WITH FRIENDS LIKE THESE: THE TROUBLE WITH *AUER* DEFERENCE

BY

DANIEL MENSHER*

One of the central issues at stake in Decker v. NEDC *was whether logging operations and their related road systems fell within EPA's "Industrial Stormwater Rule." In deciding that they did not, the Supreme Court invoked* Auer v. Robbins *to defer to EPA's interpretation of its rule. While deference to agency interpretations of regulations is not new and has garnered little academic interest, what makes* Auer *deference particularly troubling in* Decker *is that EPA offered its interpretation for the first time in an amicus brief in* Decker. *This is problematic for several reasons, including that this application of* Auer *essentially allows an agency to change its regulations without going through any public process at all, as Justice Scalia, the lone dissenting Justice in* Decker*, explained.*

The question is, without Auer*, what should courts do with agency interpretations of their regulations? In this Article, I suggest that the rationales for deferring to agency interpretations of statutes provide a sensible way to shape deference to regulatory interpretations. As a result, I conclude that a flexible, sliding scale approach to weighing agency regulatory interpretations would be a fairer, more logical, and legally defensible approach.*

* Dan Mensher is an Associate Clinical Professor and Staff Attorney at Earthrise Law Center, the environmental law clinic at Lewis and Clark Law School. He would like to thank Allison LaPlante, Melissa Powers, and Jimi Hendrix for providing inspiration and motivation to write this article.

I. INTRODUCTION

Of the issues raised by the Supreme Court's recent decision in *Decker v. Northwest Environmental Defense Center* ("*Decker*"),[1] the one that elicited the most excited commentary—other than, perhaps, the Chief Justice's use of the contraction "don't"[2]—was the Court's decision to give controlling weight to the Environmental Protection Agency's (EPA) interpretation, offered in the agency's amicus brief, of its regulations.[3] No doubt it was the withering attack Justice Scalia aimed at this so-called "*Auer* deference"[4] and the Chief Justice's invitation for future parties to seek to overturn *Auer v. Robbins* (*Auer*),[5] that piqued the interest in this issue.[6] But, it is also the starkness of the facts in *Decker* that makes the issue of deference to agency interpretations of regulations so compelling. Although the deference doctrine has been part of Supreme Court jurisprudence for nearly seventy years, rarely has the power of *Auer* deference been so clearly displayed. *Decker* should be a call for courts to revisit and revise their approach to deferring to agency interpretations of regulations.

In *Decker*, an environmental group brought suit against several logging companies and the State of Oregon under the Clean Water Act (CWA)[7] for their unpermitted discharges of polluted stormwater from logging roads.[8] Under the CWA, stormwater "discharge associated with industrial activity" is illegal unless authorized by a permit.[9] In its "Industrial Stormwater Rule," EPA defined the scope of "industrial activity" that would be subject to the permit requirement.[10] That rule explicitly included the "logging" industry in the list of sectors falling within the CWA's regulatory ambit.[11] The rule also clarified that "industrial activity" extended beyond the sites of activities themselves and included access roads associated with those activities.[12] NEDC argued that, pursuant to these regulations, discharges of stormwater from the extensive drainage systems of logging roads required permits.[13]

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1 133 S. Ct. 1326 (2013).

2 *Id.* at 1338; John Elmwood, *Opinion Analysis: Too Soon to Say 'au revoir' to Auer?*, SCOTUSBLOG, Mar. 22, 2013, www.scotusblog.com/?p=161440 (last visited Nov. 23, 2013).

3 *Decker*, 133 S. Ct. at 1331; *see also* Aaron Saiger, *Double Deference*, CONCURRING OPINIONS, Mar. 27, 2013, http://www.concurringopinions.com/archives/2013/03/double-deference.html (last visited Nov. 23, 2013).

4 *Decker*, 133 S. Ct. at 1339–42; Auer v. Robbins, 519 U.S. 452 (1997).

5 519 U.S. 452 (1997).

6 *Decker*, 133 S. Ct. at 1338–39.

7 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006).

8 *Decker*, 133 S. Ct. at 1333.

9 33 U.S.C. § 1342(p)(2)(B) (2006).

10 40 C.F.R. § 122.26(b)(14) (2006).

11 *Id.* § 122.26(b)(14)(ii); OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 107 (1987).

12 40 C.F.R. § 122.26(b)(14) (2006).

13 *Decker*, 133 S. Ct. at 1336.

Three months after NEDC filed its complaint, EPA submitted an amicus brief in support of the defendants' motion to dismiss, arguing that its rule did not cover stormwater from logging operations.[14] The agency argued that, despite the fact that the rule identified logging as a regulated industrial sector, the agency actually meant only to include facilities—such as lumber mills—not the actual logging operations at issue in the case.[15]

Although this was the first time EPA had ever articulated this construction of its regulation, the majority of the Court deferred to EPA's interpretation with little apparent hesitation.[16] Under the *Auer* doctrine, the Court deferred because EPA's interpretation of its rule was not "plainly erroneous."[17] Justice Scalia, alone in dissent, argued that the regulation plainly applied to "logging" and "tree cutting," and thus the rule was clear and the defendants were liable for discharging industrial stormwater without a permit.[18] Deferring to EPA's interpretation, Scalia explained, was simply wrong.[19] In so doing, Justice Scalia took aim at *Auer* itself, arguing that, in effect, *Auer* deference allows agencies not just to write federal law via regulations, but also to stand in the federal courts' shoes and interpret what those regulations mean.[20] By allowing an agency to write and interpret federal law, he argued, *Auer* contravenes the separation of powers enshrined in the Constitution and undermines democratic governance.[21] In an odd four-paragraph concurrence, the Chief Justice and Justice Alito also expressed their willingness to overturn *Auer* but chose to wait for a case in which the issue was more fully briefed.[22]

Auer deference, also known as *Seminole Rock* deference,[23] has existed for nearly seventy years.[24] In that time, few courts or scholars have questioned its wisdom.[25] Indeed, its application often seems like common sense.[26] But in *Decker*, the doctrine's power and unfairness are displayed in full force. NEDC brought a lawsuit based on a plain reading of the regulatory text.[27] Yet when EPA entered the case as amicus curiae, the only thing that mattered was EPA's interpretation of its regulations.[28] This case shows the overwhelming power of *Auer*, and it is time to explore the wisdom and foundation of the doctrine.

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14 Brief for United States as Amicus Curiae Supporting Petitioners at 21–31, Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188 (2007) (No. 307CV01270).

15 *Id.* at 23–24.

16 *Decker*, 133 S. Ct. at 1337–38.

17 *Id.* at 1337.

18 *Id.* at 1343–44 (Scalia, J., dissenting).

19 *Id.* at 1339–42 (Scalia, J., dissenting).

20 *Id.* at 1341 (Scalia, J., dissenting).

21 *Id.* at 1341–42 (Scalia, J., dissenting).

22 *Id.* at 1338–39 (Roberts, C.J., concurring).

23 *See* Bowles v. Seminole Rock & Sand Co. (*Seminole Rock*), 325 U.S. 410 (1945) (holding agency interpretation is controlling unless clearly erroneous).

24 *See id.* at 414; *Decker*, 1326 S. Ct. at 1337 (upholding the deferential principle espoused in *Seminole Rock*).

25 John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614–15 (1996).

26 *Id.* at 614.

27 *See Decker*, 1326 S. Ct. at 1336.

28 *See id.* at 1330 (Scalia, J., dissenting).

II. THE MANY DOCTRINES OF DEFERENCE

The starkness of the facts in *Decker* suggests something is off-kilter with *Auer* deference. For an agency's interpretation of its own regulations to control unless "plainly erroneous"—no matter the context in which the interpretation is offered—is, indeed, a downright "indulgent" standard.[29] As *Decker* demonstrates, it is also unfair.

To understand *Auer* deference fully and appreciate its uniqueness, it must be examined in the broader context of deference federal courts give to agency actions. Over the last seventy years, as the role of agencies in our federal government has grown, administrative law has developed into an enormous body of law.[30] In particular, since the Supreme Court decided *Skidmore v. Swift & Co.* ("*Skidmore*")[31] in 1944, the role of agencies in making and interpreting law has become a complex and critical part of federal law.[32] The level of deference a court assigns to agency interpretations is often, as it was in *Decker*, the deciding factor in litigation.[33]

But the doctrines that govern deference to agency actions are not self-evident; there is no constitutional mandate that courts defer to agency interpretations.[34] Indeed, it is not clear from the face of the Constitution that an entity other than Congress can make laws,[35] and it appears the Constitution reserves to the courts the power to interpret those laws.[36] Yet federal agencies routinely make and interpret federal law through their delegated authority.[37] Only by reviewing the development of this jurisprudence does the Court's current approach to dealing with agency actions become understandable.

While the narrow goal of this Article is to develop a more logical and fair way for courts to treat agency interpretations of their own rules, it ultimately suggests a slightly different way to conceptualize deference doctrines in general. Such a reconceptualization not only points the way to a new *Auer* standard, but also may in fact bolster the rationales for deferring to agency interpretations of statutes.

