

# ARTICLES

## A ROCK UNTURNED: JUSTICE SCALIA'S (UNFINISHED) CRUSADE AGAINST THE SEMINOLE ROCK DEFERENCE DOCTRINE

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*After the untimely passing of Justice Antonin Scalia, many legal scholars wrote about the long-lasting impact that he will have on Article III standing, Second Amendment gun rights, and other important areas of federal law. But one important part of his legal legacy remained unfinished and unnoticed by the academic community.*

*Starting in 2011, Justice Scalia began to express his frustration with a bedrock administrative law deference doctrine that he had “uncritically accepted” in the past. His words, which came in a short concurring opinion in *Talk America, Inc. v. Michigan Bell Telephone Co.*, flagged his newfound skepticism over the validity of the Seminole Rock doctrine. This concurrence began an impassioned crusade that would last for the next five years until his death in February 2016.*

*Established in 1945, the Seminole Rock deference doctrine directs federal courts to defer to an administrative agency’s interpretation of its own regulation unless such interpretation “is plainly erroneous or inconsistent with the regulation.” Despite the doctrinal and practical significance of the rule in our administrative state, the Seminole Rock doctrine had remained largely unexamined by the Court. But following Justice Scalia’s statements in *Talk America*, other justices began to recognize his concern.*

*The justices’ growing unease with Seminole Rock emerged from the shadows in 2015 in *Perez v. Mortgage Bankers Ass’n*. Although the case did not directly raise the doctrine, the majority opinion was written narrowly and was accompanied by three separate concurring opinions by Justices Alito, Scalia, and Thomas, expressing their views that Seminole Rock should be overruled. Thus, the Court seemed poised to re-evaluate the doctrine. However, following Justice Scalia’s death, the Court’s denial of certiorari in*

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*Bible v. United Student Aid Funds, Inc.* in 2016 signaled that Justice Scalia's crusade might be at its end.

*This Article explores the evolution of Justice Scalia's view on the Seminole Rock doctrine, which led to his unfinished campaign to have the Court re-evaluate the doctrine. Its analysis highlights the compelling reasons why the Court should not allow his efforts to have been in vain. This Article concludes that the Court should re-examine the doctrine in order to reform Seminole Rock to address the persuasive practical and constitutional concerns expressed by Justice Scalia and other justices.*

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## INTRODUCTION

Under the *Seminole Rock* deference doctrine, courts are required to defer to an administrative agency's interpretation of its own regulation unless such interpretation "is plainly erroneous or inconsistent with the regulation."<sup>1</sup> Despite being critical to our administrative state, the doctrine

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1. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

has “gone largely unexamined” by the Court, as well as the academic community.<sup>2</sup> However, beginning in 2011, Justice Scalia began to question the validity of the *Seminole Rock* doctrine. In his concurring opinion in *Talk America, Inc. v. Michigan Bell Telephone Co.*,<sup>3</sup> he signaled that although he had “uncritically accepted” the doctrine in the past, he would reconsider the doctrine in the future.<sup>4</sup> Soon, other justices echoed Justice Scalia’s call that a re-evaluation of the doctrine might be appropriate in a future case, including an explicit statement to that effect by Chief Justice Roberts during the Court’s 2012–2013 Term.<sup>5</sup>

In 2015, in a case that did not directly raise the doctrine, the Court’s separate concurring opinions by Justices Alito, Scalia, and Thomas, each set forth their views that *Seminole Rock* should be re-evaluated.<sup>6</sup> Thus, the Court seemed poised to re-evaluate the doctrine. However, following Justice Scalia’s death, the Court’s denial of certiorari in *Bible v. United Student Aid Funds, Inc.*<sup>7</sup> in May 2016 suggests that the inertia amassed in the preceding years has dissipated.

In *Bible*, the *Seminole Rock* deference doctrine was the pivotal issue: whether to defer to the agency’s interpretation of its regulation was outcome-determinative.<sup>8</sup> Yet the Court declined to hear the case—much

2. See Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 99 (2000) (proposing that the *Seminole Rock* deference doctrine has “lurked beneath the surface and evaded scholarly and judicial criticism”); Kevin O. Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 229 (2013) [hereinafter Leske, *Hard Place*] (asserting the *Seminole Rock* deference doctrine has “gone largely unexamined” by the Court, as well as the academic community).

3. 564 U.S. 50, 67–69 (2011) (Scalia, J., concurring).

4. *Id.* Justice Scalia referred to the *Seminole Rock* doctrine as “*Auer* deference” based on the 1997 case of *Auer v. Robbins*, 519 U.S. 452, 461 (1997). See *Talk Am.*, 564 U.S. 50 at 67–69. It is unknown why the court switched from calling it *Seminole Rock* deference to *Auer* deference. See 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, 1088–89, n.26 (2008) (observing Justice Scalia’s use of the term).

5. See *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring) (making the legal community “aware that there is some interest in reconsidering” the *Seminole Rock* doctrine in a future case).

6. *Perez v. Mortg. Bankers Ass’n* 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).

7. 807 F.3d 839 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1607 (2016).

8. See *id.* at 841 (Easterbrook, J., concurring in the denial of rehearing en banc) (stating “this is one of those situations in which the precise nature of deference (if any) to an agency’s views may well control the outcome.”).

to the despair of Justice Thomas, who wrote a poignant dissent to the Court's order.<sup>9</sup> And even more ominous, the justices who had previously aligned with Justices Scalia and Thomas regarding whether the Court should re-examine *Seminole Rock* were silent.<sup>10</sup> Could it be that without Justice Scalia's persistence (as well as vote), the Court is content to leave *Seminole Rock* unturned?<sup>11</sup>

But, stepping back, why should we be troubled that the Court's resolve to re-evaluate *Seminole Rock* seems to have subsided? The short answer is rooted in the tremendous importance of regulations in our modern administrative state. Agency regulations have become the prime method by which the rights and obligations of private parties are determined.<sup>12</sup> In other words, regulations affect the public's legal rights more directly than statutes.<sup>13</sup>

And compounding the importance of regulations is the level of deference that an agency receives when it sets forth its interpretation of its regulation during judicial review. The *Seminole Rock* standard amounts to a "controlling" deference standard because it basically obliges a court to accept the agency's interpretation of an ambiguous regulatory provision.<sup>14</sup> This is likely why Chief Justice Roberts observed that the *Seminole Rock*

9. 136 S. Ct. at 1608 (Thomas, J., dissenting from the denial of certiorari).

10. See *infra* Part II.G. (noting that neither Chief Justice Roberts nor Justice Alito joined Justice Thomas's dissent from the denial of certiorari in *Bible*); 136 S. Ct. at 1608 (Thomas, J., dissenting from the denial of certiorari).

11. See, e.g., *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 529 (1957) (Frankfurter, J., dissenting) (describing "rule of four").

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

13. *Id.*

14. Like my previous articles on the *Seminole Rock* doctrine, see, e.g., Leske, *Hard Place*, *supra* note 2, at 230; Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787, 789–90 (2014) [hereinafter Leske, *Splits in the Rock*], I will refer to *Seminole Rock* deference as "controlling" deference because it conforms to the Court's view that the agency's "administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); accord Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587, 591 (1984) [hereinafter Weaver, *The Deference Rule*] (calling certain deference rules, including *Seminole Rock*'s, "controlling" because they are outcome determinative). Although other scholars have referred to it as "binding deference," the effect is the same. See Manning, *supra* note 12, at 617 (discussing the concept of "binding deference," which requires "a reviewing court to accept an agency's reasonable interpretation of ambiguous legal texts, even when a court would construe those materials differently as a matter of first impression").

doctrine goes “to the heart of administrative law” and *Seminole Rock* questions “arise as a matter of course on a regular basis” during judicial review.<sup>15</sup>

It is only recently—and likely because of Justice Scalia’s opinions—that scholars have begun to build on the existing *Seminole Rock* scholarship.<sup>16</sup> This overdue effort to give the doctrine the attention it deserves is well-founded. For example, the late Professor Robert A. Anthony, a renowned administrative law scholar, argued that the *Seminole Rock* standard conflicts with the APA.<sup>17</sup> Under the plain language of the APA, federal courts must determine “the meaning or applicability of the terms of an agency action.”<sup>18</sup> *Seminole Rock*’s controlling deference standard, however, eviscerates the court’s role in this respect because courts are required to defer absent a “plainly erroneous” or “inconsistent” interpretation by the

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15. *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring).

16. When I began writing on *Seminole Rock* in 2011, there was scant in-depth scholarship on the doctrine apart from John F. Manning’s seminal article. Manning, *supra* note 12; see also Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 99 (2000) (recognizing that *Seminole Rock* “has lurked beneath the surface and evaded scholarly and judicial criticism”). Much of the scholarship on judicial deference to an agency’s interpretation of its regulation came from Professor Russell Weaver starting in the 1980s. See, e.g., Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 ARIZ. ST. L.J. 109, 124–25 (1991) (exploring the various deference standards and observing the different level of review in each case); Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35, 36–38 (1991) [hereinafter Weaver, *Inter-Agency Conflicts*] (asserting that “the courts have disagreed as to how the deference rules should be applied”); Russell L. Weaver, *Evaluating Regulatory Interpretations: Individual Statements*, 80 KY. L.J. 987, 987–88, n.3 (1991) [hereinafter Weaver, *Individual Statements*] (noting that “the Court has applied other standards as well,” when reviewing regulatory interpretations); Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681, 683–84 (1984) [hereinafter Weaver, *An Overview*] (analyzing judicial concerns during review of agency interpretation of regulations); Russell L. Weaver & Thomas A. Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-Chevron Assessment*, 22 MEM. ST. U. L. REV. 411, 411 (1992) [hereinafter Weaver & Schweitzer, *A Post-Chevron Assessment*] (concluding that the deference doctrine used by the courts “were not always consistent with each other”).

17. APA, 5 U.S.C. § 552 (2012); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. AM. U. 1, 9–10 (1996).

18. Anthony, *supra* note 17, at 9–10 (arguing § 706 of the APA requires a court to determine the meaning of the terms of an agency action thereby “arm[ing] affected persons with recourse to an independent judicial interpreter of the agency’s legislative act, where, after all, the agency is often an adverse party”); see also 5 U.S.C. § 706.

agency.<sup>19</sup>

On a more practical (and sinister) level, the *Seminole Rock* standard can also embolden an agency “to promulgate excessively vague legislative rules” and “leave the more difficult task of specification to the more flexible and unaccountable process of later ‘interpreting’ these open-ended regulations.”<sup>20</sup> In other words, an agency might not write its regulations as precisely as it should because it can rely on receiving *Seminole Rock* deference during judicial review after later interpreting its vague regulation informally.<sup>21</sup>

There are also constitutional concerns with the *Seminole Rock* standard. In 1996, Professor John F. Manning wrote how the standard raises significant separation of powers issues.<sup>22</sup> Deference to an administrative agency under *Seminole Rock*, he argues, essentially licenses an agency to make the law (because agency regulations can have the force of law) and also to definitively interpret that “law” (because it receives controlling deference for such interpretation).<sup>23</sup> This capacity to self-interpret, however, “contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and law-exposition is especially dangerous to our liberties.”<sup>24</sup>

Given these substantial concerns, it is disquieting that the *Seminole Rock* deference regime has not been the subject of close scrutiny by the Court—especially compared to the attention showered on its “doctrinal cousin,” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>25</sup> which applies when a court reviews a statutory provision.<sup>26</sup> It is unclear whether Justice

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19. See *Seminole Rock & Sand Co.*, 325 U.S. at 414.

20. Lars Noah, *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules*, 51 HASTINGS L.J. 255, 290 (2000); see also Robert A. Anthony & Michael Asimow, *The Court’s Deferences—A Foolish Inconsistency*, ADMIN. & REG. L. NEWS, Fall 2000, at 10–11 (suggesting if an agency knows that a court will defer to its regulatory interpretation, it creates “a powerful incentive for agencies to issue vague regulations, with the thought of creating the operative regulatory substance later through informal interpretations”).

21. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1309 (2007) (stating “the [*Seminole Rock*] doctrine may tempt agencies to issue vague regulations through the relatively burdensome notice-and-comment process”).

22. Manning, *supra* note 12.

23. See *id.* at 638–39, 654, 696 (discussing the “separation of lawmaking from law-exposition,” and arguing that the *Seminole Rock* standard fails the separation of powers analysis).

24. *Id.* at 617.

25. 467 U.S. 837 (1984).

26. See *id.* at 864–66; see also Leske, *Hard Place*, *supra* note 2, at 229 (explaining how

Scalia's campaign to overturn the doctrine will ever be realized based on the Court's denial of certiorari in *Bible*—the first “post-Scalia” *Seminole Rock* case.<sup>27</sup>

Accordingly, this Article explores Justice Scalia's unfinished crusade to have the Court re-evaluate the *Seminole Rock* deference doctrine in order to highlight the compelling reasons why the Supreme Court should not allow his efforts to have been in vain. Part I of this Article begins by briefly explaining the *Seminole Rock* doctrine, its doctrinal justification, and the reasons why the doctrine is so critical in our administrative state. Next, Part II analyzes Justice Scalia's evolving view of the *Seminole Rock* doctrine during his time on the Court. Finally, Part III attempts to explain why Justice Scalia radically changed his view on the validity of the *Seminole Rock* doctrine. A careful analysis suggests that his newfound rejection of the doctrine was shaped by his view of the theoretical underpinning of the related *Chevron* deference doctrine, subsequent decisions by the Court that muddled the *Chevron* and *Seminole Rock* inquiries, as well as his belief that the Court's deference regimes had augmented agency power beyond their breaking points. This Article concludes that Justice Scalia's campaign, as well as the suggested reasons that account for his shift in view, highlight why the Court should re-examine the doctrine in order to reform the doctrine to address the persuasive real-world and constitutional concerns highlighted by Justice Scalia, other justices, and legal scholars.

## I. THE *SEMINOLE ROCK* DEFERENCE DOCTRINE

Before analyzing Justice Scalia's evolving view on the *Seminole Rock* deference doctrine, it is of course necessary to briefly review the *Seminole Rock* doctrine itself. Accordingly, this Part starts by setting forth the pertinent facts that led to the Court's landmark ruling establishing the *Seminole Rock* standard. Next, it briefly explains the Court's basis for the doctrine, which was not explained by the Court in the *Seminole Rock* case. Rather, it came nearly half a century later in a series of cases that implicated the doctrine.

Finally, this Part concludes by explaining the significant practical and separation of powers problems raised by the doctrine. This discussion will set the stage for an analysis of Justice Scalia's crusade to overthrow the

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unlike *Chevron*, the *Seminole Rock* deference doctrine “has gone largely unexamined”); accord Weaver, *The Deference Rule*, *supra* note 14, at 589 (“Although commentators have lavished attention on the subject of statutory construction, they have virtually ignored the problem of how to interpret regulations.”).

27. *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1607 (2016).

doctrine in Part II, as well an exploration of the possible reasons that he changed his view in Part III.

A. Bowles v. Seminole Rock & Sand Co.

The Supreme Court's decision in *Bowles v. Seminole Rock & Sand Co.*<sup>28</sup> in 1945 established the standard for courts to apply when reviewing an agency's interpretation of its own regulation.<sup>29</sup> Under the *Seminole Rock* standard, a court must defer to an agency's interpretation of its regulation unless it "is plainly erroneous or inconsistent with the regulation."<sup>30</sup>

At issue in *Seminole Rock* was Maximum Price Regulation No. 188, which mandated "each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942."<sup>31</sup> This regulation, passed under the Emergency Price Control Act of 1942, was intended to ease inflation during World War II by controlling prices.<sup>32</sup>

The disagreement in the case centered on whether Seminole Rock & Sand had run afoul of the regulation by negotiating a contract to sell crushed stone for more than the price set during the base period.<sup>33</sup> The Administrator of the Office of Price Administration, named Chester Bowles, sued to prevent Seminole Rock & Sand from selling the stone because there had been an actual delivery in March 1942 for a lower price.<sup>34</sup> Despite acknowledging that it had delivered crushed stone for a lower price, Seminole Rock & Sand maintained that there must have been a charge as well as a delivery at such price to fix the ceiling price.<sup>35</sup> And because the contract for the delivery occurred in October 1941, it argued that the ceiling limit was not surpassed.<sup>36</sup>

The lower court found Seminole Rock & Sand not to be in violation of the Maximum Price Regulation and the Fifth Circuit affirmed on appeal.<sup>37</sup> The question presented for the Court was therefore whether Seminole Rock & Sand had charged a price that was greater than the maximum established during the regulatory period.<sup>38</sup> As an initial matter, the Court

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28. 325 U.S. 410 (1945).

29. *Id.* at 411, 414.

30. *Id.* at 414.

31. *Id.* at 413.

32. *Id.* at 411, 413.

33. *Id.* at 412, 415.

34. *Id.*

35. *Id.* at 415.

36. *Id.* at 412, 415.

37. *Id.* at 412-13.

38. *Id.* at 413.



explained that the Administrator's interpretation of the regulation would only be probative if the regulation was ambiguous.<sup>39</sup> But if the regulation was ambiguous, the Court determined that "a court must necessarily look to the administrative construction of the regulation."<sup>40</sup> The Court then established the rule that "the ultimate criterion" in determining a regulation's meaning "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>41</sup>

With respect to the regulation in question, the Court found that there was an ambiguous phrase, "highest price charged during March, 1942."<sup>42</sup> The agency's interpretation of this phrase had been set forth in a bulletin that was released at the time that the regulation was issued.<sup>43</sup> Following the agency's "consistent administrative interpretation" explained in the Bulletin, the Court ruled that the highest price of an *actual* delivery during March 1942 established the price ceiling.<sup>44</sup> Thus, the Court deferred to the agency's interpretation of the regulation, thereby reversing the judgment of the court of appeals.<sup>45</sup>

#### B. A Brief Doctrinal Explanation of *Seminole Rock*

When establishing what would become known as the *Seminole Rock* doctrine, the Court did not articulate its precise reasoning to defer to an agency's interpretation "unless it is plainly erroneous or inconsistent with the regulation."<sup>46</sup> However, the rationale for the *Seminole Rock* deference was set forth in a series of cases over three decades later.

In *Martin v. Occupational Safety & Health Review Commission*,<sup>47</sup> the Court explained that judicial deference to agency interpretations emanated from an agency's delegated lawmaking powers.<sup>48</sup> As Justice Scalia later

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39. *Id.* at 413–14.

40. *Id.* at 414.

41. *Id.*

42. *Id.* at 415.

43. *Id.* at 417.

44. *Id.* at 415, 418. The Court also appeared to be swayed by its finding that the public was on notice of this consistent interpretation. *Id.* at 417–18.

45. *Id.* at 418.

46. *Id.* at 414.

47. 499 U.S. 144 (1991).

48. *Id.* at 151 ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.") (citation omitted). For additional background on

explained, the theory is that “the agency, as the drafter of the rule, will have some special insight into its intent when enacting it.”<sup>49</sup>

In the same Term, the Court in *Pauley v. BethEnergy Mines, Inc.*<sup>50</sup> added to its reasoning that an agency’s power to interpret regulations was entrenched in the delegation to an agency by Congress.<sup>51</sup> In other words, granting *Seminole Rock* deference to agency interpretations accompanies the congressional delegation to agencies to make regulations.<sup>52</sup> Two years later, in 1994, in *Thomas Jefferson University v. Shalala*<sup>53</sup> the Court also suggested that *Seminole Rock* deference is premised on the theory that the agency has a specialized expertise in administering its “complex and highly technical regulatory program.”<sup>54</sup>

### C. What’s so Wrong with the *Seminole Rock* Standard?

Although the *Seminole Rock* standard has developed into an enormously important principle of administrative law—applied by the courts since its inception in 1945<sup>55</sup>—it has received far less scrutiny than other deference doctrines such as the *Chevron* doctrine.<sup>56</sup> But as both commentators and members of the Court have observed, there are numerous concerns presented by applying such a deferential standard to an agency interpretation.

Martin, see Leske, *Hard Place*, *supra* note 2, at 247.

49. *Decker v. Nw. Env’t. Def. Ctr.*, 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part).

50. 501 U.S. 680 (1991).

51. *Id.* at 696–97. For further background on *Pauley*, see Leske, *Hard Place*, *supra* note 2.

52. *Pauley*, 501 U.S. at 698.

As delegated by Congress, then, the Secretary’s authority to promulgate interim regulations ‘not . . . more restrictive than’ the HEW [Health, Education, and Welfare] interim regulations necessarily entails the authority to interpret HEW’s regulations and the discretion to promulgate interim regulations based on a reasonable interpretation thereof. From this congressional delegation derives the Secretary’s entitlement to judicial deference.

*Id.*

53. 512 U.S. 504 (1994).

54. *Id.* at 512.

55. See Leske, *Hard Place*, *supra* note 2, at 248–71 (describing factors applied by the U.S. Supreme Court). For a detailed analysis of the interpretation of the courts of appeals, see Leske, *Splits in the Rock*, *supra* note 14.

56. See Angstreich, *supra* note 16, at 99 (stating that the *Seminole Rock* deference doctrine has “lurked beneath the surface and evaded scholarly and judicial criticism”); see also Leske, *Hard Place*, *supra* note 2, at 229 (asserting that unlike *Chevron*, the *Seminole Rock* deference doctrine “has gone largely unexamined”).

First, a controlling deference standard can, as a theoretical matter, promote an agency “to promulgate excessively vague legislative rules” and “leave the more difficult task of specification to the more flexible and unaccountable process of later ‘interpreting’ these open-ended regulations.”<sup>57</sup> In other words, an agency might not write its regulations as precisely as it should because it can rely on receiving *Seminole Rock* deference when it later interprets its vague regulation informally.<sup>58</sup> And because such regulatory interpretations will be fashioned internally and informally, there will likely be no notice to the public; nor will there be the ability for the public to challenge the interpretation, absent an adjudication for violating one of the regulations at issue.<sup>59</sup>

Moreover, “the more misty or vacuous the regulations, the broader is the discretion to interpret, and the less predictable will be the interpretations.”<sup>60</sup> As Professor Manning asserted, “the right of self-interpretation under *Seminole Rock* removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean (unless the agency’s view is plainly erroneous), the agency bears little, if any, risk from its own opacity or imprecision.”<sup>61</sup>

Second, and relatedly, the late Professor Anthony argued that the *Seminole Rock* standard conflicts with the APA.<sup>62</sup> Under the plain language of § 706 of the APA, federal courts must determine “the meaning or applicability of the terms of an agency action.”<sup>63</sup> This standard was created

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57. See Lars Noah, *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules*, 51 HASTINGS L.J. 255, 290 (2000); see also Anthony & Asimow, *supra* note 20, at 10–11 (observing that if an agency is confident that it will receive controlling deference for its interpretation, it creates “a powerful incentive for agencies to issue vague regulations, with the thought of creating the operative regulatory substance later through informal interpretations”).

58. See APA, 5 U.S.C. § 552 (2012); *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting) (“It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.”); see also Hickman & Krueger, *supra* note 21, at 1309 (stating “the [*Seminole Rock*] doctrine may tempt agencies to issue vague regulations through the relatively burdensome notice-and-comment process”).

59. See Anthony & Asimow, *supra* note 20, at 11 (“The affected public will usually be unable to participate in shaping the informally-issued regulatory interpretations or to effectively challenge them in court.”).

60. See *id.*

61. See Manning, *supra* note 12, at 655.

62. 5 U.S.C. § 552; see Anthony & Asimow, *supra* note 20.

