

TOWARDS FUNCTION AND FAIR NOTICE: TWO
MODELS FOR EFFECTING EXECUTIVE POLICY
THROUGH CHANGING AGENCY
INTERPRETATIONS OF AMBIGUOUS STATUTES
AND RULES

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INTRODUCTION

Recent commentators have observed that the *Chevron*¹ doctrine, which governs the deference courts owe to agency interpretations of ambiguous statutes, is in a period of reevaluation and development.² For example, as described by Elizabeth V. Foote, the Supreme Court has recently diverged from *Chevron*'s established methodology in several key administrative law decisions.³ In her view, these cases signal a return to the Administrative Procedure Act's (APA)⁴ "more institutionally-attuned approach to judicial review," applying a hybridized "arbitrary and capricious test," mooring *Chevron* more closely to the provisions of the APA.⁵ Under this approach, courts would place a greater emphasis on the provisions of the APA, reviewing agency interpretations for "basic rationality" consistent with the APA's judicial review standards.⁶ For his part, Daniel J. Gifford observes that recent case law has added "layers of richness" to the original *Chevron* formulation, allowing the courts more freedom to determine when deference would be appropriate—"generally . . . requir[ing] mandatory deference in the more routine or interstitial statutory interpretations, but not necessarily in matters at the core of the statutory design."⁷ Gifford's approach would not make the APA itself the touchstone of deference, but rather would turn on the specifics of the particular case. For example, the agency's use of notice-and-comment procedures in formulating a new rule, whether or not required by the APA, would tend to increase the relative deference owed to the agency's interpretation.⁸

1. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

2. See, e.g., Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673 (2007); Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783 (2007); Ann Graham, *Searching for Chevron in Muddy Waters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229 (2008); Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007).

3. Foote, *supra* note 2, at 677 (citing *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1541 (2007); *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1520 (2007); *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007); *Massachusetts v. EPA*, 127 S. Ct. 1438, 1444 (2007)).

4. Administrative Procedure Act, 5 U.S.C. §§ 551-706 (2000).

5. Foote, *supra* note 2, at 677.

6. *Id.* at 681.

7. Gifford, *supra* note 2, at 785.

8. *Id.* at 785, 833-34.

The key feature of the Supreme Court's evolving approach to questions of deference to administrative agencies, as recognized in these articles, is the Court's growing recognition of administrative agencies' functional obligation to administer the law as compared to the *Chevron* doctrine's emphasis on canons of construction and traditional interpretive tools.⁹ It is said that the *Chevron* test, over time, turned executive agencies away from the actual work of public administration to the more judicially-oriented task of statutory interpretation and construction.¹⁰ In recent administrative law cases handed down by the Supreme Court, commentators see a development away from this inherently jurisprudential focus towards the agency's actual task of carrying out the work of the federal government.¹¹

A good example of this shift is the Supreme Court's recent decision in *Long Island Care at Home, Ltd. v. Coke*.¹² In *Long Island Care*, having determined that a Department of Labor interpretative regulation was properly within its administrative power under the Fair Labor Standards Act, the Court looked to whether there was anything "about the regulation that might make it unreasonable or otherwise unlawful" without first proceeding by way of *Chevron*'s traditional framework.¹³ *Long Island Care* suggests that the traditional tests governing ambiguous statutes and rules are collapsing into a single, APA-driven test more concerned with due process rather than formality on the part of the interpreting agency.

At the heart of public administration, of course, is policy. And policy goals can (and do) change from one administration to the next. Any renewed emphasis on the function of public administration will have to take into account this policy-executing characteristic of administrative agencies. The question addressed here is when courts should, in light of developing case law, defer to a new interpretation of federal law by an executive agency that differs from the agency's previous interpretation. Any functional approach to *Chevron* and its progeny must be able to answer this question. Indeed, this is something of a perennial regulatory issue, but the courts have not addressed the issue in a consistent manner that both respects executive agencies' need to respond promptly to policy changes and protects the fair notice concerns and established expectations of those impacted by the changes (i.e., regulated individuals and businesses).

Part of the answer lies in the process by which an agency announces a new interpretation of existing federal law. For example, when an agency adopts a rule setting forth a new interpretation of an ambiguous statutory provision through notice-and-comment rulemaking, the courts will gener-

9. Foote, *supra* note 2, at 676-78; Gifford, *supra* note 2, at 833-34.

10. Foote, *supra* note 2, at 677, 695; Gifford, *supra* note 2, at 833-34.

11. Foote, *supra* note 2, at 677-78; Gifford, *supra* note 2, at 833-34.

12. 127 S. Ct. 2339 (2007).

13. *Id.* at 2346; *see also* Foote, *supra* note 2, at 721.

ally defer to the new rule as long as the rule reasonably comports with the statute.¹⁴ That the new interpretation represents a policy change is of no relevance. In fact, this was the situation at issue in *Chevron*.¹⁵ The Supreme Court's decision in *United States v. Mead Corp.*¹⁶ went a step further and made notice-and-comment rulemaking (or something like it) a precondition to an agency's interpretation of an ambiguous statute's receiving full *Chevron* deference.¹⁷ Under *Mead*, less formally adopted interpretations are due a lesser degree of deference, taking into consideration, among other things, the agency's consistency over time.¹⁸ *Mead* thus disfavors policy changes effected through less formally adopted interpretations of ambiguous statutory provisions.

Often overlooked, however, is the fact that the APA specifically allows agencies to promulgate "interpretative" rules without notice-and-comment rulemaking.¹⁹ How should courts respond in those circumstances? Richard J. Pierce, Jr. argues that courts should adopt the position long advocated by Justice Scalia, i.e., that courts should defer to new interpretations announced by an agency so long as the new interpretation represents the agency's "fair and considered judgment on the matter in question," despite the fact that the agency issued the new interpretation through a process less formal than traditional notice-and-comment rulemaking.²⁰ As current case law now stands, a rule change or administrative action initiated in the waning months of a presidential administration can proceed apace long after a new administration has taken power.²¹ As a result, the new administration can be effectively powerless to change course promptly, regardless of whether the new administration agrees with the prior policy.²² Adopting Justice Scalia's proposal, Pierce argues, would address this problem and "would reduce by several years the present intolerably long lag between the election of a new President and judicial acquiescence in his preferred policies."²³

14. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (explaining that "if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'" (quoting *Smiley v. Citibank (S.D.), N. A.*, 517 U.S. 735, 742 (1996))).

15. See discussion of *Chevron* *infra* Section I.A.

16. 533 U.S. 218, 229 (2001).

17. See *id.* at 226-27.

18. See *id.* at 227, 234-35.

19. 5 U.S.C. § 553(b)(3)(A) (2000).

20. Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 567 (2006).

21. *Id.* at 563-65.

22. See *id.* at 564-65.

23. *Id.* at 567.

In response to concerns that Scalia's position would expose members of the regulated community to unfair retroactive applications of new interpretations of existing rules, Pierce offers three limiting principles based on existing case law. Specifically, courts should refuse to defer to new interpretations of existing statutes or rules:

(1) when the interpretation is announced as a litigating position and there is reason to believe that it does not represent "the agency's fair and considered judgment on the matter in question"; (2) when the agency interprets an open-ended rule that merely repeats the vague language of the statute the rule purports to implement [i.e., the "anti-parroting" rule]; and (3) when the agency interpretation of the rule would require a regulatee to incur large regulatory costs, and the interpretation urged in the enforcement proceeding is inconsistent with the interpretation in effect at the time the regulatee took the actions at issue²⁴

The first two limitations are potentially of limited value. Courts will generally defer to agency "litigating positions" as long as they are officially ratified by the implementing agency, and are not developed for the specific purpose of aiding parties to ongoing litigation. The anti-parroting rule runs counter to the trend towards greater deference to agency interpretations and should easily be avoided by savvy administrative agency staff. Of the three limitations, therefore, the third proposed limitation is the most critical to ensuring fair treatment of regulated parties under a more functionally-attuned *Chevron* framework.

To truly be useful in this context, the fair notice doctrine must be given further substance. Current fair notice doctrine could foreclose civil penalties where an agency seeks to apply a novel interpretation of a rule retroactively during litigation. However, case law does not make clear when, if at all, fair notice should bar injunctive relief or costs of compliance.²⁵ A more robust application of fair notice principles would also potentially bar some injunctive relief, as well as monetary penalties, in order to relieve regulated entities from unreasonable financial burdens imposed for activity that they reasonably believed to be proper when undertaken.²⁶ As discussed in this Article, existing case law supports this proposition. The D.C. Circuit, in fact, has long recognized that the fair notice doctrine can be applied to limit non-monetary penalties and other injunctive relief.²⁷ However, the D.C. Circuit has not always made clear whether these limitations are based purely on constitutional due process requirements or whether they arise from other sources. In recent cases, the First and Sixth Circuits—in *United States v. Hoyts Cinemas Corp.*²⁸ and *United States v. Cinemark*,²⁹ respec-

24. *Id.* at 568.

25. *See infra* Sections III.A-B.

26. *See Pierce, supra* note 20, at 608.

27. *See infra* Sections III.A-B.

28. 380 F.3d 558, 572-74 (1st Cir. 2004).

29. 348 F.3d 569, 581-82 (6th Cir. 2003).

tively—directed lower courts to apply equitable considerations not only to prohibit retroactive “penalties,” but also to limit injunctive relief and costs of compliance where the remedy sought was overly burdensome as compared to the benefit sought to be achieved.

The goal of this Article is to explore the two different methods proposed above through which an agency should be able to adopt new interpretations of ambiguous statutes or regulations. Both methods acknowledge the agency’s functional obligation to execute policy and also respect the fair notice concerns of potential regulatees. Specifically, this Article suggests that: first, an agency should be able to apply a new interpretation of a statute or rule after adopting the interpretation through notice-and-comment rulemaking; and alternatively, where notice-and-comment rulemaking is not required by the APA, an agency should be able to adopt a new interpretation of an ambiguous statute or rule immediately, but should be prohibited by the courts from imposing the new interpretation on individuals in an inequitable, retroactive, manner. As proposed in this Article, both of these methods are anchored in fair notice concerns and work to eliminate undue surprise while allowing agencies the flexibility to change policy in a manner consistent with the APA.

Part I of this Article will focus on the current state of the administrative deference doctrines and will explain how each doctrine treats agency changes in interpretations of statutes or rules. Part II will focus on effecting interpretive changes through notice-and-comment rulemaking and will discuss the Supreme Court’s recent administrative law decision, *Long Island Care at Home v. Coke*. Part II will analyze the Court’s developing approach to questions of administrative deference as expressed in the *Long Island Care* case and will explain that the Supreme Court is perhaps showing a greater willingness to accept new interpretations of statutes and rules so long as the new interpretations do not impose any unfair surprises on regulatees. Part II will also explain that the Department of Labor’s voluntary undertaking of notice-and-comment rulemaking, although not required by the APA, was central to the Court’s holding in *Long Island Care*. By employing notice-and-comment rulemaking, the Department eliminated the risk of unfair surprise. Part III of this Article will focus on effecting interpretive changes without notice-and-comment rulemaking. Part III will also evaluate Pierce’s suggestions for reducing the possibility of unfair consequences for regulatees. Part III will then take a closer look at applying the fair notice doctrine to offer greater protections to regulatees, with particular emphasis on the Department of Justice’s 1999 enforcement initiative under the Americans with Disabilities Act (ADA). Both *Cinemark* and *Hoyts Cinemas*—two of the cases generated by an ADA enforcement initiative—illustrate how application of the fair notice doctrine might be used to limit

unfair retroactive applications of interpretive changes to existing rules.³⁰ In conclusion, this Article will synthesize the foregoing discussion and will also provide a description of how these principles might be applied.