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29 Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L. REV. AM. U. 1, 4 (1996).

30 Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 985–86 (1983) (White, J., dissenting); *see also* Manning, *supra* note 25, at 614 n.13 ("As one commentator has noted, 'by [the] mid-twentieth century the curve for administrative legislation perhaps topped that for statute law: by the 1950's lawyers with business clients and individuals with demands on the increasing service functions of government had to turn more to administrative rule books than to statute books to locate the legal frame of reference for their affairs.'") (alteration in original) (quoting JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 41 (Cornell Univ. Press 1977)).

31 323 U.S. 134 (1944).

32 *See* Jamie A. Yavelberg, *The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. Aramco*, 42 DUKE L.J. 166 (1992).

33 *See, e.g.*, *Decker*, 1326 S. Ct. at 1331, 1338 (holding that *Auer* deference applied to the agency's interpretation of its regulation, and that the agency's interpretation was reasonable and thus controlling).

34 *See generally* U.S. CONST. (containing no mandate on judicial deference to agency interpretations).

35 *See* art. I, § 1 (granting "all legislative powers" to Congress).

36 *Id.* art. III, § 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (declaring that courts have the power to interpret laws).

37 *See, e.g.*, 40 C.F.R. § 122.26(b)(14) (2012) (interpreting "storm water discharge associated with industrial activity").

A. Agency Interpretations

Before delving into the history of deference, it is important to set out clearly the two types of agency interpretive actions on which this Article focuses. The first category is when an agency interprets a statute. Such statutory interpretation can come in various forms, including regulations derived from notice and comment rulemaking, adjudications, and informal opinion letters or memoranda.[38] In whatever form it takes, the agency is offering its interpretation of a federal statute. The second category of agency actions is when an agency interprets a regulation. In this context, rather than interpreting statutory language written by Congress, the agency is interpreting regulatory text written or promulgated by a federal agency. Again, such interpretations can come in many different contexts, including official guidance documents, websites, or amicus briefs.[39] To keep the two contexts separate and distinct, I refer to the first as "statutory interpretation" and the second as "regulatory interpretation."

B. Development of Deference to Agency Statutory Interpretations

Although rarely cited, the earliest instances of judicial deference to agency interpretations of law date back to the 19th Century.[40] In 1877, for example, the Supreme Court treated the Navy's interpretation of a statute setting pay grades for naval surgeons with special respect.[41] The Court explained that "[t]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."[42] The Court justified this "respectful consideration" because "[t]he officers concerned are usually able men, and masters of the subject."[43]

In other cases in the early 20th century the Court continued its general approach of deferring to agency statutory interpretations.[44] Importantly, these cases involved statutes that explicitly delegated authority to an agency to craft rules or regulations on particular subjects.[45] In *Atchison, Topeka and Santa Fe Railway. Co.*

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38 Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 59, 62 (1995).

39 Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. REV. 447, 448 (2013) (discussing amicus briefs); Stephen M. Johnson, *In Defense of the Short Cut*, 60 U. KAN. L. REV. 495, 496 (2012) (discuissing guidance documents); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Cannon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1729, 1730 (discussing websites and guidance documents).

40 *See, e.g.*, United States v. Moore, 95 U.S. 760, 763 (1877).

41 *Id.* at 763.

42 *Id.*

43 *Id.*

44 *See, e.g.*, Bates & Guild Co. v. Payne, 194 U.S. 106, 109–10 (1904) (summarizing the rule for deference to department actions as: "Where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."); Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett (*Scarlett*), 300 U.S. 471, 474 (1937); Am. Tel. & Tel. Co. v. United States (*AT&T*), 299 U.S. 232, 236–37 (1936).

45 *See* cases cited *supra* note 44.

v. Scarlett (*Scarlett*),[46] for example, Congress specifically empowered the Interstate Commerce Commission to promulgate rules regulating railcar designs under the Federal Safety Appliance Act.[47] The Court explained that the "regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute."[48] As a result, the Court deferred to the agency's regulation, giving it controlling weight.[49] Indeed, in these early cases, the Court offered significant latitude to agencies in crafting rules, explaining that to overturn a rule, the court must find an agency's action to "be so entirely at odds with fundamental principles of [law] as to be the expression of a whim rather than an exercise of judgment."[50] In short, a court is "not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers."[51]

As the administrative state expanded and agencies began interpreting statutes in formats less formal than rules, the Court began to add depth and nuance to its approach to deference. In its seminal decision in *Skidmore*,[52] the Court articulated its new approach to considering agency interpretations.[53] There, the Court faced the question of what to do when an agency's statutory interpretation is not expressed in a rule, but instead in a series of informal rulings and opinions.[54]

The legal issue in *Skidmore* was whether the time that firefighting employees at a packing plant spent waiting for fire alarms was properly considered "working time" under the Fair Labor Standards Act (FLSA);[55] if so, the employees were owed overtime pay.[56] In the FLSA, Congress "did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts."[57] The Act did, however, empower the agency to enforce the FLSA, and in that role the Administrator "set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings."[58] Although none of these bulletins or rulings answered the specific question before the Court, the Administrator filed an amicus brief explaining the agency's position on how "working time" should be construed in this context.[59]

As there was "no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions," the issue for the Court was how much, if any, weight to give to the agency's interpretation.[60] While the lower courts gave no weight to the Administrator's position, the Supreme Court disagreed with

46 300 U.S. 471 (1937).
47 *Id.* at 472.
48 *Id.*
49 *Id.*
50 *AT&T*, 299 U.S. at 236–37 (internal quotations and citations omitted).
51 *Id.* at 236.
52 323 U.S. 134 (1944).
53 *Id.* at 140.
54 *Id.* at 137–39.
55 Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006); *Skidmore*, 323 U.S. at 136.
56 *Skidmore*, 323 U.S. at 136.
57 *Id.* at 137 (citing Kirschbaum Co. v. Walling, 316 U.S. 517, 523 (1942)).
58 *Id.* at 138.
59 *Id.* at 139.
60 *Id.*

this approach.[61] The Court did note that the Administrator's rulings were not reached through "hearing adversary proceedings in which he [found] facts from evidence and reache[d] conclusions of law from findings of fact."[62] It further noted that the rulings "d[id] not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do."[63] Nevertheless, the Court recognized that the agency had specialized expertise on wage-related issues—more so, certainly, than a court.[64] The Court also recognized that the agency determines "the policy which will guide applications for enforcement by injunction on behalf of the Government."[65] Thus, the Court concluded:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. 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.[66]

In other words, an agency's interpretation is given weight according to a sliding scale, based on various factors.

After *Skidmore*, but before the Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[67] it appeared that the distinction between the sliding scale of *Skidmore* deference and the more rigid and deferential approach the Court articulated in cases like *Scarlett*[68] hinged on whether Congress had explicitly granted authority to the agency to interpret a statute with "the force and effect of law."[69] When a statute grants such authority, the Court explained, the agency "adopts regulations with legislative effect," and thus, "[a] reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner."[70]

The Court erased this apparent division in its decision in *Chevron*.[71] There, a unanimous Court implied congressional intent to delegate law-making authority to EPA.[72] The case involved the definition of the term "stationary source" under the

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61 *Id.* at 140.

62 *Id.* at 139.

63 *Id.*

64 *Id.* at 137–39.

65 *Id.* at 139–40.

66 *Id.* at 140.

67 467 U.S. 837 (1984).

68 *Scarlett*, 300 U.S. 471, 474 (1937).

69 Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979) (explaining "properly promulgated, substantive agency regulations have the force and effect of law."); Foti v. Immigration & Naturalization Serv., 375 U.S. 217, 223 (1963).

70 *Batterton*, 432 U.S. at 425 (citing *AT&T*, 299 U.S. 232, 235–37 (1936)).

71 *See Chevron*, 467 U.S. 837, 843–44 (1984) (noting that "[i]f Congress has explicitly left a gap for the agency to fill, there is express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" and implying that Congress need not provide express lawmaking authority to give an agency with authority to fill that gap).

72 *Id.* at 844.

