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NOTES

THE CURIOUS CASE OF *SEMINOLE ROCK*: REVISITING JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS OF THEIR AMBIGUOUS REGULATIONS

*Peter M. Torstensen, Jr.**

Introduction

The Constitution created a governing structure designed to safeguard citizens from the concentration of government power.[1] To create this structure, the framers relied upon three primary mechanisms—the separation of government powers, a system of checks and balances, and the lawmaking process. In particular, the framers vested the legislative, executive, and judicial powers in separate branches to provide distinct boundaries for each power.[2] However, they permitted enough interference to equip each branch with

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1 Some argue that this protection even extends to seemingly benign assertions of authority. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) ("The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.").

2 *See* U.S. Const. art. I, § 1 (vesting the legislative power in Congress); U.S. Const. art. II, § 1, cl. 1 (vesting the executive power in the President of the United States); U.S. Const. art. III, § 1 (vesting the judicial power in the Supreme Court and inferior courts established by Congress); *see also* The Federalist No. 48, at 245 (James Madison) (Lawrence Goldman ed., 2008) ("It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments.").

power to defend against encroachments from the other branches.[3] These checks and balances secure sufficient separation by relying on the ambition of men to preserve their own power.[4] In addition, the legislative process requires that, in order to become binding law, a bill must pass both houses of Congress and be presented to the President for approval[5]—a process that, in practice, is quite burdensome.[6] This process reflects a value judgment by the framers that "the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[7]

The modern administrative state is predicated on a normative judgment that is often in direct opposition to individual liberty interests—namely, there is a distinct preference for efficient governance in light of modern exigencies.[8] Out of these efficiency-based concerns arose judicially constructed doctrines of deference to agency decisionmaking. In particular, courts defer to an agency's reasonable interpretation of ambiguities in the statutes they administer—"*Chevron* deference"[9]—and the regulations they promulgate—"*Seminole Rock* deference."[10] Both *Chevron* and *Seminole Rock* alleviate some of the administrative burden on agencies by giving them significant latitude in their interpretive decisions, subject to two general requirements: (1) there must be an ambiguity in the statute or regulation, and (2) the interpretation

3 *See* THE FEDERALIST NO. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008) (arguing that defenses needed to be given to the respective branches that were "commensurate to the danger of attack"); *id.* ("But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

4 *See id.* (arguing that separation would be achieved by relying on "[a]mbition . . . to counteract ambition," which involved empowering the respective branches to resist the encroachments of the others).

5 The legislative process requires adherence to the bicameral and presentment requirements of Article I, § 7. *See* U.S. CONST. art. I, § 7, cls. 1–3. First, the Constitution vests the legislative power in Congress, which consists of a Senate and a House of Representatives. Second, it requires that a bill must be passed by both houses and then presented to the President. Finally, it requires that the President either approve the bill—after which it becomes law—or veto the bill—after which it only becomes law if repassed by two thirds of the Senate and House of Representatives.

6 *See* Schoolhouse Rock!, *I'm Just a Bill*, YOUTUBE (Sept. 1, 2008) https://www.youtube.com/watch?v=tyeJ55o3El0.

7 INS v. Chadha, 462 U.S. 919, 951 (1983).

8 *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1223 n.6 (2015) (Thomas, J., concurring) (quoting Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 214–15 (1887)) (referencing Woodrow Wilson's argument that concerns regarding the administrative state are found in the inability to separate what is necessary to preserve liberty from what is merely incidental, not in the general intrusions into personal liberty).

9 *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–44 (1984).

10 *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945). *Seminole Rock* deference is often referred to as *Auer* deference. For consistency, this Note exclusively refers to the doctrine as the *Seminole Rock* doctrine.

of the statute or regulation must be reasonable.[11] *Chevron* is based on a presumption of congressional intent.[12] That is, when Congress delegates authority to an agency to execute a statutory program, they intend for the agency to resolve ambiguities in the statute.[13] *Seminole Rock* appears to be an obvious corollary—if Congress intends for an agency to clarify ambiguities in a statute Congress drafted, surely Congress also intends the agency to clarify any ambiguities in its own regulations.[14] However, the *Seminole Rock* principle suffers from some significant constitutional infirmities.

At a closer look, *Seminole Rock* deference violates the principle of separation of powers and incentivizes troubling exercises of agency gamesmanship. When an agency interprets an ambiguity in a statute they are charged with administering, the legislative branch effectively relinquishes power to the agency, or executive branch, to resolve the ambiguity in pursuit of a reasonable regulatory program.[15] However, when an agency interprets an ambiguity in a regulation *it* promulgated, expands the power of the executive branch by reserving for themselves the authority to interpret the rule they authored.[16] This encourages agencies to enact vague regulations to avoid the inconveniences of agency rulemaking and, at a later time, issue interpretations to achieve their regulatory ends—interpretations that bind the courts so long as they are not "plainly erroneous."[17] This problem is exacerbated by the procedural requirements of the Administrative Procedure Act (APA), which provides "the maximum procedural requirements" that courts may impose on agencies engaged in rulemaking.[18] While the APA obligates agencies that engage in rulemaking to follow the extensive notice-and-comment

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11 *See Chevron*, 467 U.S. at 842–44; *Seminole Rock*, 325 U.S. at 413–14.

12 Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1449–50 (2011) (noting that this "presumption is in turn grounded in a set of pragmatic considerations—most notably expertise, accountability, and uniformity—that are thought to favor administrative over judicial construction").

13 *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 621–23 (1996) (discussing congressional authority to delegate legislative discretion to administrative agencies).

14 Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("On the surface, it seems to be a natural corollary—indeed, an *a fortiori* application—of the rule that we will defer to an agency's interpretation of the statute it is charged with implementing. But it is not." (citation omitted)).

15 *See id.* (arguing that deference to an agency's interpretation of a statute "effectively cedes power to the Executive").

16 *See id.* (arguing that "when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning").

17 *See id.* (noting that deference to an agency's interpretations of its own rules "encourages the agency to enact vague rules which give it the power . . . to do what it pleases").

18 *See* Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–06 (2012); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

requirements,[19] it expressly exempts interpretive rules from these onerous provisions.[20] While the contours of interpretive rules are imprecise, they have the potential to impose obligations upon citizens just as burdensome as legislative rules.[21]

Recognizing these issues, some courts have enacted procedural safeguards to protect against agency abuse of the interpretive rules exemption.[22] Agencies can use interpretive rules to interpret new regulations, old regulations, and to reinterpret previously settled interpretations.[23] In *Paralyzed Veterans of America v. D.C. Arena L.P.*, the D.C. Circuit attempted to protect against burdens imposed on affected parties by agency reinterpretations.[24] *Paralyzed Veterans* held that when an agency significantly revises a previously settled interpretation of a regulation, it has in effect, amended the rule without notice and comment, which is prohibited under the APA.[25] While the aim of *Paralyzed Veterans* was noble, the Supreme Court held in *Perez v. Mortgage Bankers Ass'n* that requiring interpretive rules, even those that are significant revisions, to go through notice and comment violates the clear text of the APA and the obligation that reviewing courts not impose additional pro-

19 The APA prescribes the process for rulemaking at 5 U.S.C. § 553(b)–(c). The procedure calls for three steps. First, the agency is required to issue a "[g]eneral notice of proposed rule making," which is usually published in the Federal Register. *Id.* § 553(b). Second, if notice is required, the agency must give interested parties the opportunity to participate in the process by providing an opportunity for comment. *Id.* § 553(c). Finally, when the agency promulgates the final rule, they are required to include in the rule "a concise general statement of their basis and purpose." *Id.*

20 The APA exempts "interpretative rules," more commonly referred to as interpretive rules, from the general rulemaking process. *See id.* § 553(b)(A). For consistency, this Note uses the term "interpretive rules."