I. WHEN IS DEFERENCE DUE?

Current doctrine addressing deference to administrative agencies is traditionally divided into three separate categories. First, the *Chevron* doctrine governs the deference courts owe to an agency's interpretation of an ambiguous statutory provision promulgated through traditional notice-and-comment rulemaking. Second, the *Mead/Skidmore*³¹ doctrine governs the deference courts owe to an agency's interpretation of an ambiguous statutory provision announced in a manner less formal than traditional notice-and-comment rulemaking. Third, the *Auer/Seminole Rock*³² test governs an agency's interpretations of its own ambiguous regulations. Each test is discussed in more detail below, together with a description of how each test treats changes in agency interpretations of ambiguous statutory or regulatory provisions.

A. *Chevron* Deference

In 1984, the Supreme Court established the now well-known two-step test for determining when a court should defer to an agency's interpretation of a federal statute Congress entrusted to the agency to implement.³³ Under *Chevron's* first step, the reviewing court must determine "whether Congress has directly spoken to precise the question at issue," relying on traditional tools of statutory construction.³⁴ If the answer is "yes," "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."³⁵ If the answer is "no," at *Chevron's* second step, the court must look to the agency's interpretation of the statute.³⁶ At this step, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."³⁷ If the agen-

30. See discussion *infra* Section III.B.

31. *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

32. *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

33. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

34. *Id.* at 842.

35. *Id.* at 842-43; 837 n.9.

36. *Id.* at 843.

37. *Id.*

cy's interpretation is "permissible"—meaning not "arbitrary, capricious, or manifestly contrary to the statute"—the agency's interpretation controls.³⁸

In *Chevron*, the Court recognized that agencies entrusted with administering an ambiguous statute were at least implicitly delegated the authority to fill the "gaps" in the statutory program.³⁹ The Court explained that this gap-filling function is inherently a policy-making function. Quoting *Morton v. Ruiz*, the Court explicitly recognized that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy."⁴⁰ *Chevron*, in fact, involved a significant *change* in policy. In 1981, the EPA adopted new regulations allowing a state to adopt a plant-wide definition of the term "stationary source" as used under the Clean Air Act's Nonattainment New Source Review program.⁴¹ Applying the EPA's new definition of "stationary source," an existing facility could add or alter an existing piece of equipment without triggering the Clean Air Act's permitting requirements for a "modification" so long as there was no increase in total emissions.⁴² In a rule adopted in 1979, the EPA had taken a different approach.⁴³ In 1979, the EPA rejected application of the plant-wide definition in states that lacked revised State Implementation Plans (SIPs) as of July 1979,⁴⁴ but permitted its use in States that had adopted SIPs before then so long as those SIPs were properly revised.⁴⁵

In 1981, Ronald Reagan "took office and initiated a 'Government-wide reexamination of regulatory burdens and complexities.'"⁴⁶ As part of this review, the EPA reevaluated its definition of the term "source," and replaced its original 1979 rule with a broad plant-wide definition.⁴⁷ The 1981 rule, at issue in *Chevron*, was the result.

In upholding the 1981 rule, the *Chevron* court recognized the propriety of the new administration changing the definition of an ambiguous statutory provision based on the new administration's policy goals.⁴⁸ Since the

38. *Id.* at 843-44.

39. *See id.*

40. *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

41. *Id.* at 858-59 (citing 46 Fed. Reg. 50766 (Oct. 14, 1981)).

42. *Id.* at 840.

43. *Id.* at 854 (citing 44 Fed. Reg. 3276 (Jan. 16, 1979)).

44. Under the Clean Air Act, the EPA's job is to promulgate air quality standards for certain pollutants and to ensure that the minimum requirements for control programs are met. 42 U.S.C. § 7409 (1977). The states are responsible for deciding how to achieve those standards and requirements within their own borders through EPA-approved SIPs. *Id.* § 7410(a).

45. *Chevron*, 467 U.S. at 854.

46. *Id.* at 857 (quoting 46 Fed. Reg. 16281 (Mar. 21, 1981)).

47. *Id.* at 858.

48. *Id.* at 865-66. The Court further stated:

[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administra-

Court handed down *Chevron* in 1985, the *Chevron* doctrine has reliably been applied to allow agencies to change their interpretations of ambiguous statutory provisions on policy grounds where the agency has set forth its new interpretation through notice-and-comment rulemaking.⁴⁹ *Chevron* itself did not address whether the same level of deference would be due to an agency's change in interpretation set forth in a less formal fashion not benefiting from notice-and-comment rulemaking. That question would not be squarely addressed by the Court until *Mead*, the next case under discussion.

B. *Mead/Skidmore* Deference

The issue in *Mead* was whether courts owed any deference to a U.S. Customs Service tariff classification ruling.⁵⁰ The Customs Service provides tariff classification rulings before fixing the final classification and rate of duty applicable to merchandise entering the United States.⁵¹ According to the Treasury Department's validly-promulgated rules, a ruling letter represents the official position of the Customs Service and is binding on all Customs Service personnel unless modified or revoked.⁵² However, tariff classification rulings are not themselves subject to notice-and-comment rulemaking.⁵³

The Mead Corporation challenged a 1993 Customs Service ruling letter classifying Mead's day planners as "Diaries . . . , bound" under the relevant provision of the Harmonized Tariff Schedule of the United States,

tion's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id.

49. See *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996) (dismissing relevance of changes in interpretation under *Chevron* where new interpretation is adopted through notice-and-comment rulemaking).

50. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

51. *Id.* at 222; see also 19 U.S.C. § 1500(b) (2000) (providing that "[t]he Customs Service shall, under rules and regulations prescribed by the Secretary [of the Treasury] . . . fix the final classification and rate of duty applicable to . . . merchandise").

52. 19 C.F.R. § 177.9(a) (2000) (A ruling letter "represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances."); see also *Mead*, 533 U.S. at 222.

53. *Mead*, 533 U.S. at 223.

subjecting the day planners to a four percent tariff.⁵⁴ From 1989 to 1993, however, the Customs Service listed day planners under a different “other” subcategory, free of any duty.⁵⁵ The 1993 ruling, therefore, represented a change in the agency’s interpretation of the statute as it applied to Mead’s day planners.⁵⁶

In an opinion authored by Justice Souter, the Court held that the Customs Service’s tariff classification ruling was not due *Chevron* deference.⁵⁷ The Court explained 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’s interpretation claiming deference was promulgated in the exercise of that authority.”⁵⁸ This implied delegation, the Court explained, could be shown in different ways, including through the agency’s express “power to engage in adjudication or notice-and-comment rulemaking,” or through “some other indication of a comparable congressional intent.”⁵⁹

Although the Court concluded that the Customs Service’s tariff rulings were not due *Chevron* deference, the Court found that they were still due “respect according to [their] persuasiveness.”⁶⁰ The Court further explained that the contours of this lesser standard of deference should be governed by the factors identified in the Court’s 1944 opinion in *Skidmore v. Swift & Co.*⁶¹ Under *Skidmore*, the measure of deference owed to an agency administering its own statute varies with the circumstances. Courts should consider the “degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”⁶² The case was remanded to the lower court to consider the Customs Service’s revenue ruling in light of these factors.⁶³

In *Mead*, the Court established an important distinction between legislative notice-and-comment type rules on one side, and less formal agency policy pronouncements not due the same judicial deference on the other. Importantly, while *Chevron* does not disfavor changes in an agency’s interpretation of an ambiguous statute, the *Skidmore* factors, adopted by the Court in *Mead*, specifically direct the courts to take into consideration the “consistency” of the agency’s position over time. Thus, the *Mead* test dis-

54. *Id.* at 224-25.

55. *Id.* at 225.

56. *Id.*

57. *Id.* at 226-27, 231.

58. *Id.* at 226-27.

59. *Id.* at 227.

60. *Id.* at 221.

61. *Id.* at 227, 234-35 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

62. *Mead*, 533 U.S. at 228 (citing *Skidmore*, 323 U.S. at 139-40).

63. *Id.* at 238-39.

favors changes in agency interpretations even where the change might have been the result of a legitimate change in policy.⁶⁴

Justice Scalia, in his dissent, strongly disagreed with the majority's conclusion.⁶⁵ For Justice Scalia, the most important factor was whether a particular agency interpretation was the authoritative—i.e., official—position of the agency, without regard to the manner in which the interpretation was adopted by the agency.⁶⁶ This factor should be determinative, in Justice Scalia's opinion, due to the underlying principle animating the *Chevron* doctrine—namely, that Congress implicitly (if not explicitly) delegated to the agency the authority to resolve statutory ambiguities, a doctrine “rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches.”⁶⁷ Justice Scalia noted that in *Mead*, for example:

Although the actual ruling letter was signed by only the Director of the Commercial Rulings Branch of Customs Headquarters' Office of Regulations and Rulings, . . . the Solicitor General of the United States has filed a brief, cosigned by the General Counsel of the Department of the Treasury, that represents the position set forth in the ruling letter to be the official position of the Customs Service.⁶⁸

As the official position of the agency, the ruling letter was therefore due *Chevron* deference by Justice Scalia's standards.⁶⁹

64. Although the *Mead* Court invited courts to reject agency interpretations adopted through something less than notice-and-comment rulemaking, the “consistency” of an agency's interpretation has generally not been a deciding factor in lower court cases applying *Skidmore* subsequent to *Mead*. A recent empirical study conducted by Kristin E. Hickman and Matthew D. Krueger found that “consistency” is “less dispositive than other *Skidmore* factors.” Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1286 (2007). In eighteen cases examined by the authors, the reviewing court concluded that the agency's interpretation was not consistent with former interpretations. *Id.* However, in seven of these cases the court upheld the agency's new interpretation despite the change. *Id.* In contrast, the authors point out, a finding against the agency on any of the other *Skidmore* factors almost always resulted in the court rejecting the agency's interpretation. *Id.*

65. *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

66. *See id.*

67. *Id.* at 243.

68. *Id.* at 258.

69. Justice Scalia went on to explain:

The “authoritativeness” of an agency interpretation does not turn upon whether it has been enunciated by someone who is actually employed by the agency. It must represent the judgment of central agency management, approved at the highest levels. I would find that condition to have been satisfied when, a ruling having been attacked in court, the general counsel of the agency has determined that it should be defended.

Id. at 258-59 n.6.

C. *Seminole Rock/Auer* Deference

In *Bowles v. Seminole Rock & Sand Co.*,⁷⁰ the Supreme Court considered the degree of deference courts owe to agency interpretations of their own regulations. *Seminole Rock* involved the proper interpretation and application of certain provisions of Maximum Price Regulation No. 188,⁷¹ issued by the Administrator of the Office of Price Administration under Section 2(a) of the Emergency Price Control Act of 1942.⁷² The rule operated to set the ceiling price for crushed stone sold by Seminole Rock pursuant to congressional efforts to combat inflation during wartime.⁷³ Seminole Rock hoped to take advantage of a provision of the regulation, which would have allowed it a higher ceiling than that determined by the agency.⁷⁴

While the Court found that the agency's interpretation of the regulation was facially correct, in finding for the agency, the Court observed that "[a]ny doubts concerning this interpretation of rule . . . are removed by reference to the administrative construction of this method of computing the ceiling price," as set forth in a publicly available agency bulletin.⁷⁵ The Court concluded that this interpretation was due "controlling weight unless it is plainly erroneous or inconsistent with the regulation."⁷⁶

In 1997, the Supreme Court once again addressed the deference owed to an agency's interpretation of its own regulations in *Auer v. Robbins*.⁷⁷ The *Auer* Court reaffirmed the holding of *Seminole Rock* and further explained that *Seminole Rock* deference was due to the official interpretation of the Department of Labor's regulations that were set forth for the first time by the agency in an amicus curiae brief.⁷⁸ Under the facts of the case, the Secretary's position was not a "'*post hoc* rationalizatio[n]'" advanced by [the] agency seeking to defend past agency action against attack."⁷⁹ Nor

70. 325 U.S. 410 (1945).

71. 7 Fed. Reg. 7967, 7968 (Oct. 8, 1942) (to be codified at 32 C.F.R. pt. 1499).

72. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 411 (1945); *see also* Act of Jan. 30, 1942, Ch. 26, 56 Stat. 23.

73. *Seminole Rock*, 325 U.S. at 414-15.