Clean Air Act (CAA).[73] While the CAA does give EPA general rulemaking authority, the CAA does not explicitly authorize EPA to define the term "stationary source."[74] As a result, the D.C. Circuit concluded that a court, rather than the agency, should interpret the admittedly ambiguous statutory term.[75] In other words, the circuit court refused to give EPA's regulatory definition of the term controlling weight.[76] The Supreme Court disagreed, explaining that "[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[77] The Court concluded that such implicit delegation occurs when "Congress d[oes] not actually have an intent regarding" the meaning of a term or when it fails to express an intent unambiguously.[78] Thus was born the now familiar *Chevron* two-step analysis of agency regulations: First, courts must ask if the statute is ambiguous.[79] If so, then "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[80]

The final development in deference to agency statutory interpretation came with the Court's decisions in *Christensen v. Harris County*[81] and *United States v. Mead Corp.*[82] After *Chevron*, it was unclear what agency actions fell within its bounds. Should courts defer only to agency regulations, or to any statutory interpretation, regardless of the format? In *Christensen*, the Court declined to give controlling weight to a nonbinding opinion letter from the Department of Labor.[83] The Court explained that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[84] Instead, the Court concluded, such interpretations were properly assessed under the sliding scale of *Skidmore*, and thus were entitled to respect, but not control.[85]

In *Mead*, the Court further examined the contours of *Chevron*-style deference, and clarified "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[86] In other words, *Mead* creates a second set of two questions enmeshed in the *Chevron* framework: 1) Did Congress intend to give an agency the ability to

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73 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006); *Chevron*, 467 U.S. at 840–41.
74 *See* 42 U.S.C. § 7601(a) (2006).
75 *See Chevron*, 467 U.S. at 841–42.
76 *See id.*
77 *Id.* at 844.
78 *Id.* at 845.
79 *Id.* at 842–43.
80 *Id.* at 844.
81 529 U.S. 576 (2000).
82 533 U.S. 218 (2001).
83 529 U.S. at 586–87.
84 *Id.* at 587.
85 *Id.*
86 533 U.S. at 226–27.

make binding rules? and, 2) did the agency exercise that lawmaking authority? If so, then *Chevron* deference is proper. If not, then the proper deference regime is *Skidmore*.[87] In *Mead*, the Court concluded that letters issued by the Customs Office assigning specific types of imported goods to different tariff classes were not entitled to *Chevron* deference because the agency did not demonstrate it issued the letters with "a lawmaking pretense in mind . . . ."[88] Indeed, the forty-six different Customs Offices issue 10,000 to 15,000 such letters in a year.[89] As a result, the Court concluded that the letters were interpretive, rather than legislative, agency actions, and thus did not carry the force of law.[90] Instead, the Court concluded that the sliding scale of *Skidmore* deference was proper.[91] Under that scheme, a letter from the Customs Office "may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight."[92]

To summarize the current state of law regarding agency statutory interpretation, courts defer to such agency interpretations on a sliding scale depending on the statute and the nature of the agency's action. When a statute explicitly or implicitly delegates rulemaking authority to an agency and the agency has exercised that authority with the force of law, its interpretation falls within *Chevron* and is the law unless it is arbitrary or capricious. If Congress has not delegated rulemaking authority to an agency or the agency has acted informally and without the force of law, its interpretation is entitled to *Skidmore* deference, or respect in proportion to its power to persuade. The more thorough, consistent, or expert an agency's interpretation, the more weight a court should place on it.[93]

C. Development of Deference to Agency Regulatory Interpretations

Unlike the history of deference to agency statutory interpretations, the Court's jurisprudence on deference owed to agency regulatory interpretations really only began during the rise of the administrative state[94] with its decision in *Bowles v. Seminole Rock & Sand Co*. (*Seminole Rock*).[95] The Court issued this opinion shortly after *Skidmore*, in which it articulated the sliding scale of deference to agency statutory interpretations.[96] In the *Seminole Rock* decision, the Court created a new doctrine of deference.[97] Indeed, the Court cited no cases in support of the deference doctrine it announced there.[98]

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87 *Id.* at 237.

88 *Id.* at 233.

89 *Id.*

90 *Id.* at 234.

91 *Id.* at 235.

92 *Id.*

93 *Skidmore*, 323 U.S. 134, 140 (1944).

94 As Justice White explained, "For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress . . . ." Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 985–86 (1983) (White, J., dissenting).

95 325 U.S. 410 (1945).

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

97 *Seminole Rock*, 325 U.S. at 413−14.

98 *See id.*

The facts of *Seminole Rock* are instructive. The litigation in *Seminole Rock* required the Court to decide how to treat a bulletin published by the Office of Price Administration (OPA) that explained how the agency believed its regulations worked.[99] In January 1942, Congress passed the Emergency Price Control Act,[100] which established the OPA as an independent agency, empowering it to issue regulations to cap the prices of various commodities.[101] On April 28, 1942, the OPA issued Maximum Price Regulation No. 188 (Rule 188), which set maximum prices for a wide range of commodities, including crushed rock.[102] The core provision of Rule 188 set the maximum price for commodities at "the highest price charged by the manufacturer during March 1942."[103] The regulation went on to define the "highest price during March 1942" in relation to specific factual scenarios.[104] Concurrently with its regulations, OPA issued a bulletin entitled "What Every Retailer Should Know About the General Maximum Price Regulation," in which it explained to manufacturers, wholesalers, and retailers how the regulations worked and applied in various situations.[105] There, the Administrator explained that "[t]he highest price charged during March 1942 means the highest price which the retailer charged for an article actually delivered during that month or, if he did not make any delivery of that article during March, then his highest offering price for delivery of that article during March."[106] It also explained that "[i]t should be carefully noted that actual delivery during March, rather than the making of a sale during March, is controlling."[107]

The OPA sued Seminole Rock for selling crushed rock above its maximum allowed price.[108] The only issue before the Court was which definition of "highest price during March 1942" applied to Seminole's sales of crushed rock.[109] Although Seminole Rock had not entered into any new agreement in March, it had actually delivered crushed rock in March 1942.[110] Nevertheless, it had charged other customers higher prices than the price it charged for the March deliveries.[111] Relying on the regulatory interpretation in its bulletin, the OPA argued that it was only the delivery in March 1942 that mattered, not when the contract was made.[112] Seminole Rock disagreed, arguing that the OPA's interpretation of the regulations did not control and that the regulations should be read to make the date of sale matter.[113]

The Court concluded that the OPA's position was correct and that it was the date of delivery, not the time of the sale, that mattered.[114] In arriving at this

99 *Id.* at 417.
100 Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23. (1942).
101 50 U.S.C. § 902(a) (1946).
102 Maximum Price Regulation No. 188, 7 Fed. Reg. 5,872, 5,873 (July 30, 1982).
103 *Id.*
104 *Id.* at 5,874.
105 *Seminole Rock*, 325 U.S. 410, 417 (1945).
106 *Id.*
107 *Id.*
108 *Id.* at 414–13.
109 *Id.* at 413.
110 *Id.* at 412.
111 *Id.* at 412–13
112 *Id.* at 413–15.
113 *Id.* at 415.
114 *Id.* at 418.

conclusion, the Court explained that "[s]ince this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[115] The Court then read the regulatory language and concluded that the OPA's interpretation fit within the text.[116] Because the interpretation was not plainly erroneous, it controlled.[117] As a result, the Court deferred to the agency's interpretation of its own ambiguous regulatory text.[118]

The approach to agency regulatory interpretations has changed little since the Court decided *Seminole Rock*.[119] Courts have applied the same highly deferential standard, with the only real differences between the cases being the manners in which the agency has articulated its regulatory interpretations. In *Udall v. Tallman*,[120] for example, the Court deferred to the Secretary of the Interior's regulatory interpretation expressed in testimony before congressional committees and in regulations postdating the regulations in question.[121] The Court also found that the longtime and consistent practice of the Secretary might constitute an interpretation worthy of deference.[122] As a result, the Court concluded that "[t]he Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it."[123]

The Court has also offered *Seminole Rock* deference to agency interpretations expressed in permits, even when the permit itself is the object of litigation.[124] In *Robertson v. Methow Valley Citizens Council* (*Methow Valley*),[125] a group of public interest organizations challenged the Forest Service's issuance of a permit to develop a ski resort in Washington's North Cascades.[126] One of the issues involved whether the Forest Service's rules required the agency to consider mitigation of offsite impacts of the proposed action.[127] The Court explained, "[a]s is clear from the text of the permit" at issue in the case, the Forest Service does not interpret its regulations to require such consideration of offsite mitigation.[128] The Court then deferred to that interpretation.[129] In other words, despite being the object of

115 *Id.* at 413–14.

116 *Id.* at 418.

117 *Id.* at 414.

118 *Id.* at 418.

119 *See id.* at 414 ("But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."); *Decker*, 133 S. Ct. 1326, 1337 (2013) ("When an agency interprets its own regulation, the Court, as a general rule, defers to it 'unless that interpretation is plainly erroneous or inconsistent with the regulation.'").

120 380 U.S. 1 (1965).

121 *Id.* at 4.

122 *Id.*

123 *Id.*

124 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 358–59 (1989).

125 *Id.*

126 *Id.* at 337.

127 *Id.* at 358.

128 *Id.* at 358–59.