21 *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring) (noting the concern created by "the exploitation by agencies of the uncertain boundary between legislative and interpretive rules"); *id.* at 1212 (Scalia, J., concurring) (noting that "if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules"). While the line between legislative and interpretive rules is imprecise, this Note assumes that even minor "interpretations" have the capacity to substantively affect the rights and interests of affected parties. Thus, the concerns about *Seminole Rock* will remain wherever that line is drawn.

22 *See* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (1997) (requiring notice and comment for interpretations of previously settled ambiguities that significantly revise the regulation), *abrogated by Mortg. Bankers*, 135 S. Ct. 1199 (2015); *see also Mortg. Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring) (calling the *Paralyzed Veterans* doctrine "a courageous . . . attempt to limit the mischief").

23 This becomes particularly troubling when an agency reinterprets a regulation with a previously settled meaning, as it can impose undue burdens on affected parties who ordered their conduct based on the prior interpretation. These reinterpretations, as noted in *Mortgage Bankers*, effectively create "new regulation[s]." *See Mortg. Bankers*, 135 S. Ct. at 1221 (Thomas, J., concurring).

24 *Id.* at 1209 (discussing the potential for abuse that *Paralyzed Veterans* was designed to address).

25 Alaska Prof'l Hunters Ass'n, Inc. v. Fed. Aviation Admin., 177 F.3d 1030, 1034 (D.C. Cir. 1999) (citing *Paralyzed Veterans*, 117 F.3d at 586).

cedural requirements on agency action beyond those provided for in the APA.[26] *Mortgage Bankers* has important—albeit indirect—consequences for the future of *Seminole Rock*. Namely, the repudiation of the *Paralyzed Veterans* doctrine opens the door for agencies to issue interpretive rules to accomplish substantive revisions in regulatory policy.[27] This increases the possibility that the Court will soon be presented with opportunities to reconsider the merits of *Seminole Rock*. This is important, as there now appear to be as many as four Justices willing to consider the possibility of either overruling or significantly limiting *Seminole Rock*—Chief Justice Roberts and Justices Scalia, Thomas, and Alito.[28]

Seminole Rock deference warrants reconsideration as it is based on questionable constitutional and pragmatic foundations. This Note argues that courts should provide a meaningful check on agency interpretations by engaging in de novo review of agency resolutions of regulatory ambiguities. Part I explores the development of the *Seminole Rock* doctrine, from its questionable doctrinal foundations and rapid expansion to the developing concerns regarding its continued validity. In addition, Part I explains the variety of forms that agency interpretations can take, including legal briefs, amicus briefs, and internal memoranda, and discusses their impact in expanding the scope of *Seminole Rock* deference. Part II considers the various justifications for, and concerns with, *Seminole Rock* deference. In particular, Part II looks at two primary arguments offered in support of *Seminole Rock*—the agency's special insight and institutional competence—and assesses their merits in light of *Seminole Rock*'s primary concerns—separation of powers and agency gamesmanship. Finally, Part III considers the merits of Professor Manning's argument that *Seminole Rock* should be replaced with *Skidmore* deference,[29] and concludes, despite the potential efficiency costs, that the Court should abandon *Seminole Rock* and engage in de novo review of agency interpretations of their regulations.

I. THE EVOLUTION OF *SEMINOLE ROCK* DEFERENCE

A. The Genesis of Deference to Agency Interpretations of Agency Regulations

During World War II and for the purpose of "stabiliz[ing] prices . . . and other disruptive practices resulting from abnormal market conditions," Congress passed the Emergency Price Control Act of 1942 (the Act), which dele-

26 *Mortg. Bankers*, 135 S. Ct. at 1206 (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978)).

27 *See id.* at 1212 (Scalia, J., concurring) (arguing that giving interpretive rules deference provides broad powers to agencies to accomplish their objectives without the burden of notice-and-comment procedures).

28 *See infra* notes 80–83, 90–98, 102–16 and accompanying text.

29 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (giving weight to an agency's interpretation based on the "thoroughness evident in the 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").

gated authority to the Price Administrator to establish maximum prices for commodities by regulation or order.[30] Three years later, in *Bowles v. Seminole Rock & Sand Co.*, the Supreme Court was called upon to determine the proper interpretation and application of a price regulation—Maximum Price Regulation No. 188 (the Regulation)—issued by the Administrator pursuant to his authority under the Act.[31] The Regulation provided that any seller of articles subject to the Regulation—which included sellers of crushed stone—could not charge a higher price than the price which they charged during the base period of March 1, 1942, through March 31, 1942.[32] The Court was tasked with determining the meaning of the phrase: "Highest price charged during March 1942."[33]

Seminole Rock & Sand Co. manufactured crushed stone subject to the Regulation.[34] In October 1941, Seminole Rock contracted with Seaboard Air Line Railway to provide crushed stone on demand at sixty cents per ton, but the stone was not delivered until March 1942.[35] In January 1942, Seminole Rock contracted with V.P. Loftis Co. to provide crushed stone on demand at $1.50 per ton, but Loftis only demanded a small portion of the stone during January—more deliveries were eventually made to Loftis in August 1942.[36] After the effective date of the Regulation, Seminole Rock entered into new contracts with Seaboard to sell crushed stone at eighty-five cents and one dollar per ton, but the Price Administrator brought an action to enjoin Seminole Rock from violating the Regulation, alleging that the highest price that Seminole Rock could sell the crushed stone for was the sixty cents per ton it had previously charged Seaboard.[37] In particular, the Court had to determine if "highest price charged" meant that the seller had to charge and deliver the product during March 1942 or if it just required an actual delivery of the product during March 1942.[38] If the Court found that the product had to be charged *and* delivered during March 1942, the ceiling price for Seminole Rock would likely be the outstanding offering price of $1.50 per ton to Loftis.[39] If, however, the Court determined that the product only needed to be delivered during March 1942, the ceiling price would be sixty cents per ton as Seminole Rock had delivered crushed stone to Seaboard during March of 1942 at that price.[40] The problem before the Court appeared to be a common interpretive issue, but the Court seized the oppor-

30 Emergency Price Control Act of 1942, Pub. L. No. 77-421, §§ 1(a), 2(a), 56 Stat. 23, 23–24. The Act created the Office of Price Administration, and placed it under the direction of the Price Administrator. *Id.* § 201, 56 Stat. at 29.

31 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 411 (1945).

32 *Id.* at 413.

33 *Id.* at 414 (internal quotation marks omitted).

34 *Id.* at 412.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 415.

39 *Id.*

40 *Id.*

tunity to opine on the respective roles of courts and administrative agencies in determining the meaning of ambiguous agency regulations.[41]

Without citing prior precedent or offering any constitutional justification, the Court announced a new approach to evaluating agency interpretations of their ambiguous regulations:

> [When the interpretation at issue] involves an [agency's] interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or *the principles of the Constitution in some situations may be relevant* in the first instance in choosing between various constructions. But the *ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.*[42]

The problem with this *ipse dixit* pronouncement was that it served as a supplementary principle, rather than as a dispositive one, and thus had no meaningful influence on the outcome of the case.[43] Instead, the Court engaged in what was essentially de novo review of the regulation, concluded that the ceiling price was the "highest price charged [for an article delivered] during March[ ] 1942," and then noted that their reading of the regulation "and the *consistent administrative interpretation* . . . thus compel[led] th[is] conclusion."[44] Thus, the Court introduced a novel approach to reviewing an agency's resolution of a regulatory ambiguity and then concluded that its new approach was unnecessary to determining the meaning of the regulation, which essentially rendered the discussion about the "controlling weight" given to "the administrative interpretation" mere dictum.[45] The subsequent expansion of the *Seminole Rock* doctrine is particularly concerning given the shaky ground on which it stands.