74. *Id.* at 415. Specifically, Section 1499.163(a)(2) of Maximum Price Regulation No. 188 provided that the term: "[h]ighest price charged during March, 1942" means (i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942." 7 Fed. Reg. at 7968. The Administrator argued that the rule turned in the actual delivery of articles in the month of March, 1942, while Seminole Rock argued that there must be *both* a charge and a delivery during March, 1942. *Seminole Rock*, 325 U.S. at 415.

75. *Id.* at 417.

76. *Id.* at 414.

77. 519 U.S. 452 (1997).

78. *See id.* at 461-62.

79. *Id.* at 462 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (first alteration in original)).

was there any “reason to suspect that the interpretation d[id] not reflect the agency’s fair and considered judgment on the matter in question.”⁸⁰

Some commentators have described *Seminole Rock/Auer* deference as being as strong, or nearly as strong, as *Chevron* deference.⁸¹ At times the Supreme Court has described the *Seminole Rock/Auer* test as being based on the same separation of powers concerns behind *Chevron*,⁸² and at other times the Court has characterized the test more as a sliding scale test similar to the *Mead/Skidmore* approach.⁸³ Many lower courts, in fact, have explicitly referenced *Mead*, and the *Skidmore* factors, in applying the *Seminole Rock/Auer* test.⁸⁴ Under this approach, new interpretations of agency rules would not receive the same degree of deference afforded consistent agency interpretations of regulations. Consequently, *Seminole Rock/Auer* could be understood as disfavoring policy changes in the same way as *Mead/Skidmore*.

II. FAIR NOTICE THROUGH NOTICE-AND-COMMENT RULEMAKING: *LONG ISLAND CARE AT HOME, LTD. V. COKE*

The principal means by which an administrative agency makes substantive changes to existing rules is through informal notice-and-comment rulemaking.⁸⁵ That process is spelled out in the APA, which generally requires notice to the public prior to final adoption of any new rule, together

80. *Auer*, 519 U.S. at 462.

81. See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 899 (2001); Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 71 (2000); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 627-29 (1996); see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1142 (2008) (conducting an empirical study of agency success rates under different deference regimes and determining that the invocation of *Seminole Rock* deference “virtually assures” the agency a legal victory, while *Chevron* yields an agency victory seventy-five percent of the time).

82. See *Pierce*, *supra* note 20, at 569-70 (citing *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696-97 (1991)).

83. See *Pierce*, *supra* note 20, at 570 (citing *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151 (1991)).

84. See, e.g., *Aeroquip-Vickers, Inc. v. Comm’r*, 347 F.3d 173, 181 (6th Cir. 2003) (granting *Skidmore* deference to a revenue ruling); *accord Omohundro v. United States*, 300 F.3d 1065, 1069 (9th Cir. 2002); *Del Commercial Props., Inc. v. Comm’r*, 251 F.3d 210, 214 (D.C. Cir. 2001); *U.S. Freightways Corp. v. Comm’r*, 270 F.3d 1137, 1142 (7th Cir. 2001); see also *Sierra Club v. Ga. Power Co.*, 443 F.3d 1346, 1354 (11th Cir. 2006) (citing *Mead* for the holding that “EPA’s . . . [g]uidance concerning [state SIP] provisions is not a regulation and is not due the same level of deference as formally adopted rules”).

85. See 5 U.S.C. § 553 (2006); see also WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, *ADMINISTRATIVE PRACTICE & PROCEDURE* 91 (3d ed. 2001).

with an opportunity for the public to submit comments on the rule.⁸⁶ A final rule is then promulgated after the agency has considered and responded to the public comments.⁸⁷ As explained above, in *Mead*, the Supreme Court identified the agency's use of this process as a chief indicator of whether a particular agency interpretation is due full *Chevron* deference.⁸⁸ However, the APA itself does not require notice-and-comment rulemaking prior to an agency's adoption of "interpretative" rules; the notice-and-comment process is instead tied to the agency's adoption of "substantive" rules.⁸⁹

One issue that remained unclear after *Mead* was whether an agency could voluntarily employ notice-and-comment rulemaking to elevate "interpretative" rules to *Chevron* status, even without any express statutory requirement to do so. This issue was ultimately addressed by the Court in *Long Island Care*, where the Court answered the question in the affirmative.⁹⁰ The lower court, however, read *Mead* as requiring a different result. The Second Circuit read *Mead* as requiring some express showing that Congress intended the agency to adopt interpretative rules through some type of formal process before affording those rules full *Chevron* deference.⁹¹

As explained below, *Long Island Care* represents an important course correction away from *Mead* and towards a more functional approach to deference as articulated by the Court in *Chevron*.⁹² Rather than cutting fine distinctions between those types of agency actions warranting *Skidmore* deference and those deserving *Chevron* deference, the Court's focus in *Long Island Care*, instead, is on the overall reasonableness of the agency's exercise of its gap-filling, policy-executing function. Furthermore, in making a determination of whether the agency's regulation is reasonable, the Court put less emphasis on consistency and more emphasis on fair notice. In light of *Long Island Care*, agencies should be able to ensure fair notice to the regulated community through employment of notice-and-comment rulemaking, even where there is no express statutory requirement that they do so prior to adopting new interpretations of ambiguous statutes or rules.

A. The APA Rulemaking Process

Under the APA, the requirements for informal rulemaking are rather basic. First, the agency must give prior notice of a proposed rulemaking,

86. 5 U.S.C. § 553(b)-(c).

87. *Id.* at § 553(c).

88. See *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

89. 5 U.S.C. § 553(b)(3)(A); see also U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 (1947).

90. See *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349-51 (2007).

91. See *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 131-32 (2d Cir. 2004).

92. See discussion *infra* at Section III.A.

which is generally accomplished by publication in the *Federal Register*.⁹³ Second, the agency must give interested persons an opportunity to participate in the rulemaking process through submission of written comments.⁹⁴ Lastly, after the agency has considered the public comments, it must issue, with its final rule, “a concise general statement of . . . basis and purpose.”⁹⁵ The word “Rule” is used in the APA broadly, including “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”⁹⁶ On the other hand, the APA contains a broad exception excluding from any rulemaking process: “matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.”⁹⁷ The APA also excludes the following actions from any notice-and-comment requirements: “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”⁹⁸ Nor is any prior notice required “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁹⁹ Undertaking notice-and-comment rulemaking can be a lengthy endeavor, and so agencies may seek to employ one of these exceptions to expedite the implementation of a new policy.

The Attorney General’s 1947 Manual on the Administrative Procedure Act explains that “[t]he further exemption of ‘interpretative rules’ and ‘general statements of policy’ restricts the application of section 4(a) and (b) to substantive rules issued pursuant to statutory authority.”¹⁰⁰ In a footnote, the Attorney General further distinguished “interpretative” rules from “substantive” rules as follows:

Substantive rules—rules, other than organizational or procedural under section 3(a) (1) and (2), issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78 n). Such rules have the force and effect of law.

Interpretative rules—rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.¹⁰¹

93. 5 U.S.C. § 553(b) (2006).

94. *Id.* § 553(c).

95. *Id.*

96. *Id.* § 551(4).

97. *Id.* § 553(a)(2).

98. *Id.* § 553(b)(3)(A).

99. *Id.* § 553(b)(3)(B).

100. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 (Gaunt, Inc. reprint 1999) (1947).

101. *Id.* at 30 n.3.

The Attorney General also defines “[g]eneral statements of policy” as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”¹⁰²

The Attorney General’s description of “interpretative” rules does not suggest that they were to be treated with any less deference than the more programmatic rules an agency might promulgate to carry out the mandate of a statute, such as the proxy rules enacted pursuant to the Securities Exchange Act. However, the implicit indication is that interpretive rules—like general statements of policy—would be applied prospectively only.¹⁰³ Additionally, neither the APA nor the Attorney General’s Manual expressly foreclose the option of employing notice-and-comment rulemaking in the course of promulgating a new interpretive rule. Arguably, use of such a procedure would put the public on notice concerning the prospective application of a new interpretation of an ambiguous statutory provision. However, *Mead* left this something of an open question. The *Mead* court directed its attention primarily at the rulemaking procedure required by Congress, rather than at the procedures voluntarily undertaken by the agency. The Court specifically tied *Chevron* deference to indicators 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”¹⁰⁴—for example, through notice-and-comment rulemaking.¹⁰⁵ However, through the APA, Congress did not require agencies to employ notice-and-comment rulemaking before adopting interpretive rules. Could an agency voluntarily employ notice-and-comment process to elevate interpretive rules to *Chevron* status? That is the question the Supreme Court addressed in *Long Island Care at Home, Ltd. v. Coke*.

102. *Id.*

103. Justice Scalia offers a reasonable explanation of why this should be so in his *Bowen* concurrence:

The first part of the APA’s definition of “rule” states that a rule “means the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency” 5 U.S.C. § 551(4) (emphasis added). The only plausible reading of the italicized phrase is that rules have legal consequences only for the future.

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1988) (Scalia, J., concurring).

104. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

105. *Id.* at 227.

B. *Long Island Care at Home, Ltd. v. Coke*

In *Long Island Care at Home, Ltd. v. Coke*,¹⁰⁶ the Supreme Court addressed whether a Department of Labor (DOL) interpretive rule was valid under the Fair Labor Standards Act (FLSA).¹⁰⁷ The *Long Island Care* case specifically involved an interpretive rule adopted through notice-and-comment rulemaking. By its terms, the FLSA exempts from the Act's otherwise applicable minimum wage and maximum hours rules "any employee employed [sic] in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor])."¹⁰⁸

A DOL interpretative regulation explained that this exemption includes those "companionship" workers who "are employed by an employer or agency other than the family or household using their services."¹⁰⁹ This provision, enacted in 1975, became highly controversial. Between 1992 and 2007, DOL had in fact considered limiting the exemption to include companionship workers paid by third parties within the scope of the FLSA's minimum wage and maximum hour rules.¹¹⁰ Ultimately, DOL decided to make no such change.¹¹¹

1. *Proceedings Before the Second Circuit*

In 2002, Evelyn Coke filed suit against Long Island Care at Home, her former employer, alleging that Long Island Care had not paid her the minimum wages and overtime pay required under FLSA.¹¹² The district court found that Section 552.109(a) controlled and thus dismissed Coke's lawsuit.¹¹³ On appeal, the Second Circuit reversed the decision of the lower court, holding Section 552.109(a) unenforceable.¹¹⁴ Although the court agreed that the term "companionship services" under the FLSA was ambiguous, the Second Circuit reasoned that Section 552.109(a) was not entitled to *Chevron* deference because it was an "interpretative" rule rather than

106. 127 S. Ct. 2339 (2007).

107. *Id.* at 2344.

108. *Id.* (quoting 29 U.S.C. § 213(a)(15) (2004)).

109. *Id.* at 2344 (quoting 29 C.F.R. § 552.109(a) (2006)).

110. *Id.* at 2345 (citing 58 Fed. Reg. 69,310-12 (Dec. 30, 1993); 60 Fed. Reg. 46798 (Sept. 8, 1995); 66 Fed. Reg. 5481, 5485 (Jan. 19, 2001)).

111. *Id.* (quoting 67 Fed. Reg. 16668 (Apr. 8, 2002)).

112. *Id.* at 2345.

113. *Coke v. Long Island Care at Home, Ltd.*, 267 F. Supp. 2d 332, 341 (E.D.N.Y. 2003).