63. 5 U.S.C. § 706; Anthony, *supra* note 17, at 9–10.

in order to “arm affected persons with recourse to an independent judicial interpreter of the agency’s legislative act.”<sup>64</sup> Thus, the courts should have an active and primary role in determining the propriety of agency action.

But *Seminole Rock*’s controlling deference standard eviscerates the court’s role in this respect because courts are required to defer absent a “plainly erroneous” or “inconsistent” interpretation by the agency.<sup>65</sup> The loss of the court as a “check” on the propriety of an agency regulation is especially troublesome because “the agency is often an adverse party” in a case involving the interpretation of that regulation.<sup>66</sup>

Third, as a practical matter, Professor Russell Weaver long ago noted that “courts have experienced great difficulty in interpreting regulations and applying the [*Seminole Rock*] deference rule to them.”<sup>67</sup> He observed that even in the wake of *Seminole Rock*, the Supreme Court has turned to several different deference standards and has “never adequately explained how they should be applied.”<sup>68</sup> Later, other legal scholars agreed that the Court’s determination of how much deference was due to an agency interpreting its own regulation is ambiguous.<sup>69</sup>

Fourth, and last (but certainly not least), are the constitutional concerns raised with respect to the current *Seminole Rock* standard. More specifically, as set forth by Professor Manning, the standard raises separation of powers

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64. Anthony, *supra* note 17, at 9–10. Professors Anthony and Asimow also contend that the *Seminole Rock* doctrine contradicts the APA’s purpose in allowing for an “exception for interpretative rules in § 553.” See Anthony & Asimow, *supra* note 20, at 11. These rules should be subject to “plenary judicial review.” *Id.* (citing 5 U.S.C. § 553). This became the subject of *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015).

65. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

66. Anthony, *supra* note 17, at 1, 9.

67. See Weaver, *The Deference Rule*, *supra* note 14, at 589; Weaver, *Inter-Agency Conflicts*, *supra* note 16, at 38 (stating that “the courts have disagreed as to how the deference rules should be applied”); Weaver, *Individual Statements*, *supra* note 16, at 987–88 n.3 (stating that “the Court has applied other standards as well,” with regard to the deference rule); Weaver, *An Overview*, *supra* note 16, at 683–84 (discussing problems facing courts when interpreting agency regulations); Weaver & Schweitzer, *A Post-Chevron Assessment*, *supra* note 16, at 411 (stating that the deference principles applied by the courts “were not always consistent with each other”).

68. See Weaver, *The Deference Rule*, *supra* note 14, at 592.

69. See, e.g., Eskridge & Baer, *supra* note 4, at 1184 (“The amount of deference *Seminole Rock* requires has always been ambiguous, also contributing to doctrinal confusion for those lower courts and commentators who follow such matters.”); see also Hickman & Krueger, *supra* note 21, at 1307 (stating that “the Court has not clearly established the bounds of *Seminole Rock* deference”).

issues.<sup>70</sup> A controlling deference standard permits an agency to cure ambiguities it created in its own regulations thereby giving the agency the ability to self-interpret.<sup>71</sup>

This authority, however, “contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and law-exposition is especially dangerous to our liberties.”<sup>72</sup> Our system of checks and balances, Manning asserts, requires that there be more of a separation between lawmaking and law interpretation to satisfy the separation of powers doctrine.<sup>73</sup> Therefore, the current *Seminole Rock* standard fails this doctrine.<sup>74</sup>

Because of these concerns, some scholars assert that the Supreme Court should dispense with *Seminole Rock* altogether. Instead, they assert that the deference under *Skidmore v. Swift & Co.*<sup>75</sup> ought to be applied to an agency’s interpretation of its own regulation.<sup>76</sup> Courts applying *Skidmore* would measure an agency’s interpretation with consideration of “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>77</sup> This standard would provide for accountability and the judicial check required to pass the constitutionally mandated separation of powers.<sup>78</sup> Likewise, by providing a less deferential standard to agencies, it would dis-incentivize an agency’s attempt to draft vague regulations.<sup>79</sup>

Countering these arguments, some scholars assert that the *Seminole Rock* doctrine should be maintained. Any weakening of *Seminole Rock*, they argue, would effectively undermine “the division of responsibility for statutory

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70. See Manning, *supra* note 12, at 638–39, 654 (examining *Chevron* and *Seminole Rock* and the “separation of lawmaking from law-exposition,” and analyzing the *Seminole Rock* decision using a separation of powers analysis).

71. See *id.* at 655 (“The right of self-interpretation under *Seminole Rock* removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean (unless the agency’s view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision.”).

72. *Id.* at 617.

73. *Id.* at 618.

74. See *id.* at 654–60 (exploring the dubious approach to separation of powers analysis applied in *Seminole Rock*).

75. 323 U.S. 134 (1944).

76. *Id.* at 140; see Anthony, *supra* note 17, at 10 (arguing for a less deferential standard); Manning, *supra* note 12, at 618–19.

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

78. See Manning, *supra* note 12, at 618–19.

79. See Anthony, *supra* note 17, at 11–12.

interpretation that *Chevron* formalized.”<sup>80</sup> In other words, if a court is to follow *Chevron*’s instruction to defer to an agency’s reasonable interpretation of ambiguous statutory language, it must first ascertain the meaning of the regulation at issue.<sup>81</sup> But if a court were to first reject an agency’s interpretation of an ambiguous regulation under *Skidmore*, it would not apply the agency’s understanding of the regulation when determining the meaning of the statute when performing the *Chevron* analysis.<sup>82</sup> This interpretation would effectively make the court, rather than the agency, in charge of policy decisions in contravention of one of *Chevron*’s key underlying rationales.<sup>83</sup> Only an endorsement of *Seminole Rock* would result in “shoring up” deference under *Chevron*.<sup>84</sup>

Finally, other scholars have offered a new approach.<sup>85</sup> For example, a reformed *Seminole Rock* could have courts apply a formal, clearly articulated, and relatively simple standard, which incorporates many of the objective factors previously applied by the Court when it has previously determined whether to apply the *Seminole Rock* standard.<sup>86</sup> Such a standard, by relying upon certain objective factors, which would limit the subjective inquiry, “fall[s] comfortably between *Chevron*’s controlling deference and *Skidmore*’s less deferential treatment that the courts apply when reviewing an agency’s interpretation of an ambiguous statutory provision.”<sup>87</sup>

All told, there have been many concerns expressed, as well as many solutions proposed, with respect to the *Seminole Rock* deference doctrine. Irrespective of which is the best approach to take, one point remains clear: the Court should at long last take a closer look at the *Seminole Rock* doctrine to bring clarity to a doctrine that goes “to the heart of administrative law” and that “arise[s] as a matter of course on a regular basis.”<sup>88</sup>

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80. Angstreich, *supra* note 16, at 59.

81. *Id.* at 58.

82. *Id.*

83. *Id.*

84. See *id.* at 58, 59 (arguing that “*Skidmore*’s potential for undermining *Chevron* leads to a justification for *Seminole Rock* deference”). In making his argument, Angstreich also staunchly defends *Seminole Rock* from the criticism that “it gives agencies too great an incentive to promulgate vague regulations, violates the Administrative Procedure Act, and is incompatible with the constitutional principle of separation of powers.” *Id.* at 51.

85. See e.g., Leske, *Hard Place*, *supra* note 2, at 230; see also Derek A. Woodman, *Rethinking Auer Deference: Agency Regulations and Due Process Notice*, 82 GEO. WASH. L. REV. 1721, 1746 (2014) (suggesting that the Court should apply a due process notice analysis to *Seminole Rock* deference questions).

86. Leske, *Hard Place*, *supra* note 2, at 235.

87. *Id.*

88. See, e.g., *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J.,

## II. THE EVOLUTION OF JUSTICE SCALIA'S VIEW

In order to attempt to explain the reasons why Justice Scalia altered his view on the *Seminole Rock* doctrine during the years that he was on the Court from 1986 to 2016, this Part analyzes the principal cases in which he opined on the *Seminole Rock* doctrine, as well as the key case following his death that suggests that the momentum to re-evaluate the doctrine has waned.

But before exploring these cases, several key observations can be made with respect to Justice Scalia and the *Seminole Rock* doctrine. First, there is no dispute that Justice Scalia's *Seminole Rock* doctrine jurisprudence changed radically during the thirty years he was a member of the Court. The pivotal expressions of his view, however, came only from 2011 to 2015, which were his 25–29th years on the Court. Second, it is evident that at the time of his death at least three additional justices shared his view that the Court should hear a case that raises the *Seminole Rock* doctrine. This is supported by the views expressed by Chief Justice Roberts and Justices Scalia, Thomas, and Alito in recent opinions.<sup>89</sup> With that said, it is not certain whether all of these justices would advocate for overruling *Seminole Rock* with the exception of Justice Scalia and Justice Thomas.<sup>90</sup> Third, following his death, the Court's denial of certiorari in *Bible*, as well as the decision by Chief Justice Roberts and Justice Alito not to join Justice Thomas's dissent from the denial of certiorari, suggests that Justice Scalia's effort might have been in vain.<sup>91</sup> It remains to be seen whether the Court will choose to leave *Seminole Rock* as it is or to re-evaluate the doctrine in the future.

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concurring) (making the legal community “aware that there is some interest in reconsidering” the *Seminole Rock* doctrine in a future case); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211 (Scalia, J., concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment).

89. See *infra* Part II.E. (discussing *Decker*, 133 S. Ct. at 1339 (Roberts, C.J., concurring) and the potential interest in reconsidering the *Seminole Rock* doctrine); see also *infra* Part II.F. (discussing the Court's opinions in *Perez*, 135 S. Ct. 1199).

90. The Court, including Justice Scalia, has approved of the doctrine in recent cases, but at the same time declined to grant an agency deference. See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012).

91. *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari).

*A. Justice Scalia's Early Views: Silence on Seminole Rock*

On September 26, 1986, Justice Scalia began his tenure on the Supreme Court. In the four decades prior to his ascension to the bench, the Court applied the *Seminole Rock* standard on a somewhat consistent basis, but it had not engaged in a critical analysis of the doctrine.<sup>92</sup> This remained true until Justice Scalia expressed his reservations with the doctrine in 2011.

In his first decade on the Court, Justice Scalia appeared to be content to endorse the Court's allegiance to the doctrine, even in the face of concern over the doctrine by other justices. For example, in the 1987 case of *Mullins Coal Co. of Virginia v. United States Department of Labor*,<sup>93</sup> Justice Thurgood Marshall, joined by Justice Brennan in dissent, cautioned that *Seminole Rock* deference could be used as "a license for an agency effectively to rewrite a regulation through interpretation."<sup>94</sup> Justice Scalia sided with the majority.<sup>95</sup>

In several other cases throughout the remainder of the 1980s and beginning of the 1990s, Justice Scalia joined the majority opinion that endorsed the *Seminole Rock* doctrine.<sup>96</sup> For example, he joined the Court in two cases that altered the original *Seminole Rock* standard but did not depart from it: *Gardebring v. Jenkins*<sup>97</sup> and *Thomas Jefferson University*.<sup>98</sup> In these two cases, the Court found that the *Seminole Rock* deference analysis required consideration of the original intent of the agency when it promulgated the regulation at issue.<sup>99</sup> He also joined a dissenting opinion in *Shalala v. Guernsey Memorial Hospital*,<sup>100</sup> which involved an agency interpretation of a regulation, but nonetheless approved of the use of the doctrine.<sup>101</sup>

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92. For a detailed review of the Supreme Court's interpretation and application of the *Seminole Rock* doctrine, see Leske, *Hard Place*, *supra* note 2, at 248–71.

93. 484 U.S. 135 (1987).

94. *Id.* at 170 (Marshall, J., dissenting) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). See generally Leske, *Hard Place*, *supra* note 2, at 248–71 (reviewing development of the doctrine).

95. *Mullins Coal*, 484 U.S. at 137.