129 *Id.* at 359.

litigation, the permit itself could contain regulatory interpretations that command *Seminole Rock* deference.[130]

In *Auer*, the Court deferred to an agency interpretation offered in an amicus brief filed at the Court's request.[131] At issue in *Auer* was the scope of the exemption from the FLSA overtime payment requirement for "bona fide executive, administrative, or professional" employees.[132] Pursuant to the Secretary of Labor's regulations, to qualify for the exemption, an employee had to be compensated on a "salary basis."[133] The regulations specified that "[a]n employee will be considered to be paid 'on a salary basis' . . . if under his employment agreement he regularly receives each pay period . . . a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."[134] The plaintiffs, a group of police officers, argued that, although they were paid a salary, because the terms of their employment subjected them to "disciplinary deductions in pay, and because a single sergeant was actually subjected to a disciplinary deduction, they [were] 'subject to' such deductions and hence nonexempt under the FLSA."[135]

To untangle the regulatory jungle, the Court asked the agency for its interpretation of the "salary basis" test on the facts of the case.[136] The agency submitted its interpretation in an amicus brief to which the Court then deferred.[137] Citing *Methow Valley* and *Seminole Rock*, the Court explained "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'"[138] Because the "critical phrase 'subject to' comfortably b[ore] the meaning the Secretary assign[ed]," his interpretation controlled.[139]

This brings us to the *Decker* decision. At issue was whether discharges of sediment and other pollutants from logging roads were subject to the CWA.[140] Under the CWA, the discharge of pollutants from point sources into waters of the United States is prohibited unless authorized by a legal CWA permit (known as a National Pollution Elimination Discharge System (NPDES) permit).[141] The CWA's application to discharges of stormwater, however, was not always clear.[142] After various agency actions and court decisions,[143] Congress ultimately amended the

130 *See id.* at 358–59.
131 *Auer*, 519 U.S. 452, 461 (1997).
132 *Id.* at 454.
133 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1996).
134 *Id.* § 541.118(a).
135 *Auer*, 519 U.S. at 460.
136 *Id.* at 461.
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 33 U.S.C. § 1311(a) (2006).
142 *See* Natural Res. Def. Council, Inc. v. EPA, 966 F.2d 1292, 1295–96 (9th Cir. 1992) (discussing the history of EPA's stormwater regulations and Congress's 1987 stormwater amendments to the CWA as a response to regulatory difficulties).
143 *See, e.g.*, Natural Res. Def. Council, Inc. v. Train, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd* Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) (holding that the

CWA in 1987 to address stormwater directly.[144] Although the amendments allowed EPA to exempt or ignore specific categories of stormwater discharges from CWA regulation, Congress mandated that EPA regulate stormwater discharges "associated with industrial activity."[145]

EPA issued regulations—commonly known as the Industrial Stormwater Rule—defining the discharge of stormwater "associated with industrial activity" as "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant."[146] EPA then specified eleven categories of activities the agency "considered to be engaging in 'industrial activity' for purposes of" the Industrial Stormwater Rule.[147] Among those specifically identified categories are facilities classified within Standard Industrial Classification (SIC) 24, which is entitled "Lumber and Wood Products, Except Furniture."[148] Subclassification No. 2411 then explicitly includes "Logging," defined as "[e]stablishments primarily engaged in cutting timber."[149] Finally, the rule clarified that it applies not just to the areas of immediate industrial activity, but also "includes . . . immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility . . . ."[150] As a result, under the CWA, any "industrial stormwater" discharges falling within the scope of the Industrial Stormwater Rule require an NPDES permit.[151]

Relying on this regulatory framework, NEDC brought suit against several timber companies and the State of Oregon alleging their discharges of pollutants from culverts and other conveyances from logging roads associated with forestry operations required NPDES permits.[152] NEDC argued that because logging facilities fall within SIC 24, such operations and their access roads qualify as "industrial activity" pursuant to the Industrial Stormwater Rule; thus any stormwater discharges from associated point sources required NPDES permits.[153] As the logging companies and the State had no CWA permit for their discharges, NEDC concluded these dischargers were violating the CWA and subject to penalties.[154]

Three months after NEDC filed its complaint, EPA, in an amicus brief in support of the defendants' motion to dismiss, argued that NEDC was incorrect, and

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Administrator of the EPA did not have authority to exempt some point sources from the requirements of the CWA).

144 Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 7, 69 (1987) (codified as amended by 33 U.S.C. 1142(p)).

145 33 U.S.C. § 1342(p)(2)(B) (2006).

146 40 C.F.R. § 122.26(b)(14) (2012).

147 *Id.*

148 *Id.* § 122.26(b)(14)(ii); OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 11, at 107.

149 OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 11, at 107.

150 40 C.F.R. § 122.26(b)(14) (2012).

151 33 U.S.C. § 1342(p)(2)(B) (2006).

152 *Decker*, 133 S. Ct. 1326, 1328–29 (2013).

153 *Id.* at 1336. There was also a dispute over whether the drainage systems and culverts were point sources. *Id.* at 1333. But, because the Supreme Court's opinion only addressed the issue of "associated with industrial activity," this Article does not examine the "point source" issue.

154 *Id.* at 1328−29.

that its regulations did not include logging roads.[155] It explained that its Industrial Stormwater Rule only applied to industrial plants and not to the type of logging facilities at issue in the case.[156] While the regulations did reference SIC 24 industries, EPA argued that the rule only applied to industrial plants, such as sawmills, in the category; thus actual logging operations were not themselves included in the rule's scope.[157] As a result, EPA concluded that its own regulations did not regulate discharges of stormwater from logging facilities or their access roads.[158]

EPA had never taken this position before. Instead it offered this interpretation of its regulations for the first time in its amicus brief to the district court.[159] It is true that EPA suggested it was a long-held position, noting that a 1995 report to Congress explained that "runoff from . . . silvicultural activities (mostly within SIC codes 01-09)" is exempt from the NPDES permit requirement.[160] This, however, only states the obvious: Unchannelized runoff is nonpoint source pollution which does not need coverage or authorization pursuant to an NPDES permit; therefore, the report merely restates one of the fundamental principles of the CWA.[161] It tells the public nothing about EPA's interpretation regarding discharges of runoff that have been collected, channelized, and discharged through an engineered drainage system. So this was in fact a newly announced interpretation.

Despite the novelty of EPA's interpretation, the Court deferred to the agency's position as binding law pursuant to *Auer*.[162] Because the Court decided EPA's position was not "plainly erroneous," the agency's interpretation controlled.[163] Once the Court determined that the interpretation was not "plainly erroneous," the Court never actually had to resolve which was the best or fairest reading of the regulation.[164] As a result, EPA effectively revised, or at least controlled, the meaning of the Industrial Stormwater Rule via an amicus brief drafted nearly two decades after it promulgated the rule.

III. WHAT TO DO WITH *AUER*

This abridged history of administrative law reveals a stark difference between deference to agency statutory interpretations and regulatory interpretations. In the statutory interpretation context, the Court has developed a sliding scale of deference, tiered to the level of agency thoroughness, the pinnacle of which is reached only when an agency's interpretation carries the force of law.[165] For

155 United States' Amicus Curiae Brief at 24, Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188 (D. Or. 2007) (No. 3:06-CV-01270).

156 *Id.*

157 *Id.* at 24–25.

158 *Id.*

159 *See generally* United States' Amicus Curiae Brief, *supra* note 14, at 21–31 (arguing that EPA does not regulate point source discharge from forestry roads).

160 *Id.* at 26 (citation omitted).

161 *See, e.g.*, Natural Res. Def. Council v. EPA, 915 F.2d 1314, 1316 (9th Cir. 1990) (explaining difference between point sources and nonpoint sources of pollution and how each is treated under the CWA).

162 *Decker*, 133 S. Ct. 1326, 1337 (2013).

163 *Id.*

164 *Id.*

165 *See* Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977).

regulatory interpretations, by contrast, there is a single standard, which provides at least *Chevron*-level deference to the agency, regardless of the source or thoroughness of the agency's interpretation.[166]

As a result, the one-size-fits-all approach of *Auer* produces unfair and problematic results. Under this deference scheme, an interpretation offered in a statement to a congressional committee or in an amicus brief carries the same weight as a regulatory preamble published at the same time an agency issues a new rule. This does not make sense. In *Decker*, EPA's amicus brief, filed three months after the complaint, ultimately decided the case.[167] It did not matter that the agency had never articulated this position before; the Court asked only whether it was plainly erroneous.[168] So long as some plausible argument could be made that the interpretation comported with the regulatory language, this newly minted interpretation became federal law.[169]

This complaint is not new. Indeed, Justice Scalia himself attacked *Auer*—an opinion he authored—in his dissent in *Decker*.[170] Others have also pointed out *Auer*'s lopsided approach to deference and called for something new.[171] But, if this one-size-fits-all approach should be changed, the question is what should replace it? Both Professors Manning and Anthony argue that an agency's interpretation of its regulations should, at best, be given special consideration only because the agency is "expert" and may have special expertise—in other words, something akin to the standards set out in *Skidmore*.[172] While *Auer* certainly suffers from its binary nature—either an interpretation receives total deference or none—it is not clear why *Skidmore*-style deference makes any more sense.

To build a defensible approach to weighing agency regulatory interpretations, it makes sense to examine the rationales underlying deference to agencies in general. Only by understanding why courts defer to agency interpretations in any context, can we craft a better replacement for *Auer*.