114. *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 133, 135 (2d Cir. 2004).

a “legislative” rule.¹¹⁵ Thus, the court concluded that Section 552.109(a) did not have the “force of law” required by *Mead* to qualify for *Chevron* deference.¹¹⁶ The court pointed to the Department’s division of its regulations between “Subpart A-General Regulations” and “Subpart B-Interpretations,” the former promulgated under a specific congressional authorization to define terms under the FLSA, but the latter not.¹¹⁷ By not referencing the provision of the FLSA granting DOL the power to make rules defining applicable terms under the FLSA, the court reasoned that “the regulation at issue, § 552.109(a), is effectively conceded by the DOL not to have been promulgated pursuant to Congress’s express legislative delegation in § 213(a)(15).”¹¹⁸ The result was that the regulation was not a true legislative rule due *Chevron* deference; DOL’s use of notice-and-comment procedures did not qualify Section 552.109(a) for *Chevron* deference.¹¹⁹ The court was also troubled that “[t]he original notice [for the proposed rule] informed the public that employees of third party employers were *not* going to be exempt from the FLSA . . . , but the final rule provided exactly the opposite without a detailed explanation.”¹²⁰

Although the appeals court concluded that Section 552.109(a) was not due *Chevron* deference, it read *Mead* as nevertheless requiring “some level of deference,” applying the multifactor test set forth under *Skidmore*.¹²¹ In applying the *Skidmore* factors, the court found that Section 552.109(a) was inconsistent with the policy behind the FLSA, inconsistent with other regulations promulgated by DOL under FLSA, inconsistent with previous DOL interpretations, and not supported by evidence of “thorough consideration” by DOL.¹²² In particular, the court found Section 552.109(a) “jarringly inconsistent” with Section 552.3, which the court found to be “legislative” rather than “interpretative” and due a higher degree of deference than Section 552.109(a).¹²³ Also, the court observed that “the agency’s position with regard to FLSA coverage through time ha[d] hardly been a model of consistency.”¹²⁴ The court explained that in 1974 “the agency proposed a regula-

115. *Id.* at 130-31.

116. *See id.* at 131-32.

117. *Id.* at 131.

118. *Id.* at 131-32.

119. *Id.* at 132 (“In this case, the agency undertook a notice and comment procedure for an interpretative regulation despite the fact that the procedure was not required. While *Mead* does not offer specific guidance on whether putting a proposed interpretation out for notice and comment has any effect on deference, following the notice and comment procedure, at most, buttresses a claim that the agency gave consideration to what it did; it does not alter the fact that the agency did not act pursuant to legislative authority.”).

120. *Id.* (citations omitted).

121. *Id.* at 133.

122. *See id.* at 133-35.

123. *Id.* at 133-34.

124. *Id.* at 134.

tion that would have afforded FLSA coverage to employees of third party employers only to reverse itself with the promulgation of § 552.109(a).¹²⁵ And, “[i]n 2001, the DOL again proposed that employees of third party employers get FLSA coverage (contrary to the view it endorses in this litigation), only to withdraw the proposal shortly thereafter.”¹²⁶ In other words, DOL’s inconsistent interpretation of an admittedly ambiguous statutory provision—driven largely by policy considerations—was a strike against it under the *Skidmore* factors.

On December 1, 2005, while Long Island Care’s petition for certiorari was pending before the Supreme Court, DOL issued *Wage and Hour Advisory Memorandum No. 2005-01*, addressed to all Labor Department Regional Administrators and District Directors under the signature of the Deputy Administrator.¹²⁷ The purpose of the *Memorandum* ostensibly was to advise staff how to apply the FLSA’s companionship exemption in light of the Second Circuit’s decision in *Coke*.¹²⁸ DOL expressly instructed its employees to continue to apply Section 552.109(a) in all states outside the Second Circuit.¹²⁹ The body of the *Memorandum* provided a more thorough rationale for applying the exemption rejected by the Second Circuit and explained that the exemption conformed to policy behind the FLSA—namely, “to ensure that working families in need of companionship services would be able to obtain them.”¹³⁰ Perhaps most importantly, the *Memorandum* explained in no uncertain terms that “the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding.”¹³¹

At the U.S. Solicitor General’s suggestion, the Supreme Court vacated the Second Circuit’s decision and remanded the case with instructions for

125. *Id.*

126. *Id.*

127. Dep’t of Labor, Wage and Hour Advisory Memorandum No. 2005-01 (Dec. 1, 2005), <http://www.dol.gov/esa/whd/FieldBulletins/AdvisoryMemoranda2005.pdf>.

128. *Id.* at 1 (“The purpose of this memorandum is to advise staff how to apply the Section 13(a)(15) companionship services exemption in light of the Second Circuit’s decision in *Coke v. Long Island Care at Home*, 376 F.3d 118 (2nd Cir. 2004). As indicated in Opinion Letter FLSA 2005-12, the Division continues to adhere to its regulation, set out at 29 C.F.R. § 552.109(a), exempting companions who are employed by third parties from the minimum wage and overtime requirements of the FLSA. Regional Administrators and District Directors are instructed to continue to apply the exemption in states outside the Second Circuit.”).

129. *Id.*

130. *Id.* at 1-7.

131. *Id.* at 7 (The Department is aware that the Second Circuit suggested in *Coke v. Long Island Health Care, Ltd.*, 376 F.3d at 131-33, that the Department’s regulations governing third party employment were intended to be advisory interpretations only, and that they therefore do not have the force and effect of law. That is not the case; the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding.”)

the Second Circuit to consider DOL's *Wage and Hour Advisory Memorandum*.¹³² On remand, however, the Second Circuit again held Section 552.109(a) unenforceable.¹³³ In a short *per curiam* opinion, the court explained that "[t]here is no dispute that Congress delegated to the Department of Labor . . . the authority to promulgate legislative rules, which carry the force of law."¹³⁴ However, "for substantially the same reasons set forth in our 2004 decision, we conclude that § 552.109(a) was not intended, at the time of its promulgation, to be a legislative rule; rather, it was meant to be an interpretive rule."¹³⁵ The rule, therefore, only warranted *Skidmore* deference. Applying the *Skidmore* factors, the court found nothing in DOL's *Memorandum* to persuade the court that its original opinion was incorrect.¹³⁶

The court acknowledged DOL's disavowal of any inconsistent previous position and explicit adoption of the interpretation set forth in Section 552.109(a) as official agency policy.¹³⁷

But a current repudiation of those past positions does not mean that they were never advanced. As firm as DOL's conviction is now that the current form of § 552.109(a) is the appropriate one, it cannot change the fact that, at multiple times in the past, the Department's position has been otherwise.¹³⁸

Again, for the Second Circuit, DOL's apparent change in policy position, although adopted at the highest level of the agency, was the reason for rejecting Section 552.109(a).

2. *Proceedings Before the Supreme Court*

In a unanimous opinion, the Supreme Court reversed the decision of the Second Circuit.¹³⁹ The Court framed the question presented as "whether, in light of the statute's text and history, and a different (apparently conflicting) regulation, the Department's regulation is valid and binding."¹⁴⁰ After providing a brief procedural history of the case, the Court's analysis began with a strong reaffirmation of the policy-making function of DOL in this instance.¹⁴¹ Citing *Chevron*, the Court explained: "We have previously pointed out that the 'power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by

132. *Long Island Care at Home, Ltd. v. Coke*, 546 U.S. 1147 (2006).

133. *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48 (2d Cir. 2006).

134. *Id.* at 50.

135. *Id.*

136. *Id.* at 51.

137. *Id.* at 52.

138. *Id.*

139. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2352 (2007).

140. *Id.* at 2344.

141. *Id.* at 2345-46.

Congress.”¹⁴² When the administrative agency “fills such a ‘gap’ reasonably, and in accordance with other applicable (e.g., procedural) requirements, the courts accept the result as legally binding.”¹⁴³ The issue, so framed, made the case an easy one. The FLSA left a “gap” concerning the scope of the companionship worker exemption and granted DOL the authority to fill the gap. DOL reasonably filled the gap pursuant to proper procedural requirements. That was the end of the story, and there should have been nothing left for the lower court to do. As the Court observed, “[s]ince on its face the regulation seems to fill a statutory gap, one might ask what precisely is it about the regulation that might make it unreasonable or otherwise unlawful?”¹⁴⁴

The Court summarily rejected Coke’s argument that DOL’s changing interpretation reduced the level of authority the Court owed to Section 552.109(a).¹⁴⁵ Indeed, the Court “concede[d] that the Department may have interpreted these regulations differently at different times in their history.”¹⁴⁶ However, “as long as interpretive changes create no unfair surprise—and the Department’s recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation . . . makes any such surprise unlikely here—the change in interpretation alone presents no separate ground for disregarding the Department’s present interpretation.”¹⁴⁷

The Court also rejected the lower court’s dismissal of DOL’s 2005 *Memorandum*. Although the 2005 *Memorandum* was issued only to internal Department personnel, the Court had “‘no reason . . . to suspect that [this] interpretation’ is merely a ‘*post hoc* rationalization[n]’ of past agency action, or that it ‘does not reflect the agency’s fair and considered judgment on the matter in question.’”¹⁴⁸ Instead, “[w]here, as here, an agency’s course of action indicates that the interpretation of its own regulation reflects its considered views . . . we have accepted that interpretation as the agency’s own, even if the agency set those views forth in a legal brief.”¹⁴⁹

The Court addressed the separate argument that the 1974 notice-and-comment procedure utilized by DOL was inadequate because DOL had originally proposed a rule that would have placed outside FLSA’s exemption third-party employers who would have been covered before the 1974

142. *Id.* at 2345 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974))).

143. *Long Island Care*, 127 S. Ct. at 2345-46 (citing *Chevron*, 467 U.S. at 843-44; *United States v. Mead*, 533 U.S. 218, 227 (2001)).

144. *Long Island Care*, 127 S. Ct. at 2346.

145. *Id.* at 2349.

146. *Id.*

147. *Id.*

148. *Id.* (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988))).

149. *Long Island Care*, 127 S. Ct. at 2349.

amendments.¹⁵⁰ As adopted, however, the final rule exempted all companionship workers employed by third-parties from the FLSA.¹⁵¹ The Court rejected the argument that this change—from proposed rule to final rule—rendered the rule inadequate and unenforceable.¹⁵² The touchstone of the notice-and-comment process, the Court explained, “is one of fair notice.”¹⁵³ As long as the final rule was “reasonably foreseeable” and a “logical outgrowth” of the proposed rule, the final rule satisfied the requirements of fair notice.¹⁵⁴ In fact, the Court noted that DOL did not receive a single objection to the rule when it was promulgated.¹⁵⁵

C. Ramifications of *Long Island Care*

The Supreme Court’s *Long Island Care* opinion did a number of interesting things. First, rather than parse the various deference doctrines to determine the precise level of deference owed to the regulation at issue—as the Second Circuit did—the Court instead began with a reassertion of the agency’s policy-making responsibilities.¹⁵⁶ Opting for what has been called a “comparative institutional approach,” the Court relied on both *Chevron* and *Seminole Rock/Mead* principles to determine that the agency’s action was reasonable under the circumstances.¹⁵⁷ Having determined that DOL’s action was properly within the scope of its administrative power under the Act, the Court looked to whether there was anything “about the regulation that might make it unreasonable or otherwise unlawful.”¹⁵⁸

Long Island Care also may signal a move away from “consistency” as an important factor in determining whether a court should defer to an agency’s preferred interpretation of a statute or regulation. The focus is instead on fair notice. The Court dismissed Coke’s argument that Section 552.109(a) did not warrant *Chevron* deference due to the agency’s differing interpretation of the FLSA’s exemption through its history. The Court explained that “as long as interpretive changes create no unfair surprise—and the Department’s resource to notice-and-comment rulemaking in an attempt to codify its new interpretation . . . makes any such surprise unlikely here—the change in interpretation alone presents no separate ground for disregarding the Department’s present interpretation.”¹⁵⁹ Because the agency prom-

150. *Id.* at 2351-52.

151. *Id.* at 2351.

152. *Id.* at 2351-52.

153. *Id.* at 2351.

154. *Id.*

155. *Id.* at 2352.

156. *See id.* at 2345-46.

157. Foote, *supra* note 2, at 717.

158. *Long Island Care*, 127 S. Ct. at 2346.