96. See, e.g., *Sec. Servs., Inc. v. Kmart Corp.*, 511 U.S. 431, 436, n.2 (1994). Justice Scalia joined the majority opinion, which adhered to *Seminole Rock*'s "plainly erroneous or inconsistent with the regulation" standard. *Id.*; see also *Stinson v. United States*, 508 U.S. 36, 45 (1993) (joining the majority); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (joining a unanimous opinion).

97. 485 U.S. 415 (1988).

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

99. See *Gardebring*, 485 U.S. at 430; *Thomas Jefferson Univ.*, 512 U.S. at 512.

100. 514 U.S. 87 (1995).

101. *Id.* at 102 (O'Connor, J., dissenting).



First, in the 1988 *Gardebring* case, the Court reviewed whether the Minnesota Department of Human Services (under Commissioner Sandra Gardebring) had violated a federal regulation issued by the U.S. Department of Health and Human Services (HHS).<sup>102</sup> The Court of Appeals for the Eighth Circuit found that the regulation required that the agency give written notice to the respondent, Kathryn Jenkins, before suspending her benefits.<sup>103</sup> The Supreme Court disagreed by relying on the *Seminole Rock* doctrine.<sup>104</sup> When assessing whether to defer to the federal agency's interpretation, the Court acknowledged that "the Secretary had not taken a position on this question until this litigation," but the Court nonetheless deferred:

When it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.<sup>105</sup>

This marked a deviation from the Court's original formulation of the *Seminole Rock* standard. Instead of articulating the standard as "plainly erroneous or inconsistent with the regulations," the Court stated that a court must defer unless "the regulation's plain language" dictates otherwise, or a different interpretation is compelled by "other indications" of an agency's intent at the time it promulgated the regulation.<sup>106</sup> Seven justices endorsed this formulation (including Justice Scalia, who joined the majority), and two justices were in partial dissent.<sup>107</sup>

Second, in 1994, in *Thomas Jefferson University*, the Court repeated this different articulation of the *Seminole Rock* standard, and, once again, Justice

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102. *Gardebring*, 485 U.S. at 417–18.

103. Under the Aid to Families with Dependent Children Program "a family receiving nonrecurring lump-sum income" was ineligible for benefits for a certain time period after it received that payment. *Id.* at 417–18 (citing Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. § 602(a)(17) (1982)).

104. *Id.* at 430. Ms. Jenkins had not argued that the agency's regulation, as interpreted by the agency, violated the statute or that it violated her constitutional rights, such as due process. *Id.*

105. *Id.*

106. Compare *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), with *Gardebring*, 485 U.S. at 430.

107. *Gardebring*, 485 U.S. at 416. Justice Kennedy took no part in the consideration or decision in the case, and Justice Marshall only joined the last paragraph of Justice O'Connor's concurrence. *Id.* at 432 (O'Connor, J., concurring in part and dissenting in part).

Scalia was in the majority.<sup>108</sup> In *Thomas Jefferson University*, the Court considered deference to the HHS interpretation of a Medicare regulation that prohibited reimbursement of certain educational activities shouldered by hospitals.<sup>109</sup> The HHS Secretary construed the regulation “to bar reimbursement of educational costs that were borne in prior years not by the requesting hospital, but by the hospital’s affiliated medical school.”<sup>110</sup> The Court quoted *Seminole Rock* and stated that HHS’s interpretation must be given “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”<sup>111</sup> It next parroted *Gardebring*’s formulation to elaborate on the *Seminole Rock* standard: “In other words, we must defer to the Secretary’s interpretation unless an ‘alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation.’”<sup>112</sup> A majority of the Court then deferred to the agency’s interpretation.<sup>113</sup>

Although four Justices, in dissent, expressed their concern with the *Seminole Rock* doctrine, Justice Scalia was not one of them.<sup>114</sup> Rather, Justice Thomas, joined by Justices Stevens, O’Connor, and Ginsburg, maintained that allowing an agency the authority to self-interpret its own regulations was at odds with an agency’s responsibility to resolve statutory ambiguities.<sup>115</sup>

In effect, Justice Thomas explained, “the Secretary had merely replaced statutory ambiguity with regulatory ambiguity.”<sup>116</sup> He announced that by giving “effect to such a hopelessly vague regulation, the Court disserves the very purpose behind the delegation of lawmaking power to administrative agencies, which is to ‘resolve . . . ambiguity in a statutory text.’”<sup>117</sup> He conceded that it was “perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather

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

109. *Id.*

110. *Id.* at 506 (citing 42 C.F.R. § 413.85(c) (1993)).

111. *Id.* at 512 (quoting *Seminole Rock & Sand Co.*, 325 U.S. at 414).

112. *Id.* at 512 (quoting *Gardebring*, 485 U.S. at 430).

113. *See id.* at 518 (finding that the Secretary’s formation of the redistribution principle coincides with the plain language of the statute and affirming the decision of the court of appeals).

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

115. *Id.* at 519.

116. *Id.* at 525.

117. *Id.* (alterations in original) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)).

than through the more cumbersome rulemaking process.”<sup>118</sup> However, he cautioned that ceding this power undercuts the APA’s notice-and-comment procedures.<sup>119</sup> Consequently, he would not have deferred and would have found that the Secretary’s interpretation violated the APA.<sup>120</sup> Thus, despite these differing formulations, the salient point remains that Justice Scalia endorsed the *Seminole Rock* doctrine.

Third, in the following year, the Court had another opportunity to address the *Seminole Rock* doctrine. In *Guernsey Memorial Hospital*, Justice Scalia joined the dissent, but nonetheless remained in the company of justices supporting the principles embodied by the *Seminole Rock* doctrine.<sup>121</sup> In her dissent, Justice O’Connor, joined by Justices Scalia, Souter and Thomas, stated that although she took seriously the Court’s “obligation to defer to an agency’s reasonable interpretation of its own regulations, . . . . An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through substantive changes recorded in an informal policy manual that are unsupported by the language of the regulation.”<sup>122</sup>

In other words, she disputed the majority’s analysis as to whether the regulation was “inconsistent with regulation” under *Seminole Rock*—not the merits of the doctrine *vel non*.

Thus, with the end of the Court’s 1993–1994 Term, there were several members of the Court who expressed concern over the controlling deference standard afforded by *Seminole Rock*, but Justice Scalia was not one of them. Looking back, however, his absence from the dissenting opinions in cases such as *Gardebring* and *Thomas Jefferson University* was unsurprising.<sup>123</sup> In the 1996–1997 Term, he wrote the unanimous opinion in *Auer v. Robbins*<sup>124</sup> in which the Court fully endorsed the *Seminole Rock* doctrine.<sup>125</sup>

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118. *Id.*

119. *Id.* (asserting that “agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency’s understanding of the law”).

120. *Id.* at 529–30 (citing 42 C.F.R. § 413.85(a), (c), (g) (1993)).

121. *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 102–03 (1995) (O’Connor, J., dissenting).

122. *Id.* at 108, 110–11.

123. *Gardebring v. Jenkins*, 485 U.S. 415 (1988); *Thomas Jefferson Univ.*, 512 U.S. at 504; *see also Mullins Coal Co. of Va. v. U.S. Dep’t of Labor*, 484 U.S. 135 (1987). In the 1995–1996 Term, the Court had one more case where *Seminole Rock* was raised. In that case, Justice Scalia dissented, but his arguments did not question the *Seminole Rock* doctrine. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 241 (1996) (Scalia, J., dissenting).

124. 519 U.S. 452 (1997).

125. *Id.* at 461.

*B. Auer v. Robbins and Gonzales v. Oregon: Uncritical Acceptance*

Justice Scalia's first opinion writing for the Court in a case involving the *Seminole Rock* doctrine was the *Auer* case in 1997.<sup>126</sup> This case, decided over a decade after he joined the Court, soon became the Court's "standard" citation for supporting the proposition that an agency's interpretation of its regulation is entitled to deference unless it is "plainly erroneous or inconsistent with the regulation."<sup>127</sup> Justice Scalia's opinion demonstrated an open willingness, which he would later call an uncritical acceptance, to defer to the agency's interpretation of its own regulation under *Seminole Rock*.<sup>128</sup>

In *Auer*, the Court was presented with the Secretary of Labor's interpretation of both statutory language and regulatory language.<sup>129</sup> The petitioners included Sergeant Francis Bernard Auer, an officer employed by the St. Louis Police Department.<sup>130</sup> He and other officers sued the St. Louis Board of Police Commissioners, which included Commissioner David A. Robbins, for overtime pay allegedly due to them under the Fair Labor Standards Act (FLSA) of 1938.<sup>131</sup>

The Board claimed that the officers were exempted from overtime pay eligibility under the FLSA because the officers were "'bona fide executive, administrative, or professional' employees," which are not eligible under the FLSA.<sup>132</sup> The Board pointed to a regulation promulgated by the Secretary of Labor, which established a salary-basis test to determine whether the officers would qualify.<sup>133</sup> The regulation stated:

An employee will be considered to be paid "on a salary basis" . . . if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.<sup>134</sup>

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126. *Id.* at 454.

127. It also resulted in "*Seminole Rock* deference" also being called "*Auer* deference" in the future. It is unknown why the courts and legal community switched from calling it *Seminole Rock* deference to *Auer* deference. See Eskridge & Baer, *supra* note 4, at 1088–89, n.26 (observing and seeking to explain Justice Scalia's use of the term in his dissent in *Gonzales v. Oregon*, 546 U.S. 243, 277 (2006) (Scalia, J., dissenting)).

128. See *Auer*, 519 U.S. at 461 (establishing that deference is "easily met").

129. *Id.* at 454.

130. *Id.* at 455.

131. *Id.*

132. *Id.* at 454–55 (quoting Fair Labor Standards Act of 1938, 52 Stat. 1060, 1067).

133. *Id.* at 455 (citing 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1996)).

134. *Id.* (alterations in original) (citing 29 C.F.R. § 541.118(a)).

In determining whether the officers were salaried employees, the Court honed in on whether “an employee’s pay is ‘subject to’ disciplinary or other deductions whenever there exists a *theoretical* possibility of such deductions, or rather only when there is something more to suggest that the employee is *actually* vulnerable to having his pay reduced.”<sup>135</sup>

To assist the Court, the Court requested that the U.S. Solicitor General file an amicus brief offering the Secretary of Labor’s view on the salary-basis test.<sup>136</sup> In the United States’ amicus brief, the Secretary interpreted the salary-basis test to deny exempt status to employees who are “covered by a policy that permits disciplinary or other deductions in pay ‘as a practical matter.’”<sup>137</sup> In other words, if there was either an actual practice of making such deductions or an employment policy that creates a “‘significant likelihood’ of such deductions,” then an employee did not have salaried status.<sup>138</sup>

Justice Scalia directly quoted the *Seminole Rock* standard: “because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is . . . controlling unless ‘plainly erroneous or inconsistent with the regulation.’”<sup>139</sup> On behalf of a unanimous Court, he found the burden “easily met.”<sup>140</sup> Justice Scalia’s opinion in *Auer* is representative of many *Seminole Rock* cases where the Court engages in “a rather mechanical application of the *Seminole Rock* standard.”<sup>141</sup>

Almost a decade later, in 2006, Justice Scalia again squarely addressed the *Seminole Rock* standard in *Gonzales v. Oregon*.<sup>142</sup> But yet again he was supportive of the doctrine. In fact, he criticized the majority for failing to defer to the agency under *Seminole Rock* and, moreover, chastised the Court for creating an exception for granting deference under *Seminole Rock*, which he found to have no support in *Auer*.<sup>143</sup>

The key question in *Gonzales* was whether the Controlled Substances Act (CSA) permitted the United States Attorney General to “prohibit doctors from prescribing regulated drugs for use in physician-assisted suicides,

135. *Id.* at 459 (emphases added).

136. *Id.* at 453, 461.

137. *Id.* at 461.