B. The Shaping of Seminole Rock *Deference*

For over half a century, *Seminole Rock* and its unstable foundation developed outside the watchful eye of the Supreme Court and the academic community.[46] In fact, after *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*

41 *See id.* at 414–17.

42 *Id.* at 413–14 (emphases added).

43 The Court evaluated the terms of the regulation and reached a conclusion on its own *before* noting that the administrative interpretation removed any doubts regarding the conclusion it reached. Rather than deciding the outcome, the newly minted principle of deference merely supported it. *See id.* at 414–18 (interpreting the provisions of the regulation and determining that the most sensible conclusion was that the price ceiling was determined based on actual delivery of the products); *id.* at 417 (noting that any doubts regarding their conclusion "[we]re removed by reference to the administrative construction of this method of computing the ceiling price").

44 *Id.* at 418 (emphasis added).

45 *See id.* at 414. As the Court's independent construction of the regulation resolved the issue, the discussion about deference was essentially dictum.

46 *See* Manning, *supra* note 13, at 613–14 (discussing the vastly different treatment of *Chevron* and *Seminole Rock* by the legal community).

Inc.[47] was decided, scholarly ire was reserved for discussions regarding the legitimacy of *Chevron* deference while *Seminole Rock* deference went largely unnoticed.[48] Between 1945 and 1996, the Supreme Court cited *Seminole Rock* for its proposition regarding deference twenty times—five of these citations, however, were in dissent.[49] During this time, the Court provided a sufficiently reasoned discussion of the justifications for deference to agency interpretations in only a fraction of the cases that cited *Seminole Rock*.[50] Prior to Professor Manning's seminal article, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, the Court and the academic community seemed to consider *Seminole Rock* deference a necessary, if not

47 Chevron U.S.A. Inc., v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

48 Manning, *supra* note 13, at 613–14 (noting that "[e]xhaustive academic commentary has scrutinized *Chevron*'s legitimacy," while "*Seminole Rock* deference . . . has long been one of the least worried-about principles of administrative law").

49 This result was reached by searching "Citing References" under the *Seminole Rock* case in Westlaw. The results were limited as follows: I selected "Cases," under "Jurisdiction" selected "Federal" and further limited the results to "Supreme Court," and, finally, entered a "Date Range" of "6/5/1945 to 2/18/1997" to capture the period between *Seminole Rock* and *Auer v. Robbins*, 519 U.S. 452 (1997). This search yielded twenty-two results, two of which did not cite *Seminole Rock* for the principle of deference—*M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614 (1946), and *United States v. Swank*, 449 U.S. 814 (1980) (denying motion for additional time for oral argument and for divided argument).

Five of the remaining twenty results were cited in dissent. Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 103 (1995) (O'Connor, J., dissenting) (citing *Seminole Rock* with approval but finding the interpretation at issue either "plainly erroneous or inconsistent with the regulation" (quoting Stinson v. United States, 508 U.S. 36, 45 (1993))); Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 297 (1994) (Souter, J., dissenting); Jean v. Nelson, 472 U.S. 846, 865 (1985) (Marshall, J., dissenting); United States v. Swank, 451 U.S. 571, 589 (1981) (White, J., dissenting); Peters v. Hobby, 349 U.S. 331, 355 & n.4 (1955) (Reed, J., dissenting). Thus, while the five cases in dissent cited *Seminole Rock*'s deference language with approval, *Seminole Rock* was only relied upon to resolve fifteen cases in more than fifty years.

50 In the cases relying on *Seminole Rock*, the Court often applied the principle of deference in a less than critical fashion. *See, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (observing that the Court's task was not to select the option that would best serve the regulatory purpose); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (uncritically deferring to the interpretation of the agency); Ehlert v. United States, 402 U.S. 99, 105 (1971) (finding the Court "obligated to regard as controlling a reasonable, consistently applied administrative interpretation"); United States v. City of Chicago, 400 U.S. 8, 10 (1970) (uncritically deferring to the interpretation of the agency); INS v. Stanisic, 395 U.S. 62, 72 (1969) (finding the consistently applied agency interpretation dispositive of the case without discussion of the rationale for deference). These results were often reached without much discussion and under the assumption that *Seminole Rock* clearly controlled—not once did the Court suggest that the "plainly erroneous" language was dictum.

It seems abundantly clear that the first fifty years of *Seminole Rock* deference did not garner the same attention in the Court or the academic community as the first thirty years of *Chevron*—despite *Chevron*'s arguably more stable constitutional foundation. *See* Manning, *supra* note 13, at 625–27 (discussing the constitutional justifications for *Chevron*).

uncontroversial, expediency in the practice of administrative law.[51] The lack of attention, however, did nothing to prevent the doctrine from significantly expanding its reach.[52] In fact, the Court's largely unquestioned adherence to the *Seminole Rock* principle allowed it to grow from strongly worded dictum to a firmly-entrenched tenet of administrative law.[53] Like the small spark that eventually lays waste to the forest, the initial applications of *Seminole Rock* deference left little cause for concern, as it often served to merely supplement the Court's conclusion.[54] However, as the doctrine began to spread, its application became more and more troubling. The remainder of this Part will evaluate the expansion of the *Seminole Rock* doctrine and the Court's moderated efforts to limit its reach.

1. The Steady Expansion of *Seminole Rock*

For the first twenty years after it was decided, *Seminole Rock* made little noise. In fact, the Court did not apply *Seminole Rock* to determine the outcome of a case until 1965, when it decided *Udall v. Tallman*.[55] After determining that they "show[ed] great deference to the interpretation given the statute by the officers or agency charged with its administration," the Court uncritically asserted that "deference [was] even more clearly in order" when "the construction of an administrative regulation rather than a statute [wa]s

51 *See* Manning, *supra* note 13, at 616–17 (conceding that "*Seminole Rock* may be an understandable reaction to the exigencies of modern regulatory governance" but arguing that "one must assess [*Seminole Rock*'s] validity in light of the incentives it supplies to an agency engaged in rulemaking").

52 For the first twenty-five years following *Seminole Rock*, the federal circuit and district courts cited it ninety-eight times. This result was found by searching "Citing References," as described above, *supra* note 49, and using the "Date Range" of "6/5/1945 to 12/31/1970." The attention given to *Seminole Rock* during the next twenty-five years was far more substantial than the previous twenty-five years—lower courts cited it 462 times. This result was found by searching "Citing References," as described above, *supra* note 49, and using the "Date Range" of "1/1/1971 to 2/18/1997."

53 When the Court announced the *Seminole Rock* principle, they referred to the "ultimate criterion" of the administrative interpretation, which was to be given "controlling" effect. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). The Court cited no authority for this principle. *Id.* at 413–14. By the mid-1990s, however, members of the Court seemed compelled to affirm its validity, even in dissent. *See Guernsey Mem'l Hosp.*, 514 U.S. at 108 (O'Connor, J., dissenting) ("I take seriously our obligation to defer to an agency's reasonable interpretation of its own regulation[ ] . . . .").