159. *Id.* at 2349.

ulgated its interpretive rule through a valid notice-and-comment process, and presumably applied the rule only in a prospective manner, there was no unfair disadvantage afforded to Coke through the agency's exercise of its policy-making action. Indeed, Coke had been employed by Long Island Care in 1997, years after Section 552.109(a) was promulgated.¹⁶⁰

Lastly, *Long Island Care* signals a shift away from *Mead*'s focus on whether or not agency action bears the "force of law" in determining what level of deference the action is due. Although *Mead* did not clearly define the difference between those sorts of agency actions warranting *Chevron* deference and those not warranting such deference, a key to the distinction was whether there was some indication "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."¹⁶¹ A chief indicator that a rule was intended to have the "force of law" is where Congress "provides for a relatively formal administrative procedure" such as notice-and-comment rulemaking.¹⁶² In *Long Island Care*, although a provision of the FLSA expressly authorized the Department of Labor to define the applicable terms through regulation,¹⁶³ the APA expressly exempts "interpretative" rules from notice-and-comment requirements.¹⁶⁴ Thus, on one hand, Congress contemplated the Department filling the gaps in the FLSA through certain interpretive rules; on the other hand, Congress exempted the Department from having to utilize notice-and-comment rulemaking in promulgating interpretive rules through the APA. This incongruity, in a nutshell, was the source of the Second Circuit's dilemma concerning the degree of deference owed to Section 552.109(a).¹⁶⁵ But, rather than focus on what *Congress* may have intended the Department to do, the Supreme Court instead focused on what the *Department* itself intended. DOL's voluntary use of notice-and-comment rulemaking—although not required by the APA—indicated that "the Department intended the third-party regulation as a binding application of its rulemaking authority."¹⁶⁶ This conclusion was further supported by the authoritative explanation of the DOL's exemption set forth in the 2005 *Memorandum*. The present DOL Administrator certainly treated Section 552.109(a) as a binding application of the agency's rulemaking authority.

160. *Coke v. Long Island Care at Home, Ltd.*, 267 F. Supp. 2d 332, 334 (E.D.N.Y. 2003).

161. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

162. *Id.* at 230.

163. *See Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 131-32 (2d Cir. 2004).

164. 5 U.S.C. § 553(b)(3)(A) (2006).

165. *See Coke*, 376 F.3d at 131-32.

166. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2350 (2007).

In sum, *Long Island Care* can be read as a development away from *Mead*'s distinction between those types of agency actions warranting *Skidmore* deference and those deserving *Chevron* deference. The focus is instead on the overall reasonableness of the agency's exercise of its gap-filling, policy-executing function. Furthermore, in making a determination of whether the agency's regulation is reasonable, there is less emphasis on consistency and more emphasis on fair notice. If the agency takes actions to ensure "no unfair surprise," a "change in interpretation alone presents no separate ground for disregarding the Department's present interpretation."¹⁶⁷ Lastly, the Court has stepped away from *Mead*'s "force of law" standard for deference and is more interested in the agency's actions—both its steps to ensure fairness and to ensure the authoritative nature of the agency's position.

Long Island Care also leaves important questions unanswered. For example, would the Court have deferred to the agency's authoritative interpretation of the statute if the Department had not used notice-and-comment procedures in adopting its interpretive rule? Could the Department have ensured "no unfair surprise" through some other means than notice-and-comment rulemaking? If the touchstone is indeed "fair notice," there are possibly other means to ensure that individuals are not unfairly surprised by novel agency interpretations of statutes or rules. If the Court is moving towards a more functional (and deferential) approach to administrative law questions, there are ways the Court can recognize the authority of administrative agencies to say what ambiguous statutory and regulatory provisions mean without exposing regulatees to unfair regulatory surprises—even where an agency has not employed notice-and-comment rulemaking. This issue is addressed further in Part III.

III. ENSURING FAIR NOTICE WITHOUT NOTICE-AND-COMMENT RULEMAKING

The immediately preceding Part of this Article described how the Supreme Court, in *Long Island Care*, took a distinct step away from the doctrinal structure established by *Mead*. As explained above, the Court's opinion de-emphasized the distinctions made by Justice Souter in *Mead* and focused, instead, on the process employed by the agency to ensure fair notice to the public and to ensure the authoritative nature of the Agency's position. The Court also downplayed the "consistency" factor enumerated under the *Skidmore* test.¹⁶⁸ This approach is more true to the APA itself and respects the agency's functional obligation to implement statutory programs. However, the APA exempts certain agency actions—including the

167. *Id.* at 2349.

168. *Id.*

promulgation of “interpretative” rules—from the notice-and-comment provisions of the APA.¹⁶⁹ As demonstrated in *Long Island Care*, agencies can still voluntarily employ notice-and-comment procedures to ensure fair notice.¹⁷⁰ In the absence of notice-and-comment procedures (in situations where it is not procedurally required by the APA), should courts simply ignore the agency’s new interpretation of an ambiguous statutory or regulatory provision, or is there a way to protect both the administrative flexibility of the agency and also ensure fair notice to regulatees?

A. Renewing *Chevron*’s Democratic Principles

Richard J. Pierce, Jr. has argued that the current deference doctrines applied by the courts often work to thwart the legitimate policy preferences of the current President in favor of a President who left office years ago.¹⁷¹ As Pierce describes, where the policy goals of an incumbent President differ from those of his predecessor, it can be a difficult and drawn-out process to implement the incumbent President’s new policy prerogatives.¹⁷² The incumbent President’s executive officers must overcome considerable administrative inertia and numerous procedural hurdles if the President is to have any success implementing the policies for which he may have been elected—even over the course of two terms in office.¹⁷³ For Pierce, this situation is unacceptable.¹⁷⁴

The *Chevron* doctrine, as originally formulated, was based on certain principles fundamental to democratic government—namely, that democratically-elected executive officers should make policy decisions intrinsic to implementing ambiguous statutory texts entrusted to the agencies, rather than politically-unaccountable judges.¹⁷⁵ However, as applied, *Chevron* and its progeny have often yielded very different results. Pierce offers two examples where current administrative law principles have lead courts to reject the policy preferences of the incumbent President in favor of the policy preferences of his predecessor: (1) the Supreme Court’s decision in *Bates v. Dow Agrosciences, L.L.C.*,¹⁷⁶ and (2) the numerous federal cases involving the meaning of the word “modification” as used under the Clean Air Act.¹⁷⁷

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

170. See *Long Island Care*, 127 S. Ct. at 2349-51.

171. Pierce, *supra* note 20, at 563.

172. *Id.* at 563-64.

173. *Id.* at 564.

174. See *id.*

175. *Id.* at 562.

176. 544 U.S. 431 (2005) (cited in Pierce, *supra* note 20, at 565, 572-585).

177. Pierce, *supra* note 20, at 565-66, 586-610 (citing *New York v. U.S. Env’tl. Prot. Agency*, 413 F.3d 3 (D.C. Cir. 2005); *United States v. Ala. Power Co.*, 372 F. Supp. 2d 1283 (N.D. Ala. 2005); *United States v. Duke Energy Corp.*, 411 F. 3d 539 (4th Cir. 2005); *United*

In *Bates*, the Supreme Court refused to defer to the current Solicitor General's interpretation of an ambiguous statute. Instead, the Court maintained the previous administration's interpretation.¹⁷⁸ Similarly, in reviewing the Clean Air Act "modification" enforcement cases, Pierce concludes that a strict application of prevailing deference doctrines requires the reviewing courts to defer the definition of "modification" adopted by the EPA in 1999 instead of the agency's new interpretation set forth in 2003.¹⁷⁹ This result troubles Pierce:

It does not seem right to conclude that a firm violated the law during the period between 1980 and 1999, and to require the firm to incur hundreds of millions of dollars of mandated costs, based on an interpretation of an ambiguous rule and statute that the government did not announce until 1999.¹⁸⁰

In response to this problem, Pierce urges the Supreme Court to adopt the proposal consistently advanced by Justice Scalia—that the Court should defer to an executive agency's new interpretation so long as the new interpretation "represents the agency's 'fair and considered judgment on the matter in question,'" even though the agency may have utilized a process less formal than notice-and-comment rule making or formal agency adjudication.¹⁸¹ This approach, according to Pierce, "would reduce by several years the present intolerably long lag between the election of a new President and judicial acquiescence in his preferred policies."¹⁸²

To assuage fears that Justice Scalia's approach would impose unfair burdens on the regulated community, Pierce proposes three limiting practices, which find support in current case law. Specifically, Pierce suggests that courts should not defer to an agency's novel interpretation of agency rules:

(1) when the interpretation is announced as a litigating position and there is reason to believe that it does not represent "the agency's fair and considered judgment on the matter in question"; (2) when the agency interprets an open-ended rule that merely repeats the vague language of the statute the rule purports to implement; and (3) when the agency interpretation of the rule would require a regulatee to incur large regulatory costs, and the interpretation urged in the enforcement proceeding is inconsistent with the interpretation in effect at the time the regulatee took the actions at issue in the enforcement proceedings.¹⁸³

As explained below, however, the first two limitations are possibly of limited scope. Courts will generally defer to agency "litigating positions" as

States v. Duke Energy Corp., 278 F. Supp. 2d 619 (M.D.N.C. 2003); United States v. Ohio Edison Co., 276 F. Supp. 2d 829 (S.D. Ohio 2003)).

178. *Bates*, 544 U.S. at 452.

179. Pierce, *supra* note 20, at 602-03.

180. *Id.* at 602.

181. *Id.* at 567.

182. *Id.*

183. *Id.* at 568, 604-08 (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

long as they are officially ratified by the implementing agency and are not developed for the specific purpose of aiding parties to ongoing litigation. The anti-parroting rule runs counter to the trend towards greater deference to agency interpretations and is easily avoided by savvy administrative agency staff. For these reasons, the application of fair-notice concepts to encompass costs of compliance and other equitable relief is critical to ensuring fairness under any approach to administrative law that provides agencies with greater authority to make prompt interpretive changes without notice-and-comment rulemaking.

1. Agency Litigating Positions

Courts have often refused to defer to agency interpretations of ambiguous statutory or regulatory provisions where the interpretation is advanced only as a litigating position and there is reason to believe the interpretation is not “the agency’s fair and considered judgment on the matter in question.”¹⁸⁴ The principal case cited for this proposition is generally *Bowen v. Georgetown University Hospital*.¹⁸⁵

The *Bowen* case involved cost reimbursement regulations promulgated by the Department of Health and Human Services (HHS) under the Medicare Act. In 1981, the HHS Secretary issued a “cost-limit schedule” that changed the “method for calculating the ‘wage index.’”¹⁸⁶ The wage index was used by HHS in making reimbursements to account for the variation in the salary levels for hospital employees in different geographic locations.¹⁸⁷ Under the rule existing prior to 1981, the wage index was determined based on the average salary levels for all hospitals in the area.¹⁸⁸ The new rule adopted in 1981, however, excluded wages paid by Federal Government-owned hospitals from the wage index computation.¹⁸⁹ The district court invalidated the 1981 rule in a suit brought by various hospitals in the District of Columbia. In response, HHS applied the pre-1981 wage index rule to settle the hospitals’ reimbursement reports. Subsequently, in 1984, HHS reissued the 1981 rule and proceeded to recoup the sums previously paid to

184. *Pierce*, *supra* note 20, at 568 (citing *Auer*, 519 U.S. at 462); *see, e.g.*, *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1327 (D.C. Cir. 2008) (Silberman, J., concurring); *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995); *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) (“We cannot accept the Commission’s current litigating position as an ‘interpretation’ by the Commission . . .”).

185. 488 U.S. 204 (1988).

186. *Id.* at 206.

187. *Id.* at 206 (citing Schedule of Limits on Hospital Per Diem Inpatient General Routine Operating Costs, 46 Fed. Reg. 33,637-39 (June 30, 1981)).

188. *Bowen*, 488 U.S. at 206.