IV. THEORIES OF DEFERENCE

Why do agency interpretations of law control at all? Put another way, why can federal agencies make law? Of course, the Constitution establishes three branches of government, vesting "legislative Powers" in Congress.[173] It empowers the Court with the authority to say what those laws mean in particular cases and controversies.[174] And with the President resides "executive Power."[175] While these powers are not wholly separate—for example, the President may veto legislation—nowhere does the Constitution purport to empower "agencies" with lawmaking

166 *Decker*, 133 S. Ct at 1339 (Scalia, J., concurring in part and dissenting in part).
167 *Id.* at 1331.
168 *Id.* at 1337.
169 *Id.*
170 *Id.* at 1339–42 (Scalia, J., concurring in part and dissenting in part).
171 Manning, *supra* note 25, at 680–83; Anthony, *supra* note 29, at 4–6, 34.
172 Manning, *supra* note 25, at 686; Anthony, *supra* note 29, at 11.
173 U.S. CONST. art. I, § 1, cl. 1.
174 *Id.* art. III, § 1; *Id.* art. III, § 2, cl. 1–2.
175 *Id.* art II, § 1, cl. 1.

authority.[176] I will leave untangling this constitutional dilemma to brighter minds. But, by exploring some of the critiques and justifications for our current system, I hope to suggest a better system and justification for deference to agency regulatory interpretations.

Perhaps the easiest context in which to defend agency lawmaking is when Congress has explicitly delegated such authority to an agency. As discussed above, in pre-*Chevron* cases, when Congress specifically delegated some lawmaking role to an agency, courts rarely questioned that delegation.[177] As Justice Scalia noted, "we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be [delegated to an administrative agency]."[178]

Although some scholars and Justices have suggested the Court has been too indulgent on this point,[179] and ought to limit the scope of delegation, it rests on solid foundations. There are often good reasons for Congress to delegate specific lawmaking responsibilities. For example, in the CWA, Congress chose to approach pollution abatement via a technology-forcing framework.[180] Rather than mandating industries use particular treatment technologies, Congress decided to rely on technology-based effluent limits.[181] Under this approach, Congress directed EPA to study each industrial sector and ascertain the best treatment technologies in use and the levels of pollutant reduction they achieve.[182] Then, based on these data, EPA sets the effluent limits in permits, rather than mandating the installation of particular treatment systems.[183] In this way, industries may work to achieve the effluent levels in the most cost-efficient manner.[184] In theory, this drives innovation, and increases treatment capacity and efficiency over time through market forces.[185]

Were Congress unable to delegate ongoing responsibility to agencies to be masters of such highly technical and evolving issues, it is difficult to see who could do this type of work. Surely not Congress; it already has a difficult enough time getting legislation passed without having to worry about the technical issues like water quality treatment.[186] And courts routinely remind us that they are not

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176 *See generally* U.S. CONST. (no mention of "agencies" or the delegation of lawmaking authority to them).

177 *See supra* Part II.B.

178 Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

179 *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); *see also* Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543–44 (1981) (Rehnquist, J., concurring) (urging the application of a more aggressive nondelegation doctrine); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 672–88 (1980) (Rehnquist, J., concurring) (same).

180 Federal Water Pollution Control Act, 33 U.S.C. § 1311(b) (2006).

181 *Id.*

182 *Id.* § 1314(b)(2)(A).

183 *Id.* § 1342(a)(1).

184 *Id.* § 1314(b)(1)(B).

185 D. Bruce La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 3 IOWA L. REV. 771, 771–73 (1977).

186 *See, e.g.*, Ezra Klein, *Good Riddance to the Rottenest Congress in History*, BLOOMBERG, Jan. 2, 2013, http://www.bloomberg.com/news/2013-01-02/good-riddance-to-rottenest-congress-in-history.html (last visited Nov. 23, 2013) (explaining that the 112th Congress passed the fewest public laws of any Congress in history).

equipped to deal with technical and scientific issues.[187] I suppose one could argue that if it cannot do all the work itself, Congress simply should not craft such complex regulatory schemes. But that is silly. Many of the issues federal law deals with are complex and demand complex regulations. Delegating authority to agencies to implement technical or scientific regimes is both efficient and logical.[188]

Deference in the *Chevron* context—where the delegation of authority is implicit rather than explicit—has generated a much broader and more heated set of critiques.[189] Delegating legislative authority to agencies is not a small matter. And as a result, Professor Thomas Merrill has argued, "[i]n order to establish that Congress has mandated the practice of deference, the Court should be able to point to more than a debatable inference from congressional inaction."[190] Simply letting silence or ambiguity constitute delegation, the argument runs, misunderstands how Congress and the Constitution work.[191] When Congress drafts a law, ambiguities are to be resolved by courts.[192] Not only does the Constitution demand this, argues Professor Anthony, so too does Congress.[193] In the Administrative Procedure Act (APA),[194] Congress assigned to courts, not agencies, the power to "decide all relevant questions of law."[195] Thus, courts contravene the APA when they defer to agency interpretations of statutory provision.[196] Treating agency interpretations as binding allows agencies, not the courts, to decide the law.[197]

As scholars like Professor Bressman point out, however, courts routinely have to examine statutory texts, their contexts, and legislative history to divine congressional intent.[198] Sometimes Congress does not legislate with perfect clarity, even on very important issues.[199] In Professor Bressman's opinion, there is little about which to be concerned in the *Chevron* context, where a court simply interprets a statute to determine if Congress meant to delegate.[200] There are many

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187 *See, e.g.*, Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) ("[A] reviewing court must generally be at its most deferential" when the agency is "making predictions, within its area of special expertise, at the frontiers of science.")

188 Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS. 127, 127–29 (1994).

189 *See, e.g.*, Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. Rev. 1271, 1285 (2008) ("[T]he assumption 'that silence or ambiguity confers that kind of interpretative authority on the agency is unacceptable, for it assumes the very point in issue and thus fails to distinguish between statutory ambiguities on the one hand and legislative delegations of law-interpreting power to agencies on the other. . . .'" (quoting CSX Transp. v. United States, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) (internal quotation marks omitted)).

190 Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 995 (1992).

191 *Id.* at 994–95.

192 Anthony, *supra* note 29, at 23; *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803).

193 Anthony, *supra* note 29, at 23–24.

194 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2006).

195 *Id.* § 706.

196 *See id.*

197 *See* Anthony, *supra* note 29, at 10, 23–24.

198 Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2046 (2011).

199 As discussed below, for example, Congress extended the regulatory reach of the CWA to "navigable waters," which it helpfully defined as "waters of the United States." *See infra* note 274 and accompanying text.

200 *See* Bressman, *supra* note 198, at 2030–31, 2037.

times when courts must dig into a law to determine what Congress intended.[201] That is what courts do. As a result, as long as Congress can explicitly delegate at least some lawmaking authority to agencies, then it is no great leap to presume that sometimes Congress does so implicitly.[202]

The Court itself in *Chevron* offered several reasons Congress might have wanted to delegate authority to agencies rather than to courts.[203] Perhaps, the Court reasoned, Congress thought it best to delegate the questions to an agency with "great expertise."[204] Or, "perhaps [Congress] simply did not consider the question at this level."[205] Or, "perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency."[206]

Implicit in the Court's opinion is the fact that were ambiguity not read as implied delegation to agencies, it would leave courts to interpret the ambiguity.[207] If a court were free to "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency,"[208] the court would, in effect, become the policy-making body any time Congress was less than clear. As Professor Manning explains, "if a court refuses to accept (defer to) the agency's reasonable interpretation of that term . . . it usurps the norm-elaboration responsibility that Congress has committed to the agency's 'judgment.' In short, binding deference is the product of Congress's right to delegate legislative authority to administrative agencies."[209]

In other words, ambiguity in statutory drafting will always create a "problem of delegation."[210] And, as Professor Margaret Lemos has explained in her insightful research, "to the extent that lawmaking by agencies triggers constitutional anxieties about the proper allocation of power among the three branches, so too should delegated lawmaking by courts."[211] Simply arguing that courts should decide the meaning of ambiguous statutes merely puts a different branch of government in control. While it is tempting to argue for a bright line between lawmaking and law-interpreting branches of government, it is not so simple. As Professor Manning explains, "By presuming that Congress allocates interpretive authority to agencies rather than courts, the background presumption embraced in *Chevron* reconciles modern conceptions of delegation and interpretive lawmaking with a constitutional commitment to policymaking by more, rather than less, representative institutions (agencies rather than courts)."[212]

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201 *Id.* at 2046.

202 *See id.* at 2037–38.

203 *Chevron*, 467 U.S. 837, 865 (1984).

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.* at 844.

209 *See* Manning, *supra* note 25, at 623.

210 John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 371 (2000).

211 Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 408 (2008).