54 *See* Russell L. Weaver & Thomas A. Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-*Chevron *Assessment*, 22 MEM. ST. U. L. REV. 411, 414 (1992) (arguing that there was doubt regarding the extent to which courts adhered to deference standards as courts often used deference principles "in a perfunctory manner").

55 The only two Supreme Court cases citing *Seminole Rock* prior to *Udall v. Tallman*, 380 U.S. 1 (1965), were *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614 (1946), and *Peters v. Hobby*, 349 U.S. 331 (1955). *Kraus* cited *Seminole Rock* for a different proposition, *see Kraus*, 327 U.S. at 622 (citing for procedural requirement), and *Peters* cited *Seminole Rock* in dissent, *see Peters*, 349 U.S. at 355 & n.4 (Reed, J., dissenting).

[at] issue."[56] The Court, however, provided some explanation regarding factors that would render an interpretation reasonable, finding that a consistently applied interpretation was one such factor.[57] This mild restraint by the Court was significant, as it chipped away at the incredibly broad deference language from *Seminole Rock*.[58] When the Court decided *Ford Motor Credit Co. v. Milhollin* in 1985, it was presented with the question of whether the Federal Reserve Board's interpretation of a regulation governing disclosure requirements for consumer lending under the Truth in Lending Act was reasonable.[59] The Court employed traditional tools of statutory construction and determined that the regulation was ambiguous.[60] More importantly, the Court felt obligated to accept the agency's "expert judgment" regarding the meaning of the regulation, and while there was more than one acceptable interpretation, the Court declined to independently construe the regulation.[61] The decision not to independently construe the regulation was important, as the Court ever so slightly placed additional interpretive questions outside its reach on account of the "broad experience" of the agency with consumer credit practices.[62] Just like that, the reach of *Seminole Rock* deference began to take on a life of its own. It was later extended to apply to an agency interpretation of another agency's regulations,[63] and it was

56 *Udall*, 380 U.S. at 16.

57 *Id.* at 17–18 (determining that the consistently applied interpretation of the Secretary warranted deference as long as it was not unreasonable because it "had . . . been a matter of public record and discussion"); *see also* Ehlert v. United States, 402 U.S. 99, 105 (1971) (deferring to "a reasonable, consistently applied administrative interpretation" (citing INS v. Stanisic, 395 U.S. 62, 72 (1969))).

58 The language in *Seminole Rock* bears repeating. The Court declared that "[t]he intention of Congress or *the principles of the Constitution in some situations may be relevant* . . . in choosing between various constructions. But *the ultimate criterion* is the administrative interpretation . . . ." *Seminole Rock*, 325 U.S. at 414 (emphases added). This seems backwards. Certainly, if the principles of the Constitution are not implicated by an administrative construction of an ambiguous regulation, these principles should not factor into the Court's eventual determination. If, however, constitutional principles are relevant to the case, the Court's construction of the regulation does not bow to an administrative interpretation. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land . . . .").

59 Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 557 (1980).

60 *Id.* at 559–62.

61 *See id.* at 568–70 (declining to independently construe the statute on the grounds that the Court would be "embark[ing] on a voyage without a compass").

62 *Id.* at 568–69 (finding that "[a]dministrative agencies are simply better suited than courts to engage in . . . a process" of evaluating and regulating consumer credit practices).

63 *See* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697–99 (1991) (finding that the Secretary of Labor's interpretation of the interim regulations issued by the then-existent Department of Health, Education, and Welfare (HEW) was entitled deference). While the Court never specifically referenced *Seminole Rock*, it deferred to the Secretary of Labor's construction of a regulation issued by HEW—an application of *Seminole Rock* deference in substance, if not in form. *See id.*

applied outside the traditional context of administrative regulations—the world of criminal sentencing.[64]

During the mid-1990s, the Court decided two cases that revealed developing cracks in the foundation of *Seminole Rock*. In *Thomas Jefferson University v. Shalala*[65] and *Shalala v. Guernsey Memorial Hospital*,[66] six different Justices joined two separate dissenting opinions, criticizing the manner in which the Court extended deference to the respective administrative interpretations—although neither dissenting opinion suggested a departure from *Seminole Rock*.[67] Just two short years later, in *Auer v. Robbins*, the Court reaffirmed their fidelity to the *Seminole Rock* principle.[68] Even though the Secretary's interpretation of the regulation was first submitted to the Court in the form of a legal brief, the Court determined that this did not render the interpretation unworthy of deference, as it was "in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack."[69] The Court was satisfied that the Secretary's interpretation "reflect[ed] the agency's fair and considered judgment on the matter in question."[70] In reaching this conclusion, the Court added an additional

64 Stinson v. United States, 508 U.S. 36, 44–45 (1993) (arguing that the Sentencing Commission's commentary on its sentencing guidelines was similar to an agency's interpretation of its own regulations and finding that the commentary was entitled to *Seminole Rock* deference).

65 512 U.S. 504 (1994).

66 514 U.S. 87 (1995).

67 In *Guernsey Memorial Hospital*, Justices Scalia, Souter, and Thomas joined Justice O'Connor in dissent, *see id.* at 102 (O'Connor, J., dissenting), while Justices Stevens, O'Connor, and Ginsburg joined Justice Thomas in his dissent in *Thomas Jefferson University*, 512 U.S. at 518 (Thomas, J., dissenting). Both dissenting opinions only criticized the particular application of *Seminole Rock* deference. *See Guernsey Mem'l Hosp.*, 514 U.S. at 108–10 (O'Connor, J., dissenting) (objecting to the Secretary's reliance on an informal policy manual that had not complied with the notice-and-comment procedures established by the APA on the grounds that it undermined the deliberative process by failing to comply with those procedures); *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting) (arguing that "giving substantive effect to such a hopelessly vague regulation . . . disserves the very purpose behind the delegation of lawmaking power to administrative agencies, which is to 'resol[ve] . . . ambiguity in a statutory text'" (second and third alterations in original) (quoting *BethEnergy Mines*, 501 U.S. at 696)). Neither dissenting opinion suggested a departure from *Seminole Rock*. *See Guernsey Mem'l Hosp.*, 514 U.S. at 108 (O'Connor, J., dissenting) ("I take seriously our obligation to defer to an agency's reasonable interpretation of its own regulations . . . ."); *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting) (dissenting on the grounds that the agency interpretation at issue, rather than *Seminole Rock*, was unreasonable).

68 *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (observing that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, *under our jurisprudence*, controlling unless 'plainly erroneous or inconsistent with the regulation'" (emphasis added) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945))).

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

70 *Id.*

measure of flexibility to the manner in which an agency could establish that an interpretation was reasonable.[71] While *Auer* reaffirmed the Court's commitment to *Seminole Rock*, the next fourteen years of *Seminole Rock*'s life were marked by ebbs and flows, rather than the steady expansion that had been the hallmark of the first fifty years of its existence.