189. *Id.*

the hospitals, including respondents', as a result of the district court's ruling.¹⁹⁰ The Supreme Court described HHS's action as effectively "promulgat[ing] a rule retroactively, and the net result was as if the original rule had never been set aside."¹⁹¹

A provision of the Medicare Act specifically authorized HHS to "provide for the making of suitable retroactive corrective adjustments" under certain circumstances.¹⁹² However, HHS had never interpreted this provision as authorizing it to promulgate the retroactive cost-limit rules at issue in *Bowen*.¹⁹³ During litigation, HHS—for the first time—argued that the retroactive rule was authorized as a "retroactive corrective adjustment" under the Medicare Act.¹⁹⁴ The Court rejected this interpretation of the Medicare Act. As the Court explained: "[W]e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'"¹⁹⁵

The policy behind this rule is reasonable. As the D.C. Circuit has explained, appellate counsel's interpretation may not reflect the views of the agency itself.¹⁹⁶ Reliance by a court on appellate litigation counsel's interpretation could risk locking an agency into a position that was never officially supported by the agency.¹⁹⁷ Also, it is likely that "a position established only in litigation may have been developed hastily, or under special pressure," and is not the result of the agency's deliberative processes.¹⁹⁸ As the court warned, "where statutes specify procedures for a specific type of decision, one engendered solely in litigation will (typically) have skirted those procedures."¹⁹⁹

This rule is also reasonable because agency supervision of litigation counsel is often irregular or uneven.²⁰⁰ Often, the positions taken by litigation counsel in court are thoroughly reviewed by the agency represented.²⁰¹ On other occasions, however, no policy-making official has even had an opportunity to consider them.²⁰² For example, EPA policy-making officials

190. *Id.* at 206-07.

191. *Id.* at 207.

192. *Id.* at 209 (quoting 42 U.S.C. § 1395x(v)(1)(A)(ii) (2000)).

193. 488 U.S. at 211-12.

194. *Id.* at 212.

195. *Id.* (quoting *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)).

196. *See FLRA v. U.S. Dep't of Treasury*, 884 F.2d 1446, 1455 (D.C. Cir. 1989).

197. *Id.*

198. *Id.*

199. *Id.*

200. *See Pierce*, *supra* note 20, at 606.

201. *Id.* at 606-07.

202. *Id.* at 607.

currently interpret the term “modification” in the opposite manner advanced by litigation counsel in Clean Air Act litigation.²⁰³ This fact “strongly supports the inference that the agency’s lawyers are engaged in a frolic of their own.”²⁰⁴

The *Bowen* rule, however, has never been read to mean that courts should never defer to an interpretation of an ambiguous statutory or regulatory provision advanced for the first time during litigation. Instead, the Supreme Court explained in *Auer v. Robbins* that the position taken by the agency in a legal brief is due deference if it actually “reflect[s] the agency’s fair and considered judgment on the matter in question.”²⁰⁵ *Auer* specifically involved an amicus brief filed by the Secretary of Labor at the Supreme Court’s request concerning the “salary basis test” under the FLSA.²⁰⁶ The brief provided a cogent explanation concerning the policy behind the Secretary’s interpretation.²⁰⁷ Therefore, the *Bowen* rule arguably turns on whether the position taken during litigation can be shown to be the official considered position of the current administrator of the agency.

The Supreme Court’s most recent consideration of the *Bowen* rule is found in *Federal Express Corp. v. Holowecki*, a case involving age discrimination claims brought by Federal Express employees against Federal Express.²⁰⁸ The case turned on whether the plaintiffs had properly filed “a charge alleging unlawful discrimination” with the Equal Employment Opportunity Commission (EEOC) as required by the Age Discrimination and Employment Act of 1967 (ADEA) before filing suit in federal court.²⁰⁹ The ADEA does not define a “charge,” and the regulations adopted by the EEOC to implement the Act failed to clarify the issue.²¹⁰ In an amicus brief, the EEOC explained to the Court its position, confirmed by various internal directives.²¹¹ The Court rejected any argument that the EEOC’s position, described in its brief, should be disregarded under *Bowen* as nothing more than the agency’s litigating position.²¹² The court found “no reason to assume the agency’s position . . . was framed for the specific purpose of aiding a party in this litigation.”²¹³ The clear implication is that the Court will not defer to an agency’s interpretive positions taken during litigation if crafted for the specific purpose of aiding a party to the litigation, presuma-

203. *Id.*

204. *Id.*

205. 519 U.S. 452, 462 (1997).

206. *Id.*

207. *Id.*

208. 128 S. Ct. 1147, 1153 (2008).

209. *Id.* at 1152-53.

210. *Id.* at 1154.

211. *Id.* at 1155.

212. *Id.* at 1156-57.

213. *Id.*

bly, even if the interpretation was officially ratified by the implementing administrative agency.

In short, the *Bowen* rule does not protect regulated parties from *all* new interpretations advanced for the first time during litigation. The courts will not defer to new interpretations that are the product of litigation counsel posturing and have not been adopted by the administrative agency charged with implementing the statutory program. Moreover, courts may also reject interpretations presented during litigation that can be shown to unfairly favor a party to ongoing litigation, even if the interpretation was officially ratified by the implementing administrative agency.

2. *The Anti-Parroting Rule*

Courts may also refuse to defer to agency interpretations of ambiguous statutory or regulatory provisions where the interpretation advanced by the agency merely “parrots” the statute or rule being interpreted. Put another way, as the D.C. Circuit said in *Paralyzed Veterans of America v. D.C. Arena L.P.*,²¹⁴ “[i]t is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations.’”²¹⁵ This limitation on deference to agency interpretations arguably proceeds from the principle that courts owe deference only to interpretations of statutes or rules when they represent “the agency’s fair and considered judgment on the matter in question.”²¹⁶

The Supreme Court officially adopted the anti-parroting rule in *Gonzales v. Oregon*,²¹⁷ which involved an Attorney General Interpretive Rule construing the Controlled Substances Act (CSA) and its implementing regulations. Adopted in 1970, the CSA makes it illegal to distribute and dispense certain substances classified under one of the Act’s five schedules without proper authorization.²¹⁸ Upon making certain findings, the U.S. Attorney General can make changes to the schedules, and may add or deleted substances from the schedules.²¹⁹ The Act requires that the Attorney General accept the scientific findings of the Secretary of Health and Human Services.²²⁰ Furthermore, the Act only allows the prescription of drugs that have a “currently accepted medical use.”²²¹ The Act “defines a ‘valid pre-

214. 117 F.3d 579, 584 (D.C. Cir. 1997).

215. *Id.* at 584.

216. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

217. 546 U.S. 243, 249 (2006).

218. *Id.* at 250 (citing 21 U.S.C. § 841 (2000 & Supp. II); 21 U.S.C. § 844 (2006)); *see also* *Gonzales v. Raich*, 545 U.S. 1, 12-13 (2005) (describing the applicable provisions of the CSA).

219. *Gonzales*, 546 U.S. at 250. (citing 21 U.S.C. § 811 (2000 & Supp. 2005)).

220. *Id.*

221. *Id.* at 257 (quoting 21 U.S.C. § 812(b) (2006)).

scription' as one issued for a 'legitimate medical purpose.'"²²² Similarly, physicians are considered practitioners if they dispense controlled substances "in the course of professional practice."²²³ A 1971 regulation promulgated by the Attorney General requires that such prescriptions be used "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."²²⁴

The 1994 Oregon Death With Dignity Act (ODWDA) exempted from civil or criminal liability doctors who "dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient."²²⁵ On November 9, 2001, the U.S. Attorney General issued an Interpretive Rule stating his intent to prohibit the use of substances regulated under the CSA for physician-assisted suicide.²²⁶ Based on a memo that the Attorney General had requested from the U.S. Office of Legal Counsel, the Attorney General ruled that "[a]ssisting suicide is not a 'legitimate medical purpose' within the meaning of 21 CFR 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act."²²⁷

The State of Oregon, along with other interested parties, filed suit challenging the validity of the Interpretive Rule in federal court.²²⁸ On certiorari before the Supreme Court, the Government argued that the Interpretive Rule was a legitimate interpretation of Section 1306.04 and was due *Auer/Seminole Rock* deference.²²⁹ The Court held that *Auer/Seminole Rock* was not applicable.²³⁰ The Attorney General's interpretation of Section 1306.04 simply repeated two statutory phrases without answering the central question before the Court: "Who decides whether a particular activity is in 'the course of professional practice' or done for a 'legitimate medical purpose'?"²³¹ Because the rule provided no new content nor provided the Attorney General with any substantive guidance, there was no legitimate agency rule for the Attorney General to interpret. The Court stated:

Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, in-

222. *Id.* (quoting 21 U.S.C. § 830(b)(3)(A)(ii) (2006)).

223. *Id.* (quoting 21 U.S.C. § 802(21) (2006)).

224. *Id.* at 256 (quoting 21 C.F.R. § 1306.04 (2005)).

225. *Id.* at 249 (citing OR. REV. STAT. §§ 127.800-897 (2003)).

226. *Id.* at 253-54.

227. *Id.* at 254 (quoting Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56608 (Nov. 9, 2001)).

228. *Gonzales*, 546 U.S. at 254.

229. *Id.* at 256-57.

230. *Id.* at 257-58.

231. *Id.* at 257.

stead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.²³²

The Court distinguished its holding in *Auer*—where the Court deferred to the Secretary of Labor’s interpretation of an ambiguous rule set forth in an amicus brief²³³—on the grounds that the underlying regulations at issue in *Auer* “gave specificity to a statutory scheme the Secretary of Labor was charged with enforcing, and reflected the considerable experience and expertise the Department of Labor had acquired over time with respect to the complexities of the Fair Labor Standards Act.”²³⁴ The equivalence of the CSA and Section 1306.04 in *Gonzales v. Oregon* belied these principles.²³⁵

The Court also held that the Attorney General’s Interpretive Rule was not due *Chevron* deference, primarily on the *Mead*-based ground that the CSA did not explicitly grant the Attorney General the power “to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.”²³⁶ In order to exercise his authority concerning scheduling under the CSA, the Attorney General must follow certain procedures detailed in the CSA. Among other things, the Attorney General must request a scientific and medical evaluation from the Secretary.²³⁷ That was not done in this case.

The anti-parroting rule is consistent with the concerns behind the “agency litigating position” rule—both work to ensure that the agency’s proffered interpretation actually “reflect[s] the agency’s fair and considered judgment on the matter in question.”²³⁸ However, the anti-parroting rule is not entirely in harmony with the deferential standard of review afforded in the Court’s more recent administrative law cases or the implicit delegation principle underlying the *Chevron* doctrine. It is the executive branch’s job to resolve regulatory ambiguities and it should be able to do so in a manner that reflects the administration’s policy preferences. The Court was on more solid ground questioning the procedural regularity of the Attorney General’s adoption of the Interpretive Rule, given the unique procedural requirements of the CSA. On this basis, it would be reasonable to predict that *Gonzales v. Oregon* will remain something of an outlier, and that the anti-parroting rule will rarely be a basis for courts to reject agency interpretations of ambiguous rules.²³⁹ This prediction seems likely given the ease

232. *Id.*

233. *See Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

234. *Gonzales*, 546 U.S. at 256-57.

235. *Id.* at 257.

236. *Id.* at 258.

237. *Id.* at 260.

238. *See Auer*, 519 U.S. at 462.

239. *But see Groff v. United States*, 493 F.3d 1343, 1351 n.2 (Fed. Cir. 2007) (refusing to defer to Bureau of Justice Assistance regulations that merely “parrot” language in the Public Safety Officers’ Benefits Act); *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 345 n.12

with which administrative agencies can avoid the anti-parroting rule by simply modifying any statutory language incorporated into an interpretive rule. The third limitation identified by Pierce and discussed below aims more directly at the major concern of the Supreme Court in *Long Island Care*—namely, limiting the potential for “unfair surprise” due to a change in an agency’s interpretation of an ambiguous statute or rule.

3. Fair Notice and Equity

The fair notice doctrine, as generally applied by courts, prohibits the imposition of liability on an individual for violating an ambiguous agency rule where the court determines that the agency did not provide the individual with adequate notice that his conduct would violate the rule before he engaged in the relevant conduct.²⁴⁰ However, language in some opinions has suggested that the fair notice doctrine should only be applied to bar *penalties* and not necessarily to bar compliance costs or other injunctive relief imposed by a court sitting in equity.²⁴¹

On the other hand, some courts have applied fair notice beyond traditional civil penalties.²⁴² The D.C. Circuit, in fact, has recognized that the fair notice doctrine should be applied to limit non-monetary penalties, injunctive relief, and other unfair results. For example, in *Satellite Broadcasting Co. v. FCC*,²⁴³ the D.C. Circuit held that “[t]raditional concepts of due process incorporated into administrative law” precluded the FCC’s dismissal of a permit application filed at the wrong location where the applica-

(3d Cir. 2006) (relying on the anti-parroting rule to reject deference to Pension Benefit Guaranty Corporation regulations implementing the Employee Retirement Income Security Act of 1974).