138. *Id.*

139. *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

140. *Id.*

141. See Leske, *Hard Place*, *supra* note 2, at 259.

142. 546 U.S. 243, 284 (2006). In the time between the *Auer* and *Gonzales* decisions, the Court cited to *Auer* twelve times. The other cases, as a general matter, remained faithful to the *Auer* formulation and analysis. See Leske, *Hard Place*, *supra* note 2, at 260 n.221.

143. *Gonzales*, 546 U.S. at 275 (Scalia, J., dissenting).

notwithstanding a state law permitting the procedure.”<sup>144</sup> The Attorney General had established an interpretive rule that detailed how to implement and enforce the CSA with respect to the State of Oregon’s Death with Dignity Act (ODWDA).<sup>145</sup>

The United States argued that its rule was an explanation of its regulations and thus should be accorded controlling deference under the *Seminole Rock* standard.<sup>146</sup> This interpretive rule, however, essentially parroted much of the statute with respect to several of the act’s key terms.<sup>147</sup> In an opinion by Justice Kennedy, the Court acknowledged that “an administrative rule may receive substantial deference if it interprets the issuing agency’s own ambiguous regulation,” but it declined to defer under these circumstances.<sup>148</sup>

The Court reasoned that the language set forth in the interpretive rule “comes from Congress, not the Attorney General” and that therefore deference was not warranted.<sup>149</sup> The Court further explained that “an agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”<sup>150</sup> This holding created an exception to granting *Seminole Rock* deference and has been aptly-called the “anti-parroting” canon.<sup>151</sup>

Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, dissented.<sup>152</sup> Citing the *Seminole Rock* standard, Justice Scalia asserted that the Attorney General’s interpretation was “clearly valid, given the substantial deference [the Court] must accord it.”<sup>153</sup> He also questioned the majority’s creation of the exception for interpretations that merely

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144. See *id.* at 248–49 (citing Controlled Substances Act, 21 U.S.C. § 801 (2000)).

145. *Id.* at 249 (citing ORE. REV. STAT. §§ 127.800–127.990 (2003)).

146. *Id.* at 256 (citing 21 C.F.R. § 1306.04 (2005)).

147. *Id.* at 254; see 21 U.S.C. § 824(a)(4) (2006) (explaining how the Attorney General may deny, suspend, or revoke a physician’s registration if it is “inconsistent with the public interest”).

148. See *Gonzales*, 546 U.S. at 255 (citing *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997)).

149. *Id.* at 257.

150. *Id.* (explaining that “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”).

151. See, e.g., Hanah Metchis Volokh, *The Anti-Parroting Canon*, 6 N.Y.U. J.L. & LIBERTY 290 (2011).

152. *Gonzales*, 546 U.S. at 275 (Scalia, J., dissenting).

153. *Id.* at 275.

“restate the terms of the statute itself” as finding no support in *Auer*.<sup>154</sup> He quipped that the “Court cites no authority for it, because there is none” and “it is doubtful that any such exception . . . exists.”<sup>155</sup>

Taken together, *Auer* and *Gonzales* represent vital cases in Justice Scalia’s *Seminole Rock* jurisprudence. In both cases, he endorsed a broad application of *Seminole Rock* without analyzing or questioning the underlying validity of the doctrine. Looking back, Justice Scalia was likely referring to these cases when he wrote later in *Talk America* that he had “in the past uncritically accepted” the doctrine.<sup>156</sup>

C. *Talk America, Inc. v. Michigan Bell Telephone Co.*:  
*Can you hear me now?*

Approximately fifteen years after Justice Scalia wrote for a unanimous Court in *Auer* fully supporting the *Seminole Rock* doctrine came an abrupt change in course in his view concerning the validity of the doctrine.<sup>157</sup> Although he joined Justice Thomas’s opinion for a unanimous Court in *Talk America* in 2011, he also penned a brief concurrence where he began what would be an unfinished crusade to overrule the *Seminole Rock* doctrine.<sup>158</sup>

The key question in *Talk America* was whether local telephone service providers “must make certain transmission facilities available to competitors at cost-based rates.”<sup>159</sup> Because “no statute or regulation squarely addresse[d]” whether the providers were required to do so under the applicable statute and regulations, the Court explained that “in the

154. *Id.* at 275, 277.

155. *Id.* at 277.

156. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67–68 (2011) (Scalia, J., concurring).

157. From 2006 (when *Gonzales* was decided) until mid-2011, the Court invoked the *Seminole Rock* doctrine eight times. There was nothing exceptional about the cases with respect to Justice Scalia’s *Seminole Rock* jurisprudence. See *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1139 (2011); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011); *Cocur Ala., Inc. v. Sc. Ala. Conservation Council*, 557 U.S. 261, 274–75 (2009); *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 295–96 (2009); *FedEx Corp. v. Holowecki*, 552 U.S. 389, 397 (2008); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328 (2008); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 672 (2007). In all these cases, except *Long Island Care*, the Court cited *Auer* for the *Seminole Rock* deference standard.

158. See *Talk Am.*, 564 U.S. at 52; *id.* at 67–68 (Scalia, J., concurring) (explaining that he would hold the same as the majority without the *Seminole Rock* doctrine because “the FCC’s interpretation is the fairest reading of the orders in question”).

159. *Id.* at 53 (majority opinion).

absence of any unambiguous statute or regulation,” it would “turn to the FCC’s interpretation of its regulations.”<sup>160</sup> The FCC construed its regulations to mandate use of the facilities if they were to be used “to link the incumbent provider’s telephone network with the competitor’s network for the mutual exchange of traffic.”<sup>161</sup>

Despite not being a party to the litigation and having submitted its interpretation in a brief as *amicus curiae*, the Court nonetheless deferred to the FCC.<sup>162</sup> The Court supported its decision to grant *Seminole Rock* deference by citing *Auer* and reasoned that the FCC’s interpretation was worthy of deference “even in a legal brief, unless the interpretation [was] ‘plainly erroneous or inconsistent with the regulation[s]’ or there [was] any other ‘reason to suspect that the interpretation [did] not reflect the agency’s fair and considered judgment on the matter in question.’”<sup>163</sup>

The Court then scrutinized the FCC interpretation and concluded that it was not “‘plainly erroneous or inconsistent with the regulation[s],’” and was “more than reasonable.”<sup>164</sup> It also observed that “there [was] no danger that deferring to the Commission would effectively ‘permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation,’” and that the interpretation did not constitute “a *post-hoc* rationalization.”<sup>165</sup>

Although Justice Scalia’s endorsement of Justice Thomas’s opinion would not have raised any eyebrows, his concurring opinion certainly did. In his concurrence, Justice Scalia focused on the *Seminole Rock* doctrine and, more specifically, his newborn uncertainty with its place in our administrative state: “For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity.”<sup>166</sup> He recognized the problems previously identified with the doctrine, such as the separation of powers concerns, that it could encourage agencies to promulgate vague regulations, and that it “frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.”<sup>167</sup> Justice Scalia concluded his opinion by bluntly stating that “we have not been asked to

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160. *Id.* at 57, 59.

161. *Id.* at 53.

162. *Id.* at 67.

163. *Id.* at 59 (second alteration in original) (quoting *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997))).

164. *Id.* at 61–62 (alteration in original) (quoting *Auer*, 519 U.S. at 461).

165. *Id.* at 63–64 (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)).

166. *Id.* at 67–68 (Scalia, J., concurring) (referring to the *Seminole Rock* doctrine as “*Auer* deference.”).

167. *Id.* at 68–69.



reconsider *Auer* in the present case. [But when] we are, I will be receptive to doing so.”<sup>168</sup>

It goes without saying that Justice Scalia’s concurring opinion in *Talk America* sent ripples through administrative law circles and prompted a renewed interest by scholars in examining the doctrine. More broadly and more importantly, his opinion is remarkable in the dramatic and whole-scale shift in Justice Scalia’s view of a bedrock administrative doctrine that, in his own words, he had “uncritically accepted” in the past.<sup>169</sup> At the time, it remained to be seen whether his remarks represented his isolated view that would be cabined to the facts of *Talk America* or whether it would be a harbinger of a more concentrated assault on the *Seminole Rock* doctrine.

D. Christopher v. SmithKline Beecham Corp.:  
*A Step Forward and A Step Back?*

Following Justice Scalia’s brief concurrence in *Talk America*, the legal community paid special attention to subsequent cases that raised *Seminole Rock* issues. And such a case came the very next year in 2012. With respect to Justice Scalia’s skepticism about the validity of the *Seminole Rock* doctrine, however, the case sent a mixed-message. On one hand, *Christopher v. SmithKline Beecham Corp.*<sup>170</sup> is the rare case where the Court declined to grant *Seminole Rock* deference to an agency interpretation.<sup>171</sup> On the other hand (and surprisingly), Justice Scalia was part of the majority, which endorsed the doctrine, despite finding that *Seminole Rock* deference was not appropriate under the facts presented.<sup>172</sup>

In *SmithKline Beecham*, the Court determined whether a Department of Labor (DOL) regulation defining “outside salesman” included pharmaceutical sales representatives.<sup>173</sup> After examining the DOL regulations and DOL’s interpretation, the Court evaluated whether it should defer to DOL’s interpretation under *Seminole Rock*.<sup>174</sup> Although it acknowledged that deference was usually due, the Court clarified that “this general rule does not apply in all cases.”<sup>175</sup> The Court then focused on previous circumstances where it refused to defer under *Seminole Rock*, including “when there is reason to suspect that the agency’s interpretation

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168. *Id.* at 69.

169. *Id.* at 68.

170. 132 S. Ct. 2156 (2012).

171. *See id.* at 2166–67.

172. *Id.*

173. *Id.* at 2161.

174. *Id.* at 2165.

175. *Id.* at 2166.

‘does not reflect the agency’s fair and considered judgment on the matter in question.’”<sup>176</sup>

As examples of when the “fair and considered judgment” element was not met, the Court noted “when the agency’s interpretation conflicts with a prior interpretation,”<sup>177</sup> and when an agency’s interpretation appears to be “nothing more than a ‘convenient litigating position,’ . . . or a ‘*post hoc* rationalizatio[n]’ advanced by an agency seeking to defend past agency action against attack.”<sup>178</sup> Examining these issues, the Court declined to defer to the DOL’s interpretation under *Seminole Rock*.<sup>179</sup> The Court reasoned that accepting DOL’s interpretation would not give fair warning to the public and would constitute “unfair surprise.”<sup>180</sup>

In Justice Thomas’s majority opinion, he conceded that there were “undoubtedly . . . important advantages” to applying *Seminole Rock* deference.<sup>181</sup> But then he reasoned that *Seminole Rock* deference also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby “frustrat[ing] the notice and predictability purposes of rulemaking.”<sup>182</sup> Thus, *SmithKline Beecham* is a step forward for the searching inquiry performed by the Court when deciding whether to defer in order to protect against the risks previously identified by Justice Scalia (and Justice Thomas) in *Seminole Rock* cases. But it is also a step back with respect to the approval by Justice Scalia of the validity of the doctrine.

*E. Decker v. Northwest Environmental Defense Center:  
Enough is Enough*

It was not long before the *Seminole Rock* doctrine appeared in another Supreme Court case. A year after *SmithKline Beecham*, the Court released its opinion in *Decker v. Northwest Environmental Defense Center*.<sup>183</sup> Beyond Justice Scalia’s vociferous attack on the doctrine, the separate opinions of Chief Justice Roberts and Justice Alito made it clear that there was enough

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176. *Id.* at 2166 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

177. *Id.* (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

178. *See id.* at 2166 (alteration in original) (citation omitted) (quoting *Auer*, 519 U.S. at 462).

179. *Id.* at 2168.

180. *Id.* at 2167 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

181. *Id.* at 2168.

182. *Id.* (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)).

183. 133 S. Ct. 1326 (2013).

momentum amassed that the Court would re-evaluate the doctrine in a suitable case.