2. The Minor Retractions of the Expanding *Seminole Rock* Doctrine

While *Auer* may have suggested that the propriety of *Seminole Rock* was a settled matter, the Court continued to wrestle with the proper circumstances in which to apply the doctrine. Three years later, in *Christensen v. Harris County*, the Court, for the first and only time, declined to apply *Seminole Rock* to an agency interpretation of a regulation on the ground that the interpretation was plainly erroneous.[72] In part, the Court determined that the regulation was simply not ambiguous.[73] The Court refused to defer to an opinion letter interpreting a permissive regulation as a mandatory one, and it observed that such deference would allow an agency "under the guise of interpreting a regulation, to create de facto a new regulation."[74] Six years later in *Gonzales v. Oregon*, the Court held that deference to an agency interpretation was not warranted when it was simply a "parroting regulation," as any ambiguity in the regulation was due to the ambiguity in the statute.[75]

In *Christensen* and *Gonzales*, the Court limited the expanding reach of *Seminole Rock* in two critical ways. First, the Court determined that an agency could not earn deference by imposing an ambiguity on a regulation.[76] Second, the Court determined that an agency could not resolve an ambiguity in a statute by issuing parroting regulations and interpreting the regulations

71 Originally, the Court required that the interpretation not be "plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414. In later applications of *Seminole Rock*, the Court gave great weight to consistently applied interpretations. *See* Udall v. Tallman, 380 U.S. 1, 17 (1965). The requirement that an interpretation "reflect the agency's fair and considered judgment on the matter in question," by its terms, does not impose any procedural requirements on the agency. That is, as long as the agency can satisfy the Court that its interpretation represents its "fair and considered judgment," there appear to be no obligations regarding the manner or method in which the interpretation is presented—such as a public memorandum or interpretive rule.

72 *See* Christensen v. Harris Cty., 529 U.S. 576, 588 (2000) (characterizing the agency's position as inconsistent with the regulation's "obvious meaning").

73 *Id.*

74 *Id.*

75 546 U.S. 243, 256–57 (2006) (finding that *Seminole Rock* deference was "inapplicable . . . [because] [t]he language the Interpretive Rule addresse[d] c[ame] from Congress, not the Attorney General, and the near equivalence of the statute and regulation belie[d] the Government's argument for [*Seminole Rock*] deference").

76 This prevents an agency from imposing an ambiguity on a regulation and then interpreting the ambiguity to create an essentially "new" regulation. Otherwise, the agency could manufacture complete regulatory regimes, by virtue of some linguistic gymnastics, without having to comply with the burdensome notice-and-comment provisions of the APA.

rather than the statute.[77] While these decisions may have suggested a slow, but steady, departure from the expansive reach of *Seminole Rock*, a series of cases on the heels of *Gonzales* suggested that the indications of its demise were greatly exaggerated.[78] In short, the Court's decisions in the five years following *Gonzales* strongly suggested that it remained committed to the *Seminole Rock* principle.

C. The Growing Discomfort With Seminole Rock

In a case where the majority employed an otherwise unremarkable application of *Seminole Rock* deference,[79] Justice Scalia wrote a concurring opinion in *Talk America, Inc. v. Michigan Bell Telephone Co.*, expressing his growing doubts regarding the validity of *Seminole Rock*.[80] He noted that it appeared to be "a natural corollary . . . of the rule that we will defer to an agency's interpretation of the statute it is charged with implementing."[81] However, he argued that *Seminole Rock* presented very different separation-of-powers concerns than *Chevron*.

> When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.
>
> . . . .
>
> Deferring to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive. By contrast, deferring to an agency's interpretation of its own rule encourages the agency to enact

77 By issuing regulations that closely mirror an ambiguous organic statute, an agency could avoid a significantly contested notice-and-comment period and then issue interpretations resolving the relevant ambiguity—interpretations that would not be subject to notice and comment. *Gonzales* forecloses this specific opportunity for agency abuse.

78 *See, e.g.*, Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 277–78 (2009) (deferring to an agency interpretation offered in an internal memorandum); Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 295–96, 296 n.7 (2009) (deferring to an agency interpretation that was both inconsistent with a prior interpretation of the same regulation and offered in a legal brief); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 169–71 (2007) (deferring to an agency interpretation that was inconsistent with a prior interpretation of the same regulation).

79 *See* Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2263–64 (2011).

80 *Id.* at 2266 (Scalia, J., concurring) ("It is comforting to know that I would reach the Court's result even without [*Seminole Rock*]. For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity.").

81 *Id.* (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

> vague rules which give it the power, in future adjudications, to do what it pleases.[82]

Scalia further indicated that he would be receptive to reconsidering the *Seminole Rock* doctrine in the future.[83] His concurrence marked the first time in nearly seventy years that anyone on the Court had questioned the doctrinal foundations of *Seminole Rock*, and it has fundamentally changed the manner in which the Court has approached questions of deference to agency constructions of their regulations.

It did not take the Court very long to revisit the issue of *Seminole Rock* deference. The next term, the Court decided *Christopher v. SmithKline Beecham Corp.*, which presented the question whether pharmaceutical sales representatives were "outside salesmen," as defined by the Department of Labor (DOL) pursuant to its authority under the Fair Labor Standards Act (FLSA), and thus exempted from the FLSA's overtime compensation requirement.[84] The DOL initially interpreted "outside salesman" to require that the employee for whom an exemption is sought be directly involved in the consummation of a transaction, which would bring pharmaceutical sales representatives within the ambit of the "outside salesman" exemption.[85] However, after the Court granted certiorari, the DOL issued a new interpretation, requiring the employee to actually transfer title in order for the employer to qualify for the exemption.[86] The Court refused to defer to the DOL's interpretation on the grounds that it would constitute an "unfair surprise," which would "impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced."[87] While there were no express suggestions that the Court reconsider *Seminole Rock*, the tone of the opinion and the extended discussion of the rationale behind deference to agency interpretations seemed to indicate a shift away from the uncritical acceptance of *Seminole Rock*.

D. The Calls to Reconsider Seminole Rock

The next term, in *Decker v. Northwest Environmental Defense Center*,[88] the Court again addressed the question of judicial deference to agency interpretations. The minor fissures that had surfaced in the foundation of *Seminole*

82 *Id.*

83 *Id.*

84 Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2161 (2012).

85 *Id.* at 2166.

86 *Id.*

87 *Id.* at 2167. The Court expressed concern about the fairness of deferring to an agency's interpretation of a regulation that allows it to enforce a regulation against a party without reasonable notice. *See id.* at 2168 ("It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.").

88 133 S. Ct. 1326 (2013).

Rock after *Talk America* and *SmithKline Beecham* had now become fractures. While the majority deferred to the EPA's interpretation of its Industrial Stormwater Rule,[89] three Justices in two separate opinions indicated their willingness to reconsider the *Seminole Rock* principle.[90] In his concurrence, Chief Justice Roberts—joined by Justice Alito—indicated that Justice Scalia's opinion "raise[d] serious questions about the principle set forth in [*Seminole Rock*]," and stated that he would be willing "to reconsider that principle in an appropriate case."[91]

Justice Scalia questioned the doctrinal foundations of the *Seminole Rock* principle and called on the Court to reconsider it, arguing that the cases before the Court highlighted the primary concerns with *Seminole Rock*.[92] Relying again on the argument that *Seminole Rock* "contravenes one of the great rules of separation of powers," he deconstructed the principal justifications—provided by the Court's prior cases—for adherence to the *Seminole Rock* principle.[93] In particular, he rejected the arguments that (1) the agency's position as drafter of the rule gave it special insight into the administrative intent of the rule,[94] and that (2) the special expertise possessed by the agency in the administration of its "complex and highly technical regulatory program" made deference especially warranted.[95] First, he argued that an agency's intent is irrelevant to the question of the regulation's meaning—for that, the Court must look to the text of the rules promulgated by the agency.[96] Second, he contended that the existence of highly technical administrative programs led to the conclusion that agencies *should make the regulations*, but it did not suggest that agencies should *interpret the regulations*.[97] As he concluded, Justice Scalia apparently offered a parting pitch to Justice Thomas, borrowing without citation his language from *Connecticut National Bank v. Germain*, writing that "[i]t is time for us to presume (to coin a phrase) that an agency says in a rule what it means, and means in a rule what it says there."[98] Two short years later, Justice Thomas would answer the call.