240. See, e.g., *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997); *Gen. Elec. Co. v. U.S. Evtl. Prot. Agency*, 53 F.3d 1324, 1333 (D.C. Cir. 1995); *Diamond Roofing Co., Inc. v. Occupational Safety & Health Review Comm’n*, 528 F.2d 645, 649 (5th Cir. 1976).

241. See, e.g., *Hoechst Celanese Corp.*, 128 F.3d at 224 (“[B]ecause civil penalties are ‘quasi-criminal’ in nature, parties subject to such administrative sanctions are entitled to . . . ‘clear notice.’”); *Diamond Roofing Co.*, 528 F.2d at 649 (“Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires”); see also RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* § 6.11 (4th ed. 2002) (discussing what qualifies as a “penalty”).

242. See, e.g., *Trinity Broad. of Fla. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (FCC’s “severe penalty” of denying a company’s application for a television station license triggered its fair notice duty); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354-55 (D.C. Cir. 1998) (“[A] recall, which entails the expenditure of significant amounts of money, deprives Chrysler of property no less than a fine.”); *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (“The dismissal of an application, we have held, is a sufficiently grave sanction to trigger this duty to provide clear notice.”).

243. 824 F.2d 1 (D.C. Cir. 1987).

ble regulations did not make it clear where applications were to be filed.²⁴⁴ Similarly, in *United States v. Chrysler Corp.*,²⁴⁵ the D.C. Circuit held that the National Highway Traffic Safety Administration must give fair notice of what is required of a motor vehicle manufacturer under applicable motor vehicle safety standards before seeking a recall.²⁴⁶ However, the D.C. Circuit's reference to "[t]raditional concepts of due process incorporated into administrative law" is unhelpful.²⁴⁷ The D.C. Circuit has not made clear whether these limitations are based purely on constitutional due process requirements or whether they arise from other sources. A fair reading of this line of cases suggests that the D.C. Circuit has incorporated broader equitable considerations into its fair notice analysis, though the court has not explicitly said so.

Two recent cases—one from the First Circuit and one from the Sixth Circuit—argue for a similar application of the fair notice doctrine to non-monetary relief.²⁴⁸ Notably, these cases differ from the D.C. Circuit's fair notice cases in that the First and Sixth Circuits explicitly root the fair notice analysis in the district courts' equitable powers.²⁴⁹ This is an important distinction because, as the First Circuit recognized, while "[d]ue process may furnish a floor to protection, based primarily on lack of fair warning . . . equitable principles give the district court even greater latitude to decline or limit retroactivity."²⁵⁰ In other words, anchoring the fair notice analysis in the district court's equitable powers explicitly gives the district courts flexibility to limit relief beyond what might be prohibited by the "floor" of constitutional due process. Both cases are more fully explored below.

B. The ADA Cases

Both *United States v. Cinemark*²⁵¹ and *United States v. Hoyts Cinemas Corp.*²⁵² were part of a larger enforcement effort launched by the Department of Justice (DOJ) in the final years of the Clinton administration.²⁵³ The basis of the ADA lawsuits was a change in official DOJ policy concern-

244. *Id.* at 3-4.

245. 158 F.3d 1350 (D.C. Cir. 1998).

246. *Id.* at 1355.

247. *Satellite Broad. Co.*, 824 F.2d at 3.

248. *See Pierce, supra* note 20, at 608 (citing *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558 (1st Cir. 2004); *United States v. Cinemark*, 348 F.3d 569 (6th Cir. 2003)).

249. *See Cinemark*, 348 F.3d at 582-83; *Hoyts Cinemas*, 380 F.3d at 573.

250. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 573 (1st Cir. 2004).

251. 348 F.3d 569 (6th Cir. 2003).

252. 380 F.3d 558 (1st Cir. 2004).

253. *See also Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000); *Meineker v. Hoyts Cinema Corp.*, 69 F. App'x. 19 (2d Cir. 2003) (unpublished); *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003); *United States v. AMC Entm't, Inc.*, No. 99-01034, 2006 U.S. Dist. LEXIS 6103 (C.D. Cal. Jan. 10, 2006).

ing the interpretation of DOJ regulations implemented under the ADA. Rather than change the interpretation of the regulations at issue through notice-and-comment rulemaking, or less formally through some other prospective change in policy, the DOJ sought to implement its new policy retroactively through enforcement actions.

Title III of the ADA generally requires that public accommodations designed and constructed “for first occupancy” after January 26, 1993 be “readily accessible to and usable by individuals with disabilities.”²⁵⁴ Congress gave the Attorney General the responsibility to promulgate regulations implementing the provisions of Title III of the ADA.²⁵⁵ In turn, these regulations must conform to certain guidelines promulgated by the Architectural and Transportation Barriers Compliance Board (Access Board).²⁵⁶ In 1991, the DOJ issued regulations, known as the Standards for Accessible Design, which incorporated the Americans with Disabilities Act Accessibility Guidelines (ADAAG) promulgated by the Access Board.²⁵⁷ The ADAAG was promulgated under the notice-and-comment procedures of the APA.²⁵⁸ Section 4.33.3 of the ADAAG provides that in “assembly areas”:

Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.

*EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.*²⁵⁹

Title III of the ADA authorizes the DOJ “to certify that state or local accessibility standards meet or exceed the ADA’s Standards for Accessible Design”²⁶⁰ This process provides the regulated community with certain advantages:

Code certification facilitates voluntary compliance by putting ADA requirements and local requirements into a single, readily available document. It allows builders

254. 42 U.S.C. § 12183(a)(1) (2000).

255. *See id.* § 12186(b).

256. *See id.* § 12186(c).

257. *See* 56 Fed. Reg. 35,546 (July 26, 1991); 28 C.F.R. § 36.406(a) (2008); 28 C.F.R. pt. 36, app. A (2008).

258. 5 U.S.C. § 553 (1998).

259. 28 C.F.R. pt. 36, app. A § 4.33.3 (2008).

260. *See United States v. Cinemark*, 348 F.3d 569, 573 (6th Cir. 2003).

to rely on their local inspection and approval processes, and it ensures that accessibility will be routinely considered in those processes. It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a significant role in enforcing the substance of the ADA.²⁶¹

Under the statute, certification serves as “rebuttable evidence” that a state law or local ordinance meets or exceeds the minimum requirements of the ADA in a later federal enforcement proceeding, and compliance with a certified code is “rebuttable evidence” of compliance with Title III of the ADA.²⁶²

On November 16, 1999, the Access Board published a new Notice of Proposed Rulemaking in the Federal Register.²⁶³ However, in a preamble to the proposed revision, the Access Board noted that it was “aware” of DOJ attempts to enforce the new DOJ’s interpretation of ADAAG Section 4.33.3 through litigation.²⁶⁴ The Board noted that it was “considering whether to include specific requirements in the final rule that are consistent with the DOJ’s interpretation of 4.33.3 to stadium-style movie theaters.”²⁶⁵

1. United States v. Cinemark

In 1999, the DOJ brought a civil enforcement action against Cinemark Theaters, arguing that Cinemark’s theaters had been constructed in a manner inconsistent with the DOJ’s interpretation of Section 4.33.3.²⁶⁶ Specifically, the DOJ asserted that the placement of wheelchair-accessible locations forced wheelchair users to look at movie screen from uncomfortable positions.²⁶⁷ For this reason, the DOJ argued that Cinemark’s stadium-style theaters were “effectively unusable” by wheelchair-using patrons.²⁶⁸

Cinemark builds, owns, and operates movie theaters nationwide.²⁶⁹ In 1995, Cinemark began construction of stadium-style movie theaters, which contained theater seating rising steeply away from the screen.²⁷⁰ This steep, stadium-style arrangement included over eighty percent of theater seats in

261. *Id.* at 573-74.

262. *See* 42 U.S.C. § 12188(b)(1)(A)(ii) (2000).

263. *See* 64 Fed. Reg. 62,248 (1999). The notice proposed modifications to ADAAG section 4.33.3 that are no relevant for present purposes.

264. *See* 64 Fed. Reg. 62,278 (1999).

265. *Id.*

266. 348 F.3d 569, 572 (6th Cir. 2003).

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

Cinemark's new theaters.²⁷¹ However, this arrangement could be very difficult to navigate in a wheelchair.²⁷² Wheelchair-accessible viewing locations were often located on flat portions of the theaters "one-third of the way back from the screen."²⁷³ Additional wheelchair-accessible viewing locations were located on a level portion in the rear of theaters seating 300 or more people.²⁷⁴

The State of Texas promulgated building codes (the Texas Accessibility Standards (TAS)) conforming to the requirements of the ADA.²⁷⁵ The DOJ approved the TAS on September 23, 1996.²⁷⁶ The DOJ announced in a press release following certification of the TAS that:

Builders in Texas who follow state building codes can be assured that they are complying with federal guidelines as well, now that the Justice Department has certified Texas codes as being in compliance with the Americans with Disabilities Act

"Everyone in the state of Texas—builders, architects, business owners, and the general public—will benefit from Texas' new accessibility standards" "Certification makes it easier to comply with the law."

. . . Builders will benefit from this new process because it ensures that construction which meets state codes meets the requirements of the ADA. Builders will also have additional legal protection in ADA lawsuits if they build in compliance with the certified code.²⁷⁷

The TAS includes a "Section 4.33.3," based on ADAAG Section 4.33.3.²⁷⁸ The State of Texas certified many of Cinemark's stadium-style theaters built under the TAS.²⁷⁹

Despite its TAS certification, on March 24, 1999, the DOJ filed an enforcement action against Cinemark in the U.S. District Court for the Northern District of Ohio, alleging that Cinemark had violated Title III of the ADA and its implementing regulations.²⁸⁰ Specifically, the DOJ alleged that Cinemark's stadium-style theaters failed to meet the requirements of ADAAG Section 4.33.3.²⁸¹ As relief, the DOJ "requested a declaratory judgment stating that Cinemark violated Title III of the ADA by designing, constructing, and operating stadium-style movie theaters in a manner that

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at 574.

276. *Id.*

277. *Id.* (omission in original).

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

discriminates against wheelchair-using patrons.”²⁸² Further, the DOJ asked that, among other things, “Cinemark be ordered to bring its present stadium-style movie theaters into compliance with Title III.”²⁸³

Cinemark argued before the district court and on appeal that the DOJ’s new interpretation of ADAAG Section 4.33.3 amounted to a new substantive rule in circumvention of the APA’s notice-and-comment requirements, and that the government should be estopped from advancing its interpretation of ADAAG Section 4.33.3 based on its previous approval of the TAS, which Cinemark had relied upon in building its theaters.²⁸⁴ In rejecting Cinemark’s first argument, the Sixth Circuit noted that, even if the government’s new interpretation advanced in the course of litigation was subject to the APA, the APA specifically exempts “interpretative” rules from the APA’s notice-and-comment rulemaking requirements.²⁸⁵

The Sixth Circuit, however, recognized the intrinsic merit of Cinemark’s estoppel argument.²⁸⁶ While the court recognized that estoppel, properly understood, only ran against the government in the case of “affirmative misconduct,” it also noted that fair notice concerns “may warrant denial of enforcement of an agency determination when conduct previously approved by a regulatory agency is retroactively branded as a statutory violation.”²⁸⁷ The court approvingly referenced Judge Friendly’s opinion in *NLRB v. Majestic Weaving Co.*,²⁸⁸ in which Judge Friendly opined:

Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as “unfair” conduct stamped “fair” at the time a party acted, raises judicial hackles considerably more than [for instance, imposing a more severe remedy for conduct already prohibited]. And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency’s changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established.²⁸⁹

With these principles in mind, the Sixth Circuit stated that “Cinemark’s reliance on TAS and the government’s statements with respect to the state building code certification process weigh strongly in favor of making any relief that the district court grants the government on remand apply only on a prospective basis.”²⁹⁰ On remand, it would be up to the district court, sitting in equity, to “take into account previous advice and representations by

282. *Id.* at 574-75.