212 Manning, *supra* note 25, at 634.

Indeed, because the judiciary, as Professor Manning and others have noted,[213] is the least representative branch of our government, inverting *Chevron*'s assumption of implied delegation might actually take our system further from the separation of powers ideals with which many of *Chevron*'s detractors claim to be most concerned.[214] While agency heads may not be directly elected, they are not appointed for life like federal judges and they are answerable to the president,[215] who is answerable to the electorate. As a result, when agencies make unpopular decisions, the public can put pressure directly on the agency and the executive to change course, or eventually, change leadership. This is not so for courts. Judges are generally insulated from democratic processes and are thus less politically accountable.[216] And representation is critical to a functioning democracy and liberty.[217]

Of course, one might argue Congress can rewrite the law to "correct" a court's decision when it disagrees with a judicial opinion. This is, at least in theory, how our federal system works. Lawmakers make the law, the courts interpret it, and the legislature adapts in response.[218]

All this is to say there are compelling concerns at root in arguments both for and against delegation. The most fundamental principle all the commenters seek to protect is the democratic process. Those who are concerned with the drift to agency-made law see delegation of legislative power as undermining democratic accountability.[219] By contrast, those like Professor Bressman, who see the ability to delegate at least some legislative power as a fundamental "right" of Congress, view the role of agencies as enhancing accountability and representative governance.[220] It is this agreement about protecting the democratic process that points the way to a different way to conceptualize deference doctrines, and perhaps to formulate a better way to deal with agency regulatory interpretations.

V. A NEW WAY TO SEE DEFERENCE TO STATUTORY INTERPRETATIONS

Generally, scholars and courts describe *Skidmore* and *Chevron* deference as being two separate doctrines.[221] When an agency acts with the force of law, its

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213 *See id.*; Lemos, *supra* note 211, at 410.

214 *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1037 (2007).

215 While Congress can vest authority in "independent agencies," Humphrey's Executor v. United States, 295 U.S. 602, 619, 632 (1935), this Article focuses on agencies housed in the executive branch.

216 *See* Manning, *supra* note 25, at 634.

217 *Id.*

218 William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332–36 (1991) (synthesizing data on Congressional override of judicial statutory interpretation and observing trends).

219 Merrill, *supra* note 190, at 996– 97.

220 Bressman, *supra* note 198, at 2,034–39; Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 194–97 (2006).

221 *See, e.g.*, Manning, *supra* note 25, at 686–88 (describing *Skidmore* as "a nonbinding version of deference" from "a court exercising independent judgment"); Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 568–69 (2006) (describing *Skidmore* standard as "weaker and more contingent type of deference" than *Chevron*); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1116–

action is reviewed pursuant to *Chevron*.[222] If its interpretation takes some other form, then *Skidmore* and its sliding scale governs.[223]

What if we recast this understanding? What if, rather than seeing *Skidmore* as different and separate from *Chevron*, we instead considered *Chevron* as a subset of *Skidmore* deference? Typically, when courts describe *Skidmore* deference, they focus on the Court's explanation that the "weight of [an agency's statutory interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements."[224] While this sliding scale seems like common sense, it does only in light of the Court's preceding sentence: "We consider that [the agency's interpretations], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants *may properly resort for guidance*."[225] In other words, it is not only that the agency has delegated authority or that it has special expertise, but also that when an agency interprets statutory texts, it helps to guide the public by working to explain our rights and responsibilities under federal law. Thus, when an agency's consideration of an issue is particularly thorough or its position consistent over time, it deserves more weight because the agency's action has meaningfully clarified the law. The opposite is true too: when an agency's position changes over time or is offered for the first time in an amicus brief, it is due little to no special weight, for it has done nothing to promote the democratic value of clarifying the law.

In this formulation of deference, then, *Chevron* deference becomes just one end of the *Skidmore* spectrum. When an agency promulgates rules via notice and comment rulemaking, it has provided definitive guidance to the public and courts as to what the law is.[226] Rulemaking is open for all to see, participate in, and understand.[227] Final rules are published in the Federal Register and codified in the Code of Federal Regulations.[228] Such regulations, then, are essentially as good as statutes at explicating the law.

The rulemaking process not only guides the public, but, as Professor Michael Asimow explains, "The APA rulemaking procedure . . . provides an ingenious substitute for the lack of electoral accountability of agency heads. Indeed, rulemaking procedures are refreshingly democratic: People who care about legislative outcomes produced by agencies have a structured opportunity to provide input into the decisionmaking process."[229] Because rules are created by democratic

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18 (2001) (describing *Skidmore* as "weak deference" and as "a lesser degree of deference" than *Chevron*).

222 United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

223 *Id.* at 227.

224 *Skidmore*, 323 U.S. 134, 140 (1944).

225 *Id.* (emphasis added).

226 *See Mead Corp.*, 533 U.S. at 226–27 (applying the presumption that regulations promulgated under lawful notice-and-comment rulemaking typically have the force of law, entitling them to *Chevron* deference).

227 *See, e.g.*, *id.* at 223 n.3 (noting that notice and comment rulemaking provides interested parties with an opportunity to comment and the relevant administrative agency must consider all comments before publishing a ruling or decision and applying these requirements to the Customs Service).

228 Amy Bunk, Federal Register 101, 67 COAST GUARD J. OF SAFETY & SECURITY AT SEA 55, 56 (2010), *available at* http://www.uscg.mil/proceedings/archive/2010/.

229 Asimow, *supra* note 187, at 129.

process, open to all, and codified in a final form, it makes sense for courts to defer to such statutory interpretations unless they are arbitrary and capricious.

By contrast, when an agency does not act with the force of law, its interpretation has less power to inform the public and likely derives from less democratic or representative processes. Such interpretations may, to varying degrees, fail to uphold the democratic ideals central to our system.[230] As a result, under this framework, they are entitled to less deference.

In short, I think that *Skidmore* is the framework for deference to agency statutory interpretations. It has a sliding scale of deference that culminates in *Chevron*. Deference depends on the relative representativeness of process and the ability for the agency's action to provide meaningful guidance to the public. Thus, it makes sense to give an agency's interpretation controlling weight when it has acted in an open, public, and democratic manner by crafting rules or actions that carry the force of law. When the agency has acted in less open or formal ways, less respect is due to the agency's position.

This is not such an odd approach to understanding *Chevron*. Although in its opinion in *Chevron* the Court does not appear to view the issue as part of the *Skidmore* sliding scale,[231] the Court does hint that it might in *Mead*.[232] After the Court explained that, pursuant to *Skidmore*, "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position," the Court stated that *Chevron* "identified a category of interpretive choices distinguished by an additional reason for judicial deference."[233] That reason, of course, is when an agency exercises its authority to "speak with the force of law."[234] In other words, when an agency speaks with the force of law, it has reached one end of the *Skidmore* spectrum and its interpretation is binding. When an agency speaks without such force, as it had in *Mead*,[235] then its statutory interpretation carries less weight.

VI. REPLACING *AUER*

In this section, I suggest that the reconceptualized approach to understanding the relationship between *Skidmore* and *Chevron* provides the justification for a new approach to giving weight to agency regulatory interpretations. Above, I have argued that courts defer to agency statutory interpretation in relation to two related factors: the level of guidance the interpretation provides to the public and the level of public participation involved in creating the agency's interpretation.[236] These same principles should guide courts as they interpret agency regulatory

230 *See* Manning, *supra* note 25, at 623 n.59 (quoting Monaghan).

231 *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984) (focusing its analysis on whether the statutory language is ambiguous and, if so, whether the agency's interpretation of that language "is based on a permissible construction of the statute").

232 *See generally Mead*, 533 U.S. 218, 218 (2001).

233 *Id.* at 228–29 (footnotes omitted).

234 *See generally id.*

235 *See generally id.* at 219–20 (using the proposition "that classification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.").

236 *See* discussion *supra* Part V.

interpretations, rather than the one-size-fits-all approach now embodied in *Auer*. The more the public can rely on an agency's interpretation, the more weight it should receive. And the more representative or democratic the process underlying the interpretation, the more weight it should receive. Not only would this approach harmonize the two lines of deference, it would result in fairer, more rational outcomes. Three examples serve to illustrate the validity of this approach.

A. Decker *and the Trouble with Surprise*

First, returning to the *Decker* case, had the Court applied a sliding scale approach to weighting EPA's amicus brief, the outcome of the case would have been very different. Under the proposed approach, EPA's amicus brief would have been entitled to little deference. When an agency chooses to offer its regulatory interpretation for the first time in an amicus brief, it has done little if anything to guide the parties, public, or courts. As discussed above, EPA offered its regulatory interpretation for the first time in its amicus brief.[237] As a result, NEDC filed its complaint without any notice that EPA would construe the definition of "industrial activity" to exclude logging. If anything, the clarity of its regulation—with the direct reference to "logging" as a covered activity[238]—should have been enough for NEDC to know what the law is. Thus, the amicus brief would have received low marks on its "guidance" to the public.

Similarly, because EPA's interpretation was apparently crafted for the first time by its attorneys in preparing the amicus brief, the public had no role in arriving at this position. There were no hearings, notices, comments, responses to comments, or explanations of the agency's position. In other words, deferring to the amicus brief served no democratic principles and did not promote a more representative process of government. Instead, it simply allowed the agency to remake its rule long after it was drafted without any public participation or notice.