At issue in *Decker* was whether the federal “Clean Water Act [CWA] and its implementing regulations required permits before channeled stormwater runoff from logging roads can be discharged into the navigable waters of the United States.”<sup>184</sup> The CWA and the implementing regulations issued by the EPA mandated that a permit for such runoff is necessary if the discharge is “deemed to be ‘associated with industrial activity.’”<sup>185</sup> An EPA regulation further defined “the term ‘associated with industrial activity’ to cover only discharges ‘from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.’”<sup>186</sup>

Like in other *Seminole Rock* cases, the EPA filed an amicus brief for the case stating that “the EPA interprets its regulation to exclude the type of stormwater discharges from logging roads at issue.”<sup>187</sup> The Court concluded, applying the *Seminole Rock* doctrine, that deference to the EPA’s interpretation was appropriate because the EPA’s determination was a “reasonable interpretation of its own regulation.”<sup>188</sup> The majority decision, therefore, was a fairly straightforward application of the *Seminole Rock* doctrine.

However, it was the separate opinion of Justice Scalia and others that are noteworthy with respect to *Seminole Rock*. First, in a separate opinion, concurring in part and dissenting in part, Justice Scalia agreed with the majority that the case was not moot and that the District Court had jurisdiction, but he appeared to have reached his breaking point when stating, “enough is enough” with respect to “giving agencies the authority to say what their rules mean under the harmless-sounding banner of” *Seminole Rock* deference.<sup>189</sup>

Justice Scalia was prompted to write because unlike in *Talk America*, where the “agency’s interpretation of the rule was also the fairest one, and no party had asked [the Court] to reconsider” the doctrine, the application of the *Seminole Rock* doctrine in *Decker*, “[made] the difference.”<sup>190</sup>

184. *Id.* at 1330.

185. *Id.* (quoting 33 U.S.C. § 1342(p)(2)(B) (2006)).

186. *Id.* at 1330–31 (quoting 40 C.F.R. § 122.26(b)(14) (2006)).

187. *Id.* at 1331 (citing Brief for United States as Amicus Curiae Supporting Petitioners at 24–27, *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (No. 11-338)).

188. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

189. *Id.* at 1339 (Scalia, J., concurring in part and dissenting in part) (citing *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring)).

190. *Id.*

Moreover, he maintained that the “circumstances of these cases illustrate [*Seminole Rock*’s] flaws in a particularly vivid way.”<sup>191</sup>

He pointed out that the Court had not “put forward a persuasive justification” for *Seminole Rock* deference and proffered many of the criticisms of the doctrine argued in scholarship and by justices in past cases.<sup>192</sup> Justice Scalia ended his attack on the *Seminole Rock* doctrine by concluding that “however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers,”—namely that “who writes a law must not adjudge its violation.”<sup>193</sup>

Second, the other aspect of *Decker* that was significant with respect to Justice Scalia’s campaign was the concurring opinion of Chief Justice Roberts, joined by Justice Alito, which clarified their interest in re-evaluating the *Seminole Rock* doctrine.<sup>194</sup> The Chief Justice acknowledged that Justice Scalia’s opinion “raise[d] serious questions about the principle[s] set forth” in *Seminole Rock* and *Auer*.<sup>195</sup> Chief Justice Roberts concluded his opinion by letting it be known that that he “would await a case in which the issue is properly raised and argued.”<sup>196</sup>

#### F. *Perez v. Mortgage Bankers Ass’n: The Elephant in the Room*

Given the Court’s various opinions in *Decker*, it was no surprise that the *Seminole Rock* doctrine took center stage in *Perez v. Mortgage Bankers Ass’n*<sup>197</sup> in its 2014–2015 term. Although the case did not directly raise the *Seminole Rock* doctrine, the three separate concurring opinions penned by Justices Scalia, Thomas, and Alito—as well as their questions at the oral arguments—demonstrated that the *Seminole Rock* doctrine was the proverbial elephant in the room.<sup>198</sup>

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191. *Id.*

192. *Id.* (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting)); see generally Anthony, *supra* note 17, at 11–12; Manning, *supra* note 12).

193. *Decker*, 133 S. Ct. at 1342 (Scalia, J., concurring in part and dissenting in part).

194. *Id.* at 1338 (Roberts, C.J., concurring).

195. *Id.* (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997)).

196. *Id.* Although the Chief Justice remarked that “it may be appropriate to reconsider that principle in an appropriate case,” he conceded that *Decker* was not appropriate because the parties had not set forth arguments on the issue. *Id.* at 1338–39.

197. 135 S. Ct. 1199 (2015).

198. *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment); *id.* at

Justice Sotomayor wrote the decision on behalf of the Court.<sup>199</sup> The central question presented in the case was whether the *Paralyzed Veterans* doctrine was consistent with the APA.<sup>200</sup> Under the *Paralyzed Veterans* doctrine, which was created by the U.S. Court of Appeals for the District of Columbia in 1997, “once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”<sup>201</sup> Thus, *Seminole Rock* was potentially implicated by the Court’s assessment of the validity of the *Paralyzed Veterans* doctrine as it applied to informal agency interpretations of its own regulations.

The case involved DOL regulations implementing the FLSA.<sup>202</sup> The FLSA, as a general matter, mandates that covered employers pay overtime wages to employees who work more than forty hours per week.<sup>203</sup> An exemption in the FLSA, however, states “‘any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . .),’ is exempt from the ‘minimum wage and maximum hour requirements’ otherwise required by the Act.”<sup>204</sup>

The Mortgage Bankers Association (MBA) alleged that DOL had shifted its interpretation of the scope of the exemption.<sup>205</sup> The MBA maintained that certain employees, such as mortgage loan officers, should be subject to the FLSA exemption; thus, not entitled to over-time pay.<sup>206</sup> It pointed to various DOL opinion letters, as well as an administrative interpretation bulletin, that showed DOL’s shifting interpretation.<sup>207</sup> The latest of these

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1211 (Scalia, J., concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment).

199. *See id.* at 1203 (majority opinion).

200. *Id.*; *see also* 5 U.S.C. § 551–706 (2012).

201. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). The court revisited, and re-affirmed, this holding later in *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033–34 (D.C. Cir. 1999), but the doctrine is most often cited as the *Paralyzed Veterans* doctrine.

202. *Perez*, 135 S. Ct. at 1204–05; 29 U.S.C. §§ 201–19 (2012).

203. *Perez*, 135 S. Ct. at 1204–05; *see* 52 Stat. 1060, as amended, 29 U.S.C. §§ 201–262; *see also* *Mortg. Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193, 195–96 (2012); 29 U.S.C. § 207(a)(1).

204. *See Solis*, 864 F. Supp. 2d at 196 (alterations in original) (quoting 29 U.S.C. § 213(a)(1)).

205. *Id.* at 196–201.

206. *Id.* at 198.

207. *Id.* at 201.

interpretations was one that the MBA challenged as violating the *Paralyzed Veterans* doctrine.<sup>208</sup>

The unanimous Court held that the *Paralyzed Veterans* doctrine “improperly impose[d] on agencies an obligation beyond the ‘maximum procedural requirements’ specified in the APA.”<sup>209</sup> The Court reasoned that the APA plain language stated that unless “‘notice or hearing is required by statute,’ the APA’s notice-and-comment requirement ‘does not apply . . . to interpretative rules.’”<sup>210</sup> Simply stated, “because an agency is not required to adhere to the notice-and-comment” requirements when developing an initial interpretive rule, it is not required to do so if it later decides to alter or repeal such interpretive rule.<sup>211</sup> Thus, as a result of the APA’s categorical exemption of interpretive rules from the notice-and-comment provisions, the *Paralyzed Veterans* doctrine could not stand.<sup>212</sup>

While the Court’s decision was significant and uncontentious in vacating the *Paralyzed Veterans* doctrine, the justices’ separate concurrences concerning the *Seminole Rock* doctrine were more controversial. Justice Scalia’s opinion was his most comprehensive explanation on why *Seminole Rock* should be overruled.

Justice Scalia first agreed with the Court’s conclusion that the *Paralyzed Veterans* doctrine was irreconcilable with the APA.<sup>213</sup> He then disputed the “Court’s portrayal of the result” as being justifiable in light of Congress’s desire to allow agencies leeway to issue interpretive rules.<sup>214</sup> He asserted that the Court’s current deference doctrines, such as the *Seminole Rock* doctrine, had upended the balance that Congress intended when it enacted the APA.<sup>215</sup>

In his view, the APA was enacted as a “check” to agency “zeal” because of the tremendous growth of our administrative state.<sup>216</sup> Although agencies needed the ability to thrive and react to a changing world, the APA’s

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208. *Id.*

209. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

210. *Id.* at 1206 (quoting 5 U.S.C. § 553(b)(A)); *see also* 5 U.S.C. § 553(b) (“Notice of proposed rulemaking shall be published in the Federal Register.”); *id.* § 553(c) (“The agency shall give interested persons an opportunity to participate in the rule making.”).

211. *Perez*, 135 S. Ct. at 1206.

212. *See id.*

213. *Id.* at 1211 (Scalia, J., concurring in the judgment).

214. *Id.*

215. *Id.* In his view, the Court’s development of an “elaborate law of deference to agencies’ interpretation of statutes and regulations” now gives agencies the ability to “authoritatively resolve ambiguities” in both statutes and regulations. *Id.*

216. *Id.* (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)).

notice-and-comment provisions and the mandate that courts should “interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action” were designed to guard against abuse.<sup>217</sup>

However, the Court’s deference doctrines, including the *Seminole Rock* doctrine, have rendered the courts’ role illusory.<sup>218</sup> He asserted that when courts defer to agency interpretations, agencies can effectively bind the public and such interpretive rules have the force of law.<sup>219</sup> With respect to the *Seminole Rock* deference doctrine, Justice Scalia contended that it is especially problematic because if an agency promulgates broad and vague substantive regulations, it can later interpret such regulations according to its needs and then receive controlling deference for its interpretations.<sup>220</sup> This ability, Justice Scalia asserted, conflicted with Congress’s intent when it enacted the APA.<sup>221</sup> He also repeated the separation of powers concerns that he had previously voiced in other cases.<sup>222</sup>

Justice Scalia’s solution that would “restore the balance originally struck by the APA with respect to an agency’s interpretation of its own regulations” would be for the Court to overrule *Seminole Rock*.<sup>223</sup> These would be Justice Scalia’s final words with respect to the *Seminole Rock*

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217. *Id.* (Scalia, J., concurring in the judgment) (quoting 5 U.S.C. § 706 (2012)). Justice Alito similarly recognized in his concurrence that the D.C. Circuit could have created the *Paralyzed Veterans* doctrine to check the “aggrandizement of the power of administrative agencies.” *Id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment). This power, he asserted, amassed because Congress’s delegation of broad lawmaking authority to agencies coupled with the *Seminole Rock* deference doctrine led to agencies’ exploitation of the border between legislative and interpretive rules. *Id.* at 1210. To address this issue, he cited to the separate opinions of both Justice Scalia and Justice Thomas to highlight “substantial reasons why the *Seminole Rock* doctrine may be incorrect.” *Id.* at 1210–11; *id.* at 1211–13 (Scalia, J., concurring in the judgment).

218. *Id.* at 1211 (Scalia, J., concurring in the judgment). Justice Scalia also pointed out the Court has been relying on *Seminole Rock* even though it was decided before the APA was enacted. *Id.*

219. *See id.* at 1212 (“Interpretive rules that command deference *do* have the force of law.”).

220. *Id.*

221. *Id.*

222. *See id.* at 1213.

223. *Id.* Justice Thomas, too, wrote at length about his disdain for the *Seminole Rock* doctrine. *Id.* at 1213 (Thomas, J., concurring in part, dissenting in part). For an in-depth look at Justice Thomas’s views, see Kevin O. Leske, *Chipping Away at the Rock: Perez v. Mortgage Bankers Association and the Seminole Rock Deference Doctrine*, 49 LOY. L.A. L. REV. (forthcoming 2017).

deference doctrine.