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89 *Id.* at 1337–38 (finding that "an agency's interpretation need not be the [best] possible reading of a regulation," especially when an "agency has been consistent in its" interpretation).

90 *Id.* at 1338 (Roberts, C.J., concurring); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part).

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

92 *Id.* at 1339 (Scalia, J., concurring in part and dissenting in part).

93 *Id.* at 1340–42.

94 *Id.* at 1340.

95 *Id.* (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).

96 *Id.* ("Whether governing rules are made by the national legislature or an administrative agency, we are bound *by what they say*, not by the unexpressed intention of those who made them.").

97 *Id.*

98 *Id.* at 1344; *see also* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

In *Perez v. Mortgage Bankers Association*, the Court considered whether the *Paralyzed Veterans* doctrine was consistent with the APA.[99] *Paralyzed Veterans* required an agency to comply with notice-and-comment procedures when it wished to issue a new interpretation that significantly revised a prior interpretation of a regulation that had been previously adopted by the agency.[100] The Court unanimously held that "[t]he *Paralyzed Veterans* doctrine [wa]s contrary to the clear text of the APA's rulemaking provisions, and it improperly impose[d] on agencies an obligation beyond 'the maximum procedural requirements' specified in the APA."[101] While the majority held that *Paralyzed Veterans* was inconsistent with the APA, the real fireworks came from the trio of separately written concurrences by Justices Alito, Scalia, and Thomas. Justice Alito wrote separately to note that *Paralyzed Veterans* was likely "prompted by an understandable concern about the aggrandizement of the power of administrative agencies" as a result of the *Seminole Rock* doctrine.[102] Justice Scalia wrote separately to note the impact of the shifting landscape of administrative law on the original design of the APA.[103] In particular, he argued that the exemption for interpretive rules from the APA's notice-and-comment provisions was designed to be a modest one in a world where "courts, not agencies, w[ould] authoritatively resolve ambiguities in statutes and regulations."[104] Instead, he argued that interpretive rules have become a tool that an agency can use to advise *and* bind the public.[105] In light of these concerns, he concluded the best course was to abandon *Seminole Rock*.[106]

Perhaps encouraged by Scalia's parting words in *Decker*, Justice Thomas critiqued the constitutional weaknesses underlying *Seminole Rock* deference, arguing that the doctrine improperly "transfer[s] . . . judicial power to the Executive Branch[ ]" and "amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches."[107] First, Justice Thomas argued that the framers placed the judicial power—which was understood to include

99 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015).

100 Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997).

101 *Mortg. Bankers*, 135 S. Ct. at 1206 (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524 (1978)). For an explanation of the rulemaking process and the relevant exemptions, see *supra* notes 19–20.

102 *Mortg. Bankers*, 135 S. Ct. at 1210 (Alito, J., concurring in part and concurring in the judgment).

103 *Id.* at 1211–13 (Scalia, J., concurring in the judgment).

104 *Id.* at 1211.

105 *Id.* at 1212.

106 *Id.* at 1213.

107 *Id.* at 1217 (Thomas, J., concurring in the judgment). Justice Thomas observed that the Court has long claimed that the separation of powers and the constitutional structure of checks and balances are vital to the protection of individual liberty, while endorsing a more flexible approach when it seemed practical. *Id.* at 1215 (citations omitted). Giving only lip service to these principles, he said, "runs the risk of compromising our constitutional structure" as "the Framers . . . [believed] [t]hey were practical and real protections for individual liberty in the new Constitution." *Id.* at 1215–16 (citing Mistretta v. United States, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting)).

the power to resolve ambiguities in the law—in an *independent* judicial branch to insulate them from political pressures.[108] With respect to the executive and legislative branches, the framers made an entirely different value judgment—namely, these branches should be tied to, rather than insulated from, political pressures.[109] Because an agency's interpretation of an ambiguous regulation gives that regulation the force of law, these determinations are, he argued, properly reserved for the exercise of the independent judgment of the courts,[110] and *Seminole Rock* improperly precludes them from exercising this judgment.[111]

Second, he argued that *Seminole Rock* undermines the judicial "check" on the political branches that the judiciary is obligated to exercise.[112] Revisiting the settled principle that "a law repugnant to the constitution is void,"[113] Thomas argued that the framers expected Article III judges to exercise the judicial "check" against executive and legislative actions that were contrary to law.[114] In particular, he argued that this check had not been consistently exercised with respect to administrative interpretations, which allowed "precisely the accumulation of governmental powers that the Framers warned against."[115] The concentrations of power permitted under *Seminole Rock* "allow[ ] agencies to change the meaning of regulations at their discretion and without any advance notice to the parties."[116] As Justice Thomas rightly suggests, the heightened potential for these types of agency abuses, and the attendant likelihood that agencies will take advantage of opportunities to reinterpret previously settled regulations, renders it all the more important that the Court reconsider *Seminole Rock*. Given the likelihood that the Court will soon have an opportunity to do so, the next Part considers the justifications for and against *Seminole Rock*.

II. Justifications for and Against *Seminole Rock* Deference

In light of the concerns raised regarding *Seminole Rock*, this Part considers the relative strengths and weaknesses of judicial deference to agency interpretations. While the concerns implicated by particular agency interpretations are fact-intensive, this Part highlights the particular concerns raised by *Mortgage Bankers*—the reinterpretation of a previously settled administrative ambiguity—as this could be the form the controversy takes the next time the Supreme Court addresses the question. Nevertheless, the concerns associated with *Seminole Rock* are largely the same regardless of the form that the agency interpretation takes. This Part will first address the arguments gener-

108 *Id.* at 1217–18.
109 *Id.* at 1218–19.
110 *Id.* at 1219.
111 *Id.*
112 *Id.* at 1220–21.
113 *Id.* at 1220 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803)).
114 *Id.*
115 *Id.* at 1221.
116 *Id.*

ally advanced in favor of *Seminole Rock* and consider their general merits, and then it will address the common arguments in opposition to *Seminole Rock*.

A. *Rationales for* Seminole Rock *Deference*

While the *Seminole Rock* Court provided no rationale for its principle of deference, the Court and the legal community have offered two primary arguments in support of *Seminole Rock* deference. First, agencies should be given deference because they have special insight into the original intent of their regulations. Second, because agencies administer highly technical regulatory programs requiring specialized knowledge, they are best situated to explain the meaning and purpose of their regulations. Each argument is considered in turn.

1. The Special Insight of Agencies

A frequently cited justification for *Seminole Rock* deference is that agencies are in a better position to know the original intent of their regulations.[117] Essentially, because the agency promulgates the regulations, the agency would be "in a better position . . . to reconstruct the purpose of the regulations in question."[118] This presumption arises because of the agency's "historical familiarity" with the reasons for adopting the regulatory text.[119] The rationale supporting this presumption suggests that interpretations offered closest to when the regulations were promulgated and interpretations by the original drafter would be more deserving of deference.[120] While the agency's intent is certainly more persuasive when the administrative interpretations have been issued by the authoring agency, "*[a]uthorship [ha]s not [been] an essential predicate* to deference under *Seminole Rock*."[121] Moreover, the Court has on occasion been willing to defer to an agency interpretation that was inconsistent with an interpretation given closer to the time when the regulations were promulgated.[122] Despite these exceptions, an agency's special insight seems to carry the most weight when the authoring agency issues

117 *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 152–53 (1991). To discern this intent, it has been suggested that courts utilize pre-promulgation documents, or the administrative history, to help resolve regulatory ambiguities. *See* Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 147–48 (2000).