This case demonstrates precisely the concern Professor Manning expressed about *Seminole Rock*.[239] He explains: "Seminole Rock deference disserves the due process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it. In these respects, it undermines the rule of law values served by the separation of lawmaking from law exposition."[240] By contrast, if the sliding scale approach had been applied in *Decker*, EPA's interpretation would have received no special consideration. As a result, the Court should have interpreted the language of the Industrial Stormwater Rule without deference to EPA.

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237 *See supra* text accompanying note 14.

238 *See* 40 C.F.R. § 122.26(b)(14)(ii) (2006) (defining facilities engaging in "industrial activity" to include those classified under Standard Industry Code 24); OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 11, at 107 (including "logging" under Standard Industry Code 24).

239 *See* Manning, *supra* note 25, at 617.

240 *Id.* at 669.

B. SmithKline Beacham*—Heads You Win, Tails I Lose.*

Surprise and unrepresentativeness are not the only two vices of *Auer*. As the Court explained in *Christopher v. SmithKline Beecham Corp.* ("*SmithKline Beecham*"),[241] a court should not defer to an agency's interpretation offered in an amicus brief if the agency's interpretation would expand the scope of liability.[242] In other words, *Auer* deference only works in one direction, and thus it is outcome determinative in the amicus context. This often will mean that citizens attempting to hold corporate or government entities liable for violations of federal law only stand to lose from an agency's amicus brief.

In *SmithKline Beecham*, the issue was whether two pharmaceutical representatives, known as "detailers," were entitled to overtime pay under the FLSA.[243] FLSA requires employers to pay their employees at the rate of one and a half times their hourly rate for any work in excess of forty hours a week.[244] This overtime pay requirement, however, does not extend to those "employed . . . in the capacity of outside salesmen."[245] At issue was whether the two detailers were "outside salesmen."[246] The two employees of SmithKline were not paid by the hour, but instead had base salaries augmented by performance-based bonuses.[247] However, because of federal limits on how pharmaceuticals can be sold, drug representatives cannot actually sell drugs to physicians or to patients.[248] Instead, detailers work to obtain nonbinding commitments from doctors to prescribe their employer's medications.[249]

Although the statute is silent on the scope of "outside salesmen," the Department of Labor (DOL) has several interrelated regulatory provisions germane to determining who is an outside salesman.[250] The issue before the Court reduced to whether an "outside salesman" actually had to secure contracts for the sale of drugs, or whether securing a nonbinding commitment from doctors would suffice.[251] While the regulations themselves did not provide a single definitive answer, the DOL submitted an amicus brief in support of the two employees, interpreting its regulations to require that an employee actually make binding sales to be considered an "outside salesman."[252] Thus, in the agency's view, its regulations would entitle the employees to time-and-half pay for any overtime work they performed.[253]

Under *Auer*, as demonstrated in *Decker*, an agency's interpretation offered in an amicus should control unless plainly erroneous.[254] Instead, the Court declined to

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241 132 S. Ct. 2156 (2012).
242 *Id.* at 2167–68.
243 *Id.* at 2164; 29 U.S.C. §§ 201–219 (2006).
244 29 U.S.C. § 207(a) (2006).
245 *Id.* § 213(a)(1).
246 *SmithKline Beecham*, 132 S. Ct. at 2161.
247 *Id.* at 2164.
248 *See* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 353(b) (2006); *Christopher*, 132 S. Ct. at 2163.
249 *See SmithKline Beecham*, 132 S. Ct. at 2172.
250 *See* 29 C.F.R. §§ 541.500–504 (2012).
251 *SmithKline Beecham*, 132 S. Ct. at 2167, 2172.
252 *Id.* at 2165.
253 *See id.* (affirming that DOL did not see pharmaceutical detailers as exempt from overtime pay).
254 *Auer*, 519 U.S. 452, 461 (1997).

defer to the agency because to do so would "impose potentially massive liability on [the defendant] for conduct that occurred well before that interpretation was announced."[255] The Court reasoned that deference to the agency "in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[256] Thus, it would not defer to the agency.[257] The Court went on to interpret the regulatory text itself, and determined that the regulations did not require actual sales, and thus no overtime pay was required.[258]

The Court's reluctance to defer to an agency's regulatory interpretation offered for the first time in an amicus brief makes my point. Because the amicus brief offered no notice to the public of its rights and responsibilities, it fails one of the core justifications of deference. And, just as with the EPA's interpretation in *Decker*, there is no indication the agency engaged in any democratic process in arriving at its position. When such an interpretation offers no meaningful guidance to the public on how to operate or behave, the interpretation does little to advance our principles of fairness or liberty.[259] So apparently the Court understands this problem with *Auer*. But the one-way nature of the Court's decision only serves to deepen the doctrine's problem. A plaintiff seeking to hold a party liable for a violation of a federal statute can only be hurt by an agency's amicus brief,[260] but never helped.[261]

In *SmithKline Beecham*, had the Court applied a sliding scale to the agency's regulatory interpretation, the outcome would have been the same. The Court would have given little weight to the agency's interpretation. When *SmithKline Beecham* is read in tandem with *Decker*, the problem with *Auer* stands in stark relief.

C. Waters of the United States Guidance

Deferring to agency regulatory interpretations is not, as my first two examples might suggest, always problematic. Just as deference to statutory interpretations can serve important democratic functions,[262] so too can an agency's explanation of its regulations. The trick is to strike a balance between competing interests to promote clarity of law and representativeness of process. There are at least three reasons that deference to agency regulatory interpretations enhances these two goals.

First, higher levels of deference promote clarity for the public and regulated entities. If the public can read an agency's regulatory interpretation and be fairly

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255 *SmithKline Beecham*, 132 S. Ct. 2167.

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

257 *Id.*

258 *Id.* at 2174.

259 *See* Manning, *supra* note 25, at 634 ("Representativeness traditionally has been an important structural safeguard of liberty").

260 *See Decker*, 133 S. Ct. 1326, 1331 (2013) (deferring to agency's modified interpretation when that interpretation limits liability for regulated parties)

261 *See SmithKline Beecham*, 132 S. Ct. at 2167–68 (refusing to uphold an agency's interpretation, first introduced in an amicus brief, that expands liability, because it would cause "unfair surprise" to regulated parties acting in reliance on a prior interpretation).

262 *See* Asimow, *supra* note 188, at 129.

certain that the agency's position will survive review in court, the public will not have to wait for the judicial process before reasonably relying on the interpretation.[263] The ability to rely on such informal interpretations is important because, otherwise, regulated entities are at risk of misconstruing vague regulations.[264] When the public knows that courts are likely to defer to an agency's interpretation, they are more likely to act in reliance on the agency's position, rather than waiting for courts to conclude their review.[265] An associated benefit is uniformity across jurisdictions; with stronger deference, there is less likelihood that circuits will divide over the meaning of regulations. Indeed, some argue that *Seminole Rock* is "the only approach that can yield predictability and national uniformity with respect to the legal standards applicable to a system of benefits or regulation."[266]

Second, when an agency has more leeway to interpret its rules rather than rewriting them, the agency can react much more quickly to new legal precedents, scientific information, or market conditions. Even Justice Scalia in his dissent in *Decker* acknowledges that, as a result of strong deference,

> [t]he country need not endure the uncertainty produced by divergent views of numerous district courts and courts of appeals as to what is the fairest reading of the regulation, until a definitive answer is finally provided, years later, by this Court. The agency's view can be relied upon, unless it is, so to speak, beyond the pale.[267]

But Justice Scalia dismisses this benefit as hollow because the

> duration of the uncertainty produced by a vague regulation need not be as long as the uncertainty produced by a vague statute.[268] For as soon as an interpretation uncongenial to the agency is pronounced by a district court, the agency can begin the process of amending the regulation to make its meaning entirely clear.[269]

Justice Scalia then uses the example of *Decker*, where EPA prepared a new regulatory definition of industrial activities within a year. Justice Scalia is correct that it is important to keep agencies honest and to make new regulations via the proper rulemaking process, but he is too flippant about the speed of rulemaking. Often new rules take just as long to create as new legislation; so nonrule actions can offer the public meaningful and timely guidance in the interim.[270]

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263 *See* Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 120 (2000).

264 *See id.* at 104–05.

265 *Id.* at 120.

266 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 211 (Supp. 1999).

267 *Decker*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., dissenting).

268 *Id.* at 1341–42 (Scalia, J., dissenting).

269 *Id.*

270 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 5–6 (2009), *available at* http://www.gao.gov/new.items/d09205.pdf (noting that, in sixteen case studies, the average length of the rulemaking process was four years but could take up to fourteen years).