*G. Bible v. United Student Aid Funds, Inc.:*

*Justice Thomas Carries the Torch*

Following Justice Scalia's death in February of 2016, the Court was presented with a case that squarely implicated the *Seminole Rock* deference doctrine. In *Bible*, the U.S. Court of Appeals for the Seventh Circuit deferred to the Department of Education's (DOE's) interpretation of one of its own regulations.<sup>224</sup> The defendant, United Student Aid Funds, Inc., petitioned to the Supreme Court for a writ of certiorari.

On May 16, 2016, the Court denied the petition; Justice Thomas dissented from the denial of certiorari.<sup>225</sup> He agreed with Judge Manion, who had written a partial dissent in the case below, that the DOE's interpretation is "not only at odds with the regulatory scheme but also defies ordinary English."<sup>226</sup> Quoting Justice Scalia, Justice Thomas asserted that "by enabling an agency to enact 'vague rules' and then to invoke *Seminole Rock* to 'do what it pleases' in later litigation, the agency—with the judicial branch as its co-conspirator—frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."<sup>227</sup>

Justice Thomas lamented that the "case is emblematic of the failings of *Seminole Rock* deference."<sup>228</sup> In his view, this was a suitable case for re-evaluating *Seminole Rock*.<sup>229</sup> He criticized the Court for "sitting idly by" while permitting "he who writes a law" to also "adjudge its violation."<sup>230</sup>

### III. A ROCK UNTURNED

#### *A. Preliminary Thoughts*

With Justice Scalia's views now explained, the next question is: what accounts for the paradigm shift in his view concerning the *Seminole Rock*

224. *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639 (7th Cir. 2015). The Department of Education's (DOE's) interpretation had been set forth in an amicus brief that the DOE filed at the invitation of the Seventh Circuit. *Id.*

225. *Id.*, cert. denied, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari).

226. *Id.*

227. *Id.* (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67 (Scalia, J., concurring)).

228. *Id.*

229. *See id.*

230. *Id.* (quoting *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1342 (2013)).



deference doctrine? This Part attempts to explain the possible reasons that prompted his radical change on the validity of the *Seminole Rock* doctrine. While we may never know precisely, several key observations can be made. And these observations underscore why the Court should undertake a meaningful evaluation of the doctrine in a future case.

First, Justice Scalia's view on deference to an administrative interpretation of its regulation is inextricably tied to his view on deference to an agency's interpretation of a statutory provision under *Chevron*.<sup>231</sup> The *Seminole Rock* doctrine and *Chevron* doctrine are, after all, "doctrinal cousins" and Justice Scalia regards *Seminole Rock* deference as "*Chevron* deference applied to regulations rather than statutes."<sup>232</sup> And in particular, his view that the theoretical foundation of *Chevron* is premised on providing a "background rule of law against which Congress can legislate" helped to pave the way for his subsequent rejection of *Seminole Rock* later in his tenure on the Court.<sup>233</sup>

Second, it is likely that the Court's decision in *United States v. Mead Corp.*<sup>234</sup> and *Seminole Rock* doctrine cases, such as *Gonzales* and *SmithKline Beecham*, contributed to his skepticism towards the efficacy of the Court's deference doctrines.<sup>235</sup> These cases, in his view, muddled the water with respect to the functionality of *Chevron* deference and *Seminole Rock* deference, respectively, to provide "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."<sup>236</sup>

Third, these factors coupled with the growth of our administrative state, which in his view led to a significant (and dangerous) expansion of agency power, crystallized his belief that the *Seminole Rock* doctrine violated separation of powers principles and therefore should be abandoned.

231. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

232. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part & dissenting in part) (citing *Chevron*, 467 U.S. 837).

233. Antonin Scalia, Associate Justice of the U.S. Supreme Court, *Judicial Deference to Administrative Interpretations of Law*, Administrative Law Lecture at Duke University School of Law, January 1989, in 1989 DUKE L.J. 511, 517 (1989) [hereinafter *Scalia, Judicial Deference*].

234. 533 U.S. 218 (2001).

235. See generally *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

236. *Scalia, Judicial Deference*, *supra* note 233 at 516.

*B. Illusory Intent, Blanket Presumptions, and the Expansion of Agency Power in Our Modern Administrative State*

Just three years after he joined the Court, Justice Scalia had an opportunity to share his view on the *Chevron* doctrine where, five Terms before, the Court established the landmark two-step test to analyze an agency's interpretation of its own statute.<sup>237</sup> Analyzing his views on *Chevron* deference is imperative because Justice Scalia viewed *Seminole Rock* deference as being "*Chevron* deference applied to regulations rather than statutes."<sup>238</sup>

During an Administrative Law Lecture in 1989 sponsored by the Duke Law Journal, he explored both the theoretical basis of *Chevron* and predicted the practical implications of the Court's decision.<sup>239</sup> Most notable, Justice Scalia rejected the notion that separation of powers principles *compelled* judicial deference under *Chevron*.<sup>240</sup> An often repeated justification for *Chevron* is that, in its simplest form, where Congress leaves an ambiguity or "gap" in legislation, which cannot be ascertained by its plain language, the resolution of such issues involves policy judgments that must be answered by the Executive Branch.<sup>241</sup> Rather, he believed that "traditional tools of

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237. See Scalia, *Judicial Deference*, *supra* note 233, at 511; see also *Chevron*, 467 U.S. at 842–43. Under *Chevron* step-one, a court looks to the statutory language to determine whether Congress has directly spoken on the question at issue. See *Chevron*, 467 U.S. at 842–43. If the statute's language is unambiguous, then the court applies the plain meaning of the statute (and the agency's interpretation of the statutory provision is irrelevant). See *id.* If the statute is silent or ambiguous, however, the court proceeds to *Chevron* step-two, where it determines whether the agency's interpretation is "based on a permissible construction of the statute." *Id.* at 843. If the interpretation is reasonable, then the interpretation must be accepted. See *id.* at 843–44.

238. *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part) (citing *Chevron*, 467 U.S. at 837). In his view, courts will accept an agency's interpretation even if it is not the fairest reading of the regulation, as long as it is a plausible reading. *Id.* at 1339–40.

239. See Scalia, *Judicial Deference*, *supra* note 236, at 516. In what would become typical humor and bluntness, Justice Scalia warned the students to "lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture" and to expect "a quiz afterwards." *Id.* at 511.

240. See Scalia, *Judicial Deference*, *supra* note 236, at 515–16.

241. See *id.* at 514–15. Scalia cited to several academic articles. See, e.g., Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 277–78, 283–85 (1988); Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 308, 312 (1986) (noting that *Chevron* shifts policymaking responsibility from courts to "democratically accountable officials" in agencies). He also rejected the notion that "the 'expertise' of the agencies in question, their intense familiarity with the

statutory construction” includes a full range of interpretive tools, including text, legislative history, as well as the consideration of policy implications.<sup>242</sup> These considerations are applied at *Chevron* step-one when determining whether ambiguity exists.<sup>243</sup> If ambiguity does exist, courts will defer to an agency under step-two if its interpretation is reasonable.<sup>244</sup>

He offered a hypothetical that “painlessly” rejects any separation of powers justification for *Chevron*: if Congress specified in a statute that an agency view should be given no deference during judicial review, it seems beyond serious dispute that courts would follow that direction and engage in an interpretive analysis de novo.<sup>245</sup> This, he posited, proves that courts are not *constitutionally* prohibited from evaluating policy considerations that deference is necessary.<sup>246</sup> If it were the case, such a command by Congress could not stand because it would be trumped by the Constitution, as embodied by separation of powers principles.<sup>247</sup>

Rather, the theoretical underpinning, in his view, is more modest.<sup>248</sup> Deference under *Chevron* is nonetheless a function of Congress’s intent but is premised on a different proposition. When Congress leaves an ambiguity, it either intended a result but was imprecise, or Congress had no certain intent in mind and thereby meant the agency to resolve the ambiguity.<sup>249</sup> The Court’s approach to the interpretive question during judicial review, however, is different depending within which category the ambiguity falls.<sup>250</sup> If Congress was not clear but intended a given result then the case presents a legal question that should be resolved by the courts.<sup>251</sup> But where Congress intended to have the agency resolve the issue, the court’s role is to determine whether the agency acted within the scope of its discretion.<sup>252</sup> This threshold inquiry to evaluate congressional intent resulted in a statute-by-statute analysis that in the past had led to

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history and purposes of the legislation at issue, or their practical knowledge of what will best effectuate those purposes” provided a theoretical basis for *Chevron*. Scalia, Judicial Deference, *supra* note 236, at 514.

242. See Scalia, Judicial Deference, *supra* note 236, at 515.

243. See *id.*

244. See *id.* at 516.

245. See *id.* at 515–16.

246. See *id.* at 516.

247. See *id.*

248. See *id.*

249. See *id.*

250. See *id.*

251. See *id.*

252. See *id.*

“uncertainty and litigation.”<sup>253</sup>

The *Chevron* doctrine, therefore, sought to simplify the judicial role by imposing an “across-the-board presumption” that where ambiguity is present courts should assume that Congress intended agencies to have discretion.<sup>254</sup> In actuality, Justice Scalia was even more cynical because discerning “genuine” legislative intent was, in his words, “a wild-goose chase anyway” because “Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn’t think about the matter at all.”<sup>255</sup> Thus, he regarded the entire *Chevron* doctrine as being even more illusory than his initial assumption and is justified as “merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.”<sup>256</sup>

Seen in this light, the *Chevron* doctrine allows for the required flexibility, as well as the necessary political participation, in the administrative process.<sup>257</sup> In other words, if viewed as a background rule of law in administrative law, Congress has learned that any ambiguity that results from its statutory creations (irrespective of whether such ambiguity was intentional or simply an oversight) will not be left to the courts to interpret.<sup>258</sup> Rather, agencies, which remain accountable to the political process—and that are cabined by the requirement that their interpretations are reasonable—will be empowered to resolve such ambiguities.<sup>259</sup>

Thus, in 1989, Justice Scalia endorsed the *Chevron* doctrine, albeit with a different theoretical underpinning than has been articulated throughout the cases and in the scholarship. And because the Court and scholars have suggested that controlling deference under *Seminole Rock* is implicit in Congress’s delegation to agencies under *Chevron*,<sup>260</sup> we can surmise that, if

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253. *Id.*

254. *Id.* (stating that “it is beyond the scope of these remarks to defend that presumption” because he was not on the Court when *Chevron* was decided but asserting that “it is a more rational presumption today than it would have been thirty years ago—which explains the change in the law”).

255. *Id.* at 517.

256. *Id.*

257. *See id.*

258. *See id.*

259. *See id.* At bottom, Justice Scalia agreed with the adoption of the *Chevron* doctrine, but not merely because it was going to result in a more manageable decisionmaking process (for both the courts and litigants), but instead “because it more accurately reflects the reality of government, and thus more adequately serves its needs.” *Id.* at 521.

260. *See, e.g.,* *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151 (1991) (“Because applying an agency’s regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives, we presume that

he gave any serious thought to the *Seminole Rock* doctrine at the time, he would have regarded *Seminole Rock's* foundation as the same: namely, a “blanket default rule” for both courts and Congress.<sup>261</sup>

Turning back to the important question of what changed in Justice Scalia’s mind to prompt him to retract his uncritical acceptance of the *Seminole Rock* doctrine over twenty years later; a lecture that he presented in 2009, two years prior to his *Talk America* concurrence, sheds light on the evolution of his view. During his speech to mark the 25th anniversary of the *Chevron* decision, he reflected on his previous observations and predictions on the impact of the *Chevron* doctrine, as well as the Court’s more recent decision in *Mead*.<sup>262</sup> These insights, coupled with frustration over more recent *Seminole Rock* cases, as well as his view concerning agency power, help explain the evolution of his view that *Seminole Rock* should be overruled.