118 *Martin*, 499 U.S. at 152.

119 *Id.* at 153.

120 *See* Stephenson & Pogoriler, *supra* note 12, at 1454–55.

121 Manning, *supra* note 13, at 630 n.104 (emphasis added) (noting that the Court had previously deferred to agency interpretations of regulations it did not adopt (citing Arkansas v. Oklahoma, 503 U.S. 91, 109–14 (1992))).

122 *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007) (deferring to an agency interpretation that was inconsistent with an interpretation adopted closer in time to the promulgation of the regulation).

an interpretation that is contemporaneous with the promulgation of the regulations at issue.[123]

Relying on an agency's special insight to resolve an ambiguity improperly ignores the purpose of the notice-and-comment procedures—the administrative law analogue to bicameralism and presentment.[124] Notice-and-comment procedures ensure that legally binding obligations are not hastily imposed on affected parties, and they subject regulations to a rigorous process of extended debate and analysis before imbuing them with the force and effect of law.[125] Final regulations are necessarily the product of extended debate, political maneuvering, and compromise—not a singular administrative purpose. For this reason, "[w]hether governing rules are made by the national legislature or an administrative agency, we are bound *by what they say*, not by the unexpressed intention of those who made them."[126] The regulatory text, not the administrative intent, must survive notice and comment. Scouring pre-promulgation documents to divine an agency's intent is little more than glorified conjecture.[127] Giving weight to such conjecture ignores the reality that there is often strong disagreement about the import of the enacted regulatory text.[128] It is, therefore, irrelevant whether the agency interpretation is issued contemporaneously by the drafting agency, as the issue is limited to the meaning of the regulatory text. Agencies are certainly empowered to offer interpretations of their regulations. However, when those interpretations are contested, their interpretation is not the final word, as "[i]t is emphatically the province and duty of the *judicial* department to say what the law is."[129]

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123 *See* Stephenson & Pogoriler, *supra* note 12, at 1454.

124 *See* Manning, *supra* note 13, at 651 (arguing that the "process values served by bicameralism and presentment . . . would be illusory if Congress could transfer its lawmaking powers to agents fully under its control").

125 *Cf. id.* at 649–50 (observing that the bicameral-and-presentment requirements, which serve similar functions to the notice-and-comment procedures, serve three important liberty-preserving functions: (1) making laws harder to pass also makes bad laws harder to pass, (2) they promote caution and deliberation, and (3) they produce the necessary circumstances for open and robust debate).

126 Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part).

127 *But see* Angstreich, *supra* note 117, at 147–48 (arguing that pre-promulgation materials could be used to determine "the original administrative intent of an ambiguous regulation"). While administrative history may not suffer from the same flaws identified with legislative history, this approach still places an inappropriate emphasis on the agency's intended meaning, which is not subject to notice and comment.

128 *See* ERNEST A. YOUNG, THE SUPREME COURT AND THE CONSTITUTIONAL STRUCTURE 121–22 (2012) (observing that Alexander Hamilton believed that implied constitutional powers provided the basis for a Bank of the United States while James Madison believed that chartering the bank was beyond Congress's limited and enumerated powers).

129 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

2. Institutional Competence

Another justification offered for *Seminole Rock* deference is that an agency's judgment should not be subject to unnecessary judicial scrutiny due to its unique expertise in administering a highly technical regulatory regime.[130] Given the inherent complexities attendant to a complex regulatory scheme, along with the interdependence of many regulatory provisions, it may be preferable to let the "expert agencies" resolve regulatory ambiguities over the "generalist courts."[131] This argument is about the relative institutional competence between administrative agencies and the courts, and the outcome of the analysis largely depends on how the interpretive inquiry is framed. For instance, if the resolution of a regulatory ambiguity is framed as an inquiry into the *meaning* of a regulation, the issue is whether courts or agencies are better suited to determining the meaning of the regulatory text.[132] However, if resolving a regulatory ambiguity is framed as a *policy choice*, the inquiry boils down to whether politically accountable agencies or an independent judiciary should be making policy choices.[133] Regardless of how the interpretive inquiry is framed, it is important to consider the relative merits of placing the authority to resolve ambiguities in either administrative agencies or the courts.

If the interpretive inquiry is framed as an inquiry into the meaning of the regulatory text and, consequently, an assessment of the validity of the agency's interpretation, there is significant reason to believe that the courts are at least as effective as agencies in undertaking such a task.[134] Regardless, determining the meaning of the law[135] is a task for the judicial power of the United States, which is vested in the judicial branch.[136] It is without question that agencies are permitted to interpret regulatory ambiguities—indeed, it is

130 *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (finding deference necessary when a "regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991))).

131 Stephenson & Pogoriler, *supra* note 12, at 1456.

132 *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1222 (2015) (Thomas, J., concurring in the judgment) ("The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means. . . . Judges are at least as well suited as administrative agencies to engage in this task").

133 *See* Stephenson & Pogoriler, *supra* note 12, at 1456–57 (suggesting that policy choices may be better left for politically accountable agencies rather than insulated judges).

134 *See supra* note 132.

135 For all intents and purposes, regulations accorded deference are laws. *See Mortg. Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). Once promulgated, they have the force and effect of law. *Id.* Parties electing to disobey regulations are no less subject to sanction than those electing to disobey statutes. *Id.* The power to say what the *law* is, then, rests with the courts when deciding the meaning of regulations, just as it would when deciding the meaning of statutes.

136 *See* U.S. CONST. art. III, § 1.

expected that agencies will clarify ambiguities that arise in the course of enforcing their regulatory program.[137] However, the expectation that agencies, in the course of implementing their regulations, will sometimes need to issue clarifying interpretations of those regulations does not divest the courts of their constitutionally assigned obligation to determine the meaning of the law. The final word about the meaning of the law—whether it takes the form of a statute or regulation—rests with the courts, not agencies.

If, instead, the interpretive inquiry is framed as a policy choice, there is reason to believe that the politically accountable agency, rather than insulated courts, should resolve the regulatory ambiguity.[138] The assumption, however, that any resolution of a regulatory ambiguity involves a policy choice is flawed. This characterization conflates a policy choice with something having policy implications.[139] That a judicial determination of a regulation could have an effect on policy is neither unexpected nor problematic.[140] If every resolution of a regulatory ambiguity were a policy choice reserved for an agency's final determination, it is hard to imagine a role for the courts in evaluating the validity of an agency's interpretation.[141] That simply cannot be right. While it is the agency that is empowered by Congress to make policy choices, the agency's policy choices should be reflected in the regulatory text, not its subsequent interpretations. Moreover, interpretations of regulatory ambiguities should clarify a regulation rather than create a new one. Allowing agencies to utilize these ambiguities as policymaking devices gives them license to capitalize on interpretive rules' exemption from the APA and create binding regulations without adhering to

137 *See* Manning, *supra* note 13, at 687–90 (suggesting that agencies would continue to interpret their regulations under a regime of independent judicial review and noting that if their interpretations were contested they would have to justify them before a reviewing court).

138 *See supra* note 130 and accompanying text.

139 Every decision by a court has an effect on the scope and the contours of a statute, but its decisions are only referred to as policymaking—in the pejorative, *Lochner*-esque sense of that term—when it ventures far beyond the limits of reasoned decisionmaking in which courts ordinarily engage. While not without their flaws, courts have a longstanding history of engaging in principled judicial review of statutory programs while according Congress's legislative judgment its due respect. Labeling every decision made by a court that could impact a regulatory program a "policy choice" reserved for politically accountable agencies conveniently excuses courts from performing their constitutionally assigned role and, ironically, insulates the agency from any accountability.