283. *Id.* at 575.

284. *Id.* at 580-81.

285. *Id.* at 580 n.8.

286. *Id.* at 581-83.

287. *Id.* at 581.

288. 355 F.2d 854, 860 (2d Cir. 1966).

289. *Cinemark*, 348 F.3d at 581 (quoting *NLRB*, 355 F.2d at 860).

290. *Id.*

the government upon which Cinemark . . . reasonably relied” in fashioning any relief.²⁹¹

2. United States v. Hoyts Cinemas Corp.

In 2000, the DOJ filed a similar enforcement action against two companies, Hoyts Cinemas Corp. and National Amusements, Inc., in the U.S. District Court for the District of Massachusetts.²⁹² Both complaints alleged that numerous theaters controlled by the companies violated of the DOJ’s current interpretation of Section 4.33.3.²⁹³ The DOJ again requested declaratory and injunctive relief that would require the companies to retrofit the existing theaters at issue.²⁹⁴ In total, the DOJ alleged that over five hundred of the companies’ theaters were not in compliance.²⁹⁵

The district court denied the defendants’ motion for summary judgment and granted the DOJ summary judgment *sua sponte*.²⁹⁶ However, the district court granted the DOJ only declaratory relief and not retroactive relief.²⁹⁷ As a matter of due process, the district court determined that the rule was unclear and that the DOJ had not been consistent in its interpretation of Section 4.33.3.²⁹⁸ Due process, therefore, required that Section 4.33.3 be applied to those theaters ““wherein construction or refurbishment . . . occurs on or after the date on which this lawsuit commenced,””—i.e., December 18, 2000.²⁹⁹ Both sides appealed, the DOJ seeking greater retroactivity and the defendants seeking a narrower, case-by-case application of the rule prospectively.³⁰⁰

In a consolidated appeal, the First Circuit likewise accepted the DOJ’s current interpretation of Section 4.33.3, but also agreed with the defendants that application of the rule should be assessed in a theater-specific manner.³⁰¹ Like the district court, the First Circuit wrestled with the retroactive application of the rule. The court noted that “[t]he power of a district court to craft and even withhold injunctions based on equitable considerations is well established.”³⁰² Indeed, “[d]ue process may furnish a floor to protec-

291. *Id.* at 583.

292. *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73 (D. Mass. 2003); *United States v. Nat’l Amusements, Inc.*, 180 F. Supp. 2d 251 (D. Mass. 2001).

293. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 564 (1st Cir. 2004).

294. *Id.*

295. *Id.* at 562-63. Two hundred and twenty-five of these were Hoyts’ theaters. *Id.*

296. *Id.* at 564.

297. *Id.* at 564-65.

298. *Id.* at 564.

299. *Id.* (citing *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 93 (D. Mass. 2003)).

300. *Hoyts*, 380 F.3d at 564.

301. *Id.* at 570, 572.

302. *Id.* at 573.

tion, based primarily on lack of fair warning, but we think that equitable principles give the district court even greater latitude to decline or limit retroactivity.³⁰³ In support, the First Circuit cited an earlier opinion, observing that “the retroactive application of a new interpretation of an old regulation” may be limited by due process considerations, and “a critical consideration is the extent to which a retroactive rule or interpretation adversely affects the reasonable expectations of concerned parties.”³⁰⁴ In the present case, the First Circuit observed that the DOJ had been “slow in providing more precise guidance by regulation,” and that “some range of expenditures for altering existing theaters to achieve theoretical perfection might not be reasonable.”³⁰⁵ The lower court was directed to “consider not only the level of warning but also government indolence or misleading advice and the avoidance of extravagant expenditure for little gain.”³⁰⁶ To be sure, the equities “do not operate only one way.”³⁰⁷ The court was also directed to consider “the plight of the disabled” and the public interest at stake.³⁰⁸ These factors, among others, would have to be evaluated on remand to determine just how far the equities would allow injunctive relief, if any.³⁰⁹

We do not know how the lower courts would have balanced the equities on remand. Both *Cinemark* and *Hoyts Cinemas* settled before the district courts had an opportunity to address the task the Second and First Circuits set out for them.³¹⁰ Together, however, the ADA cases provide an interesting approach to the problem of retroactive application of new interpretations of ambiguous statutory and regulatory provisions. While earlier D.C. Circuit cases addressing fair notice provide, at the very least, a basis for limiting injunctive relief as well as civil penalties where an agency attempts to enforce a new interpretation of ambiguous statutes and rules, the ADA cases explicitly ground the courts’ power to do so in the courts’ traditional equitable powers. The D.C. Circuit’s reference to “[t]raditional concepts of due process incorporated into administrative law” was never an

303. *Id.*

304. *Id.* at 573 n.11. (quoting *Cheshire Hosp. v. N.H.–Vt. Hospitalization Serv., Inc.*, 689 F.2d 1112, 1121, 1121 n.10 (1st Cir. 1982)).

305. *Id.* at 573.

306. *Id.*

307. *Id.* at 574.

308. *Id.*

309. *Id.* at 574-75.

310. The Northern District of Ohio approved a consent order against *Cinemark* on November 15, 2004. Consent Order at Docket Entry 206, *United States v. Cinemark USA, Inc.*, 66 F. Supp. 2d 881 (N.D. Ohio 1999) (No. 99-00705). The District of Massachusetts approved a consent order against *Hoyts Cinemas* on June 16, 2005. Consent Order at Docket Entry 212, *United States v. Nat’l Amusements, Inc.*, 180 F. Supp. 2d 251 (D. Mass. 2001) (No. CIV. A. 00-12567-WGY).

entirely satisfactory basis for doing so.³¹¹ Grounding this authority in traditional equitable principles provides courts with a preexisting body of case law that can be used to guide the court's application of equitable principles under these circumstances.

Arguably, a truly flexible approach to rulemaking would warrant the kind of oversight recommended in the ADA cases. And district court fair notice scrutiny of new interpretations of ambiguous statutes or rules would further encourage executive agencies to inform the public of new agency policy enacted through interpretive changes—through traditional notice-and-comment procedures or otherwise. At the same time, the district courts, sitting in equity, would have the authority to grant relief where the government fails to show legitimate interests outweighing the fair notice concerns of regulatees.

CONCLUSION

Current Supreme Court jurisprudence governing the deference courts owe to executive agencies' changed interpretations of ambiguous statutes or rules is notably uneven. In *Chevron* itself, the Court recognized that agencies entrusted with administering an ambiguous statute were at least implicitly delegated the authority to fill the gaps in the statutory program.³¹² Moreover, the Court recognized that this gap-filling is inherently a policy-making function.³¹³ The Court thus recognized the power of a new administration to change the definition of ambiguous statutory provisions based on the new administration's policy goals. Since it was handed down in 1984, the *Chevron* doctrine has reliably been applied to allow agencies to change their interpretations of ambiguous statutory provisions on policy grounds, where the agency has set forth its new interpretation in legislative rules.

In *Mead*, however, the Court limited the scope of *Chevron* deference to those administrative actions bearing the "force of law"—generally speaking, those adopted through notice-and-comment rulemaking or formal adjudication.³¹⁴ Agency actions not entitled to *Chevron* deference were still entitled to some deference governed by an application of the *Skidmore* factors. *Skidmore*, however, specifically disfavors change, counting lack of consistency as one of the reasons a court should not defer to an agency's interpretation of an ambiguous statutory provision.³¹⁵ *Mead* thus meant that

311. *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (citing *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

312. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

313. *Id.*

314. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

315. *See id.* at 227-28 (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

an agency could change its interpretation of an ambiguous statutory provision but, generally only after notice-and-comment rulemaking or some other formal process. The great irony of *Mead* is that Congress itself—through the APA—never intended to require agencies to undergo notice-and-comment rulemaking before changing their interpretive policies.³¹⁶ While the issue remains somewhat unclear, the same principles may also limit an agency's power to change its interpretation of its own regulations.³¹⁷

With *Long Island Care*, the Supreme Court has undertaken what can be understood as something of a course correction, reaffirming executive agencies' policy-making functions. Once determining that DOL's regulation at issue was properly within its administrative power under the Act, the Court looked to whether there was anything "about the regulation that might make it unreasonable or otherwise unlawful."³¹⁸ The Court specifically looked to whether the Department's change in interpretation created any "unfair surprise."³¹⁹ Having undertaken notice-and-comment rulemaking, no such threat was present. Consistency, therefore, was not the important issue. Rather, the Court was more interested in fair notice concerns. The use of notice-and-comment eliminated those concerns, but the Court did not suggest that notice-and-comment rulemaking was the only means of limiting unfair surprise.

Richard J. Pierce, Jr. effectively illustrates the reasons why agencies should have more flexibility to change their interpretations of ambiguous statutes or rules, and he provides a number of suggestions to allow agencies to do so while protecting regulatees and the public from unfair retroactive application of new interpretations.³²⁰ Most importantly, Pierce proposes the application of equitable principles by district courts to limit the unfair application of new interpretations of statutes and rules to conduct reasonably believed to be free of all regulatory costs at the time the conduct was undertaken. Such an approach is suggested in the ADA cases as described above.

Together, *Long Island Care* and the ADA cases provide something of a working framework for adjudicating disputes over changed agency interpretations of ambiguous statutes or rules in a manner true to the APA and consistent with the functional obligations of administrative agencies. Under this framework, an agency may apply a new interpretation of a statute or rule after adopting the interpretation through notice-and-comment rulemaking. Alternatively, where notice-and-comment rulemaking is not otherwise required by the APA, an agency may adopt a new interpretation of an ambiguous statute or rule immediately, but it will be prohibited by the courts

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

317. See discussion *supra* Section II.A.

318. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2346 (2007).

319. *Id.* at 2349.

320. See discussion *supra* Section III.A.

from imposing the new interpretation on individuals in an inequitable, retro-active manner.

To offer just one example, in the ADA cases, concerned about the availability of adequate wheelchair-accessible seating, the DOJ could have undertaken notice-and-comment rulemaking to amend Section 4.33.3 of the ADAAG. Through any such amendments, the DOJ could have better explained what was expected of new stadium-style seating. The DOJ could have even included provisions providing for retrofitting of existing seating under specific circumstances. By employing notice-and-comment rulemaking, the regulated community would not have been subject to unfair surprise and could have played a more meaningful role in the development of any such regulatory changes through the submission of comments. It is hard to imagine that this would have been a less efficient strategy compared to five years of litigation.

Alternatively, concerned about the time it would take to effect a change in policy through notice-and-comment rulemaking, the DOJ could have adopted a new interpretation of Section 4.33.3 of the ADAAG immediately in 1999. Any such change in interpretation, confirmed by the Attorney General, would be immediately effective. The new interpretation would therefore be applicable to theaters undergoing construction as of the effective date. Any attempt to apply the new interpretation to existing theaters, however, would be limited by equitable principles as explained in *Cinemark* and *Hoyts*, potentially foreclosing injunctive relief and costs of compliance along with civil penalties.

Lastly, given the framework recommended by this Article, the incoming administration in 2000 would have been just as able to change the DOJ's interpretation of Section 4.33.3 to terminate any ongoing enforcement action or to relieve the Cinema industry of burdensome costs of compliance. This possibility would also suggest that the outgoing president in 1999 should have initiated any interpretive change earlier in his administration, rather than simply relying on administrative inertia to continue his policies during the tenure of the subsequent administration. Fundamental to American representative government is the belief that the chief executive will have the functional ability to implement the policy preferences for which he was elected. The second model outlined in this Article would help facilitate that result while at the same time protecting the fair notice concerns and established expectations of those impacted by the changes.