Finally, there may be areas where it makes sense to have the technical or scientific expertise of an agency fill in ambiguities or gaps in regulations. Indeed, this was the leading justification the Court provided for *Seminole Rock* deference in *Thomas Jefferson University v. Shalala*.[271] There, the Court explained that the agency possesses special expertise in administering its "complex and highly technical regulatory program."[272]

While these are all valid reasons to support significant deference to agency regulatory interpretations, they only make sense in the case where the interpretations also provide meaningful guidance on the law or result from meaningful representative democratic processes. An agency's interpretation fails to give clarity to the law if, for example, it only informs the public of its position in an amicus brief. Similarly, certainty vanishes if an agency is assured that it can change the meaning of its regulations at any time and in nearly any manner it chooses. Finally, if an agency may simply use informal interpretations to adapt its regulations to new situations, it may avoid going through the "refreshingly democratic" process of rulemaking.[273] Striking the right balance is key to arriving at the proper standard for deference.

Under the sliding scale approach, it is possible to achieve this goal. A good example of a situation in which an agency ought to receive significant deference to its regulatory interpretation is EPA's guidance on the scope of the waters of the United States. Under the CWA, Congress prohibited the unpermitted discharge of pollutants from point sources into navigable waters.[274] While Congress defined "navigable waters" as the "waters of the United States," it did not provide any more detail as to the geographic sweep of the law.[275] To fill this statutory gap, EPA and the Army Corps of Engineers promulgated regulations establishing seven categories of water bodies that qualify as "waters of the United States."[276]

The validity of these categories of "waters" has reached the Supreme Court on three occasions.[277] In the first instance, the Court found that the rule, as applied to wetlands adjacent to navigable-in-fact waters, was a reasonable interpretation of "waters of the United States," and thus the Court deferred to the rule.[278] On two other occasions, however, the Court has found that the regulatory categories went too far, and declined to defer to the agency interpretation.[279] In the first of these cases, the Court explained that "nonnavigable, isolated, intrastate waters," without a connection to a navigable-in-fact water, could not reasonably be construed as being a "water of the United States."[280] As a result, the Court found that the Corps' interpretation of the rules was erroneous.[281] In the second case, the Court explained

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271 512 U.S. 504, 512 (1994).

272 *Id.* (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 686, 697 (1991)).

273 Asimow, *supra* note 188, at 129.

274 33 U.S.C. §§ 1311(a), 1362(12) (2006).

275 *Id.* § 1362(7).

276 33 C.F.R. § 328.3 (1987).

277 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2006).

278 *Riverside Bayview Homes*, 474 U.S. at 134.

279 *SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 757.

280 *SWANCC*, 531 U.S. at 172.

281 *Id.*

that EPA and the Corps could not rely on a per se assumption that an isolated wetland or a wetland adjacent to a nonnavigable tributary were waters of the United States.[282] Although the Court in *Rapanos v. United States* divided 4–1–4, with no five-Justice majority reasoning, it found that the Corps' interpretation went beyond the congressional delegation to define "navigable waters."[283] Instead, to establish a wetland as a water of the United States, the agencies would need to show a significant nexus between the wetland and a navigable-in-fact water.[284]

In response to the Court's decision in *Solid Waste Agency of Northern Cook County. v. United States Army Corps of Engineers* (*SWANCC*), EPA and the Corps provided notice of a proposed rulemaking but ultimately decided not to amend the regulations.[285] After the Court's decision in *Rapanos*, however, EPA and the Corps issued a guidance document in 2008 entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (2008)."[286] The goal of the guidance document was to explain EPA's interpretation of the regulatory categories of water of the United States in light of the Court's decisions.[287] Then again, in April 2011, EPA and the Corps revised the guidance, published a draft version, and requested public comment.[288] During the ninety-day comment period, the agencies received approximately 230,000 comments from the public.[289] Currently, the 2011 Guidance Document is awaiting approval from the Office of Management and Budget (OMB).[290]

Presuming that OMB allows EPA to finalize the 2011 Guidance Document, the guidance should receive a significant level of deference under the sliding scale approach. First, the Guidance Document provides very detailed explanations as to what types of wetlands and other waters fall within the CWA's reach.[291] In the document's thirty-nine pages, the agencies not only provide examples, but also detail the methodologies they will use to determine "waters of the United States" in the future for each regulatory category.[292] In fact, because of its length and detail, the guidance is far more helpful in understanding the Act's reach than the

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282 *Rapanos*, 547 U.S. at 742.

283 *Id.* at 757, 783.

284 *Id.* at 755.

285 Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1,991, 1,991, 1,996 (Jan. 15, 2003).

286 EPA & U.S. ARMY CORPS OF ENG'RS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES*, 1 (2007), *available at* http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf.

287 *Id.* at 3.

288 EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24,479, 24,479–80 (May 2, 2011); EPA & U.S. ARMY CORPS OF ENG'RS, DRAFT GUIDANCE ON IDENTIFYING WATERS PROTECTED BY THE CLEAN WATER ACT 1 (2011), *available at* http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf [hereinafter 2011 DRAFT GUIDANCE].

289 EPA, *Clean Water Act Definition of "Waters of the United States,"* http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm (last visited Nov. 23, 2013).

290 *Id.*

291 2011 DRAFT GUIDANCE, *supra* note 288, at 15, 19.

292 *See generally* 2011 DRAFT GUIDANCE, *supra* note 287 (illustrating the general organization of the document).

regulations themselves. For example, in its decisions on "waters of the United States," the Court has explained that to be regulated under the Act, a wetland, pond, or tributary must have a "significant nexus" with a navigable-in-fact water body.[293] The regulations, however, do not include the term "significant nexus."[294] It is an explanatory gloss the Court put on the regulations to explain why in *Riverside Bayview* it was logical for the agencies to include nonnavigable wetlands in the scope of "navigable waters."[295] The meaning of "significant nexus" is unclear because the Court has opined on its geographic extent only three times.[296] In the Guidance Document, however, the agencies provide three-and-a-half pages explaining their interpretation of the phrase.[297] The agencies also then provide detailed descriptions of how field staff should apply the "significant nexus" test in various contexts.[298] Thus, because the 2011 Draft Guidance does a meaningful job enlightening the public as to what waters are protected by the Act, it should receive a high level of deference.

Similarly, because EPA and the Corps decided to go through a democratic notice and comment style process—inviting comments from the public, responding to the comments, and adapting the guidance in response—the guidance should receive significant deference. People who are concerned about the CWA's reach were able to participate in drafting the 2011 Draft Guidance and will be able to see their impact on the outcome. And, because of the guidance's clarity, the public can assess how the agencies are applying their own interpretations and policies.

As a result, giving the 2011 Draft Guidance significant deference meets the core goals that motivate deference. First, it provides clarity to the public. Second, it promotes consistency in application of the law. Third, it happened relatively quickly.[299]

Importantly, though, by not affording the 2011 Draft Guidance controlling weight, à la *Chevron*, the sliding scale approach to deference still incentivizes the agency to rewrite its rules. EPA cannot rest on its laurels knowing that it need not update its rules because its interpretation of the existing rules will control, as it would under *Auer*. Instead, as EPA has suggested, once the guidance is finalized and the agency builds its expertise through its implementation, it will commence the process of updating its rules.[300] Such updated rules would, of course, be reviewed under the deferential arbitrary and capricious standard.[301]

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293 *Rapanos*, 547 U.S. 715, 726, 753 (2006).

294 *See* 2011 DRAFT GUIDANCE, *supra* note 288, at 2.

295 *Rapanos*, 547 U.S. at 726, 753.

296 *Riverside Bayview*, 474 U.S. 121, 131 (1985); *SWANCC*, 531 U.S. 159, 167 (2001); *Rapanos*, 547 U.S. at 742.

297 2011 DRAFT GUIDANCE, *supra* note 288, at 7–10.

298 *Id.* at 11–20.

299 I recognize that guidance issued in 2008 and then again in 2011 in response to a 2006 Court decision does not seem "quick." But, compared to the amount of time rewriting regulations would require in this context, EPA has acted with commendable speed. OMB, on the other hand, is certainly taking its time reviewing the document.

300 EPA, *Clean Water Act Definition of "Waters of the United States,"* http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm (last visited Nov. 23, 2013).

301 *See Chevron*, 467 U.S. 837, 844 (1984).

VII. CONCLUSION

Giving authority to federal agencies to make and interpret the law can, contrary to some criticism, enhance democratic and transparent governance, not just efficiency. As scholars like Asimow and Bressman have demonstrated, deferring to agency statutory interpretations is often a more desirable outcome than leaving statutory ambiguities in the hands of the courts.[302] This is less obviously so, however, when an agency interprets its own regulations. There are many reasons to be suspicious of a system of law that grants the same body the power to make and interpret laws—indeed, the division between those two roles is at the heart of our Constitution. And, as *Decker* and *SmithKline Beacham* demonstrate, *Auer* deference can lead to problematic and unfair outcomes.

Seen in the proper framework, however, deference to agency regulatory interpretations can actually bolster democratic governance and promote efficiency and transparency. To do so, however, the courts must get rid of *Auer*'s approach. Where, how, and in what form an agency offers an interpretation must matter to the weight the interpretation receives. This is what the courts already do with statutory interpretations. It should be how courts treat agency regulatory interpretations as well.

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302 Asimow, *supra* note 188, at 127–28; Bressman, *supra* note 198, at 2050.