejecting an intentionalist justification of *Auer*).

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

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