First, simply stated, Justice Scalia hated *Mead*.<sup>263</sup> In the 2006 case, the Court in *Mead* ruled a court should only grant an agency *Chevron* deference when Congress authorizes the interpretation of a statute, and such interpretation carries with it the force of law.<sup>264</sup> Justice Scalia immediately recognized, in his dissent, that “its consequences will be enormous, and almost uniformly bad.”<sup>265</sup>

In his 2009 remarks, he noted that in 1989 he had predicted, “that in the long run *Chevron* will endure and be given its full scope.”<sup>266</sup> However, Scalia conceded this prediction had been wrong due to *Mead's* back-peddle with respect to the deference inquiry under *Chevron*.<sup>267</sup> Under *Mead*, the Court established that courts must first determine whether “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>268</sup>

In Justice Scalia’s view, *Mead* had a significant impact on *Seminole Rock* deference in several respects. He expressed concern that *Chevron* deference

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the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers.”); *see also* *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 568 (1980).

261. Antonin Scalia, Associate Justice of the U.S. Supreme Court, Remarks for the 25th Anniversary of *Chevron v. NRDC* at American University Washington College of Law, April 2009, in 66 ADMIN. L. REV. 243, 244 (2014). [hereinafter Scalia, 25th Anniversary].

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

263. *Id.* at 241, 261 (Scalia, J., dissenting).

264. *Id.* at 231–32 (majority opinion).

265. *Id.* at 261 (Scalia, J., dissenting).

266. *See* Scalia, *Judicial Deference*, *supra* note 236, at 521.

267. *See* Scalia, 25th Anniversary, *supra* note 261, at 244.

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

coupled with *Mead*'s new analysis would cause an agency to create "bare-bones" regulations because the exercise of creating a regulation—as skeletal as it might be—would demonstrate to a court that it had been enacted under a delegation from Congress.<sup>269</sup> And to the extent that the agency wanted to clarify that interpretation later, it would upon judicial review receive *Chevron* deference for the regulation (since it was promulgated under the notice-and-comment period) and then receive *Seminole Rock* deference for its interpretation.<sup>270</sup>

Such a system would thwart the very goal that *Mead* sought to serve because it would allow the agency to receive deference for the "meat" of the regulation (found in the subsequent interpretation) without ever having to engage in "procedural formalities."<sup>271</sup> Thus, the fact that "agencies [could] get wise to this gimmick" of a "*Mead* loophole" may explain a pragmatic reason why he wished to overturn *Seminole Rock* deference: without *Seminole Rock* deference, the loophole would close.<sup>272</sup>

Second, by installing this new predicate step into the *Chevron* analysis (called *Chevron* step-zero<sup>273</sup> in the academic literature), Justice Scalia was concerned that the Court had turned the inquiry into a "case-by-case, statute-by-statute mode of analysis . . . with all the harmful side effects" that accompany such types of analysis.<sup>274</sup> As one commentator suggested, it is possible that the Court's use of "*Mead*'s controversial flexible deference regime in the previously uncontroversial [*Seminole Rock*] context" might have prompted his shift.<sup>275</sup>

If we view Justice Scalia's loyalty to deference doctrines, such as *Chevron* and *Seminole Rock*, as being mostly rooted in their utility "to simplify the judicial process of giving or withholding deference" then perhaps Justice

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269. See Scalia, 25th Anniversary, *supra* note 261, at 245.

270. *Id.* Justice Scalia had previously articulated this view in *Perez* where he asserted that *Seminole Rock* deference incentivizes agencies to create broad and vague substantive regulations because an agency can later interpret these regulations through interpretive rules, which do not require notice and comment, and receive controlling deference for such interpretations. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring).

271. See Scalia, 25th Anniversary, *supra* note 261, at 245.

272. *Id.* at 246.

273. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (explaining the development of the Court's "initial inquiry into whether the Chevron framework applies at all"); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

274. Scalia, 25th Anniversary, *supra* note 261, at 244.

275. Conor Clarke, *The Uneasy Case Against Auer and Seminole Rock*, 33 YALE L. & POL'Y REV. 175, 194 (2014).

Scalia grew frustrated by the Court's *Seminole Rock* cases that eroded the doctrine's straightforwardness.<sup>276</sup> As Justice Souter observed in *Mead*, "Justice Scalia's first priority over the years has been to limit and simplify," while "the Court's choice has been to tailor deference to variety."<sup>277</sup> Therefore, to the extent that a bright-line rule became riddled with exceptions, we can expect that Justice Scalia would have become frustrated and questioned its vitality in favor of other considerations.

One *Seminole Rock* example where we see this to be true is *Gonzales*.<sup>278</sup> In *Gonzales*, Justice Scalia questioned the basis for the majority's creation of the exception to *Seminole Rock* deference for agency interpretations that merely "restate the terms of the statute itself" (the anti-parroting exception).<sup>279</sup> In the dissent, he quipped that the reason that the Court had not cited any authority for it was that there was none.<sup>280</sup> Reflecting in 2009 on the Court's decision in *Gonzales*, he lamented that courts would now "have to decide case-by-case whether an agency is parroting or not."<sup>281</sup> In other words, *Seminole Rock*'s relatively straightforward analysis of "plainly erroneous or inconsistent with the regulation" had become more layered and nuanced.

And this was not the only expansion of the *Seminole Rock* analysis during his tenure. In *SmithKline Beecham*, the Court aptly summarized many of the exceptions to *Seminole Rock*; all of which had been incorporated into the *Seminole Rock* analysis while Justice Scalia was a member of the Court:

Although [*Seminole Rock*] ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief, . . . this general rule does not apply in all cases. Deference is undoubtedly inappropriate, for example, when the agency's interpretation is "plainly erroneous or inconsistent with the regulation." . . . And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." . . . This might occur when the agency's interpretation conflicts with a prior interpretation, . . . or when it appears that the interpretation is nothing more than a "convenient litigating position," . . . or "post hoc rationalizatio[n] advanced by an agency seeking to defend past agency action against attack."<sup>282</sup>

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276. *Id.* at 194 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001)).

277. *See Mead Corp.*, 533 U.S. at 236.

278. *See Gonzales v. Oregon*, 546 U.S. 243 (2006).

279. *Id.* at 277 (Scalia, J., dissenting) ("It is doubtful that any such exception to the *Auer* rule exists.").

280. *Id.* at 277 (Scalia, J., dissenting) (stating that the "Court cites no authority for it, because there is none.").

281. *See* Scalia, 25th Anniversary, *supra* note 261, at 246.

282. *See* *Christopher v. SmithKline Beecham Corp.* 132 S. Ct. 2156, 2166–67 (2012)

Thus, taken together, *Mead*'s new rule and these various *Seminole Rock* exceptions undermine the ability of both *Chevron* and *Seminole Rock* to operate as "blanket default" rules in our administrative state.<sup>283</sup> Thus, Justice Scalia's earlier view in 1989 that it was "best to adopt a straightforward default rule that courts could easily administer and that Congress, if it wished, could legislate around" no longer applied in full force. Perhaps the Court's recitation in *SmithKline Beecham* of what the *Seminole Rock* inquiry had become finally tipped Justice Scalia towards his conclusion that it would be best to abandon it all together.<sup>284</sup>

Third, Justice Scalia also expressed a broader concern that agencies were amassing too much power for his comfort. In his view, abandoning *Seminole Rock* was a prime way to diminish such power. He explained his belief in detail in his dissent in *Perez* that *Chevron* and *Seminole Rock* have tilted the balance that Congress sought when it enacted the APA.<sup>285</sup> He believed that because of the Court's creation of an "elaborate law of deference to agencies' interpretation of statutes and regulations," an agency effectively can now "authoritatively resolve ambiguities" in both statutes and regulations.<sup>286</sup>

This development, in his view, undermined the APA's goal to serve as a "check" to agency "zeal" to counter the unprecedented growth of our administrative state.<sup>287</sup> Various provisions within the APA were supposed to function together to act as a restraint on agency action. For example, the notice-and-comment provisions set forth a procedural mechanism for

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(citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 211 (2011); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994); and quoting *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)) (final alteration in original); *see also generally Auer*, 519 U.S. at 461–62; *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007) (suggesting *Seminole Rock* deference was not warranted if interpretation results in "unfair surprise").

283. *See* Scalia, 25th Anniversary, *supra* note 261, at 244.

284. Nor would returning to the pre-exception *Seminole Rock* standard be satisfying to Justice Scalia because of his broader concern about the aggrandizement of agency power. Regardless of whether Justice Scalia might have been partly satisfied if *Mead* were overruled, some of his same concerns about *Seminole Rock* would remain, such as the constitutional prohibition of allowing agencies to self-interpret, as well as incentivizing agencies to promulgate vague regulations.

285. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212–13 (2015) (Scalia, J., concurring).

286. *Id.* at 1211 (Scalia, J., concurring).

287. *Id.* (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)).



agencies to follow when promulgating a rule,<sup>288</sup> and another provision assigns the court the role to then “interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”<sup>289</sup> Thus, when enacting the APA, Congress envisioned that courts would have the authoritative role to decide ambiguities in statutes and regulations.<sup>290</sup>

Therefore, an agency should use a legislative rule to make known its interpretation of the law to the public, but such interpretation does not bind the public (and should not have the force of law) because the court during judicial review has the final say on the matter.<sup>291</sup> But Justice Scalia believed that the *Seminole Rock* doctrine, as it is currently applied, has upset this balance.<sup>292</sup> Simply stated, the courts’ role to resolve ambiguities is illusory when the courts are compelled to defer under *Seminole Rock*.<sup>293</sup> Because agencies can now effectively bind the public as a result of the agency receiving deference for its interpretation of its interpretive rule, interpretive rules are no longer used simply to notify the public.<sup>294</sup>

In sum, in light of Justice Scalia’s view that our administrative state has evolved in this way, it should be no surprise that his view on the merits of the *Seminole Rock* doctrine evolved, as well. His newfound solution to “restore the balance originally struck by the APA with respect to an agency’s interpretation of its own regulations” was naturally to jettison *Seminole Rock*.<sup>295</sup> To do so would restore the APA’s plain language resulting in no deference to agencies’ interpretations of their regulations and would provide the needed check to agency power that had grown to unacceptable levels during his time on the Court.<sup>296</sup>

288. *Id.* at 1202; *see also* 5 U.S.C. § 553(c) (2012) (mandating that an agency notify the regulated community of the proposed rule, ask for comments on the rule, consider and reply to comments received, and then justify the final rule or decision upon completion).

289. *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (quoting 5 U.S.C. § 706 (2012)).

290. *Id.* at 1211.

291. *Id.* at 1211.

292. *Id.* at 1213.

293. *Id.* at 1212; *see also* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

294. *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment) (stating “interpretive rules that command deference *do* have the force of law.”).

295. *Id.* at 1213.

296. *Id.*; *see also* *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part) (stating a regulation’s meaning should be determined by applying “familiar tools of textual interpretation,” such as the fairest reading of the regulation).

## CONCLUSION

As I have set forth in previous articles, reforming the current *Seminole Rock* standard would lead to positive results in our administrative state, such as increased consistency, uniformity, fairness and transparency.<sup>297</sup> The various opinions of Justice Scalia addressing the *Seminole Rock* doctrine show that there are both practical implications and weighty constitutional concerns with the doctrine that impede the achievement of these principles. These concerns coupled with the confusion and inconsistencies in the lower courts when they attempt to apply the doctrine demonstrate why the Court should not allow Justice Scalia's efforts to have been in vain. The Court should re-evaluate the doctrine to reform *Seminole Rock* to address the persuasive practical and constitutional concerns expressed by Justice Scalia and other justices.

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297. Leske, *Splits in the Rock*, *supra* note 14 ("more clarity and uniformity in [the *Seminole Rock* inquiry] should promote greater fairness, increased transparency, and more meaningful public participation."); *see also* Leske, *Hard Place*, *supra* note 2, at 274 (challenging the current *Seminole Rock* standard "would better effectuate consistency, transparency, and accountability in the administrative state").