140 Even assuming that courts faithfully adhere to "*Skidmore*'s admonition to respect persuasive agency expositions of meaning," it is axiomatic that "some ambiguity is inevitable," so "a post-*Seminole Rock* world would sometimes require courts to make interpretive policy judgments now reserved for relatively accountable administrative agencies." Manning, *supra* note 13, at 691.

141 After all, courts are not supposed to make policy—that is reserved for the politically accountable branches. Any determination by a court that an agency interpretation is invalid would, under this reasoning, be an impermissible intrusion into the province of the political branches. But this would render meaningless the judiciary's check against the excesses of the legislative and executive branches.

the liberty-preserving notice-and-comment procedures. Finally, even if it is assumed that resolving a regulatory ambiguity is always a policy choice, there is no constitutional basis for precluding the courts from their duty to independently determine the meaning of the law and to serve as a "check [against] the excesses of [the] political branches."[142]

B. Concerns Presented by Seminole Rock *Deference*

While it is uncontroversial to suggest that the judicial power rests in the judicial branch, proponents of *Seminole Rock* instead point to efficiency as justification for retaining its principle of deference.[143] However, the primary arguments offered against *Seminole Rock* are that it violates the constitutional principle of separation of powers and permits agencies to bypass a meaningful notice-and-comment period by promulgating regulations with ambiguities they can later resolve with binding interpretations. Each argument is considered in turn.

1. Separation of Powers

The Constitution contemplates a meaningful separation between the legislative and interpretive functions of the political branches.[144] While the framers did not intend that the branches be entirely separate,[145] they sought

142 *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1220 (2015) (Scalia, J., concurring in the judgment). In *Mortgage Bankers*, Justice Thomas discusses and rejects the argument, discussed briefly by Professor Manning, that Congress implicitly delegates interpretive authority to the agency because of its familiarity with the regulations and unique expertise. *See id.* at 1224 (Thomas, J., concurring in the judgment); Manning, *supra* note 13, at 630 & n.107; *cf.* Angstreich, *supra* note 117, at 112–50 (arguing that *Seminole Rock* should be retained to give effect to *Chevron*). Thomas notes that Congress cannot delegate power to an agency that it does not possess. *See Mortg. Bankers*, 135 S. Ct. at 1224 (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986)). While Congress has the power to delegate policymaking authority to the agency, which is subject to judicial review, it does not have the authority to delegate final interpretive authority to agencies. Therefore, any implication that Congress delegated judicially binding interpretive authority is void, as Congress cannot delegate power it does not have.

143 *See, e.g.*, Angstreich, *supra* note 117, at 113–28 (rationalizing retention of *Seminole Rock* on the basis of various efficiency costs, such as the social costs of additional regulatory clarity, higher costs of individual determinations, costs of promulgating and enforcing the new regulations, and signification transitional costs).

144 *See* Manning, *supra* note 13, at 638–44 (reviewing the separation-of-powers doctrine in the context of *Chevron* and *Seminole Rock*). For a more robust treatment of the separation of powers doctrine, see *id.* at 631–54. Scott Angstreich also provides a helpful summary of the separation-of-powers concerns attendant to *Seminole Rock*. *See* Angstreich, *supra* note 117, at 110–11.

145 *See* THE FEDERALIST NO. 48, *supra* note 2, at 245 (arguing that "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government, can never in practice be duly maintained").

to prevent the centralization of power in any one branch.[146] Professor Manning observes that the framers took special care to "limit Congress's direct control over the instrumentalities that implement its laws," which he argues was accomplished by limiting the legislative influence over the compensation and election of the President and by insulating the judiciary.[147] From case law and the separation-of-powers tradition, Manning argues that if Congress fails to clearly articulate its policies during bicameralism and presentment, "it does so only at the price of forfeiting its power of policy specification to a separate expositor beyond its immediate control."[148] *Chevron* is consistent with this understanding, but *Seminole Rock* is not.[149] Under *Chevron*, when Congress passes an ambiguous statute, the agency is charged with the independent authority to interpret the ambiguous legal text.[150] Thus, there is separation between the lawmaker (Congress) and the interpreter (the agency).[151] Under *Seminole Rock*, however, the agency is empowered to both promulgate the regulation and interpret any ambiguities in the regulatory text.[152] This is the very "accumulation of all powers . . . in the same hands" that concerned the framers.[153]

The question remains whether the centralization of rulemaking authority in agency hands meaningfully implicates the framers' concerns. While *Seminole Rock* violates the separation-of-powers principle, some scholars have argued that the degree of interference with constitutional values is not significant enough to outweigh the gains in efficient governance by agencies in dire need of more resources and flexibility.[154] In that case, the question is whether the efficiency gains of a doctrine, such as *Seminole Rock*, can ever overcome constitutional infirmity. Assuming that at least some constitutional inconsistency is permitted when the harms are insignificant, the inquiry would, to one degree or another, become a balancing of interests—fidelity to the Constitution on one end and the practical necessities of administrative governance on the other. This balancing, however, misstates the relevant inquiry. Constitutional principles are not balanced against efficiency considerations—where these values collide, the constitutional principles *always* pre-

146 *See* THE FEDERALIST NO. 47, at 239 (James Madison) (Lawrence Goldman ed., 2008) (arguing that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny").

147 Manning, *supra* note 13, at 641–42.

148 *Id.* at 654.

149 *See id.* According to Manning, "*Seminole Rock* leaves in place *no* independent interpretive check on lawmaking by an administrative agency." *Id.* at 639.

150 *Id.*

151 *Id.*

152 *Id.* at 639–40.

153 THE FEDERALIST NO. 47, *supra* note 146, at 239.

154 *See* Angstreich, *supra* note 117, at 113–28 (discussing the costs of abandoning *Seminole Rock*); *see also* Stephenson & Pogoriler, *supra* note 12, at 1459–60 (summarizing the pragmatic arguments in favor of *Seminole Rock*—namely, improved efficiency and flexibility).

vail.[155] Within constitutional limits, agencies should seek efficient regulatory programs.[156] However, the inefficiencies that attend our current governmental structure were intentionally created by the framers to protect individual liberty.[157] Thus, it is of little relevance that *Seminole Rock* enables agencies to operate more efficiently, as the concentration of government powers it allows is the "very definition of tyranny."[158]

2. Agency Gamesmanship

Seminole Rock removes important incentives for agencies to promulgate sufficiently clear regulations.[159] Because interpretive rules are exempt from the notice-and-comment procedures of the APA,[160] an agency may avoid the hassle of notice and comment by promulgating regulations with ambiguous provisions to be filled in later with interpretive rules.[161] As long as an interpretation is not "plainly erroneous," a court will not disturb it.[162] Moreover, an agency can utilize deference in several potentially abusive ways,[163] and *Mortgage Bankers* provided one such example. Under the Fair Labor Stan-

155 *See* Mistretta v. United States, 488 U.S. 361, 426–27 (1989) (Scalia, J., dissenting) (arguing that the degree of commingling of powers may be appropriate for consideration "at the margins," but that it was "far from a marginal question whether our constitutional structure allows for a body which is not the Congress . . . making . . . rules that have the effect of laws"); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment) (arguing that the Court has an obligation to guard against deviations from the principles of the Constitution).

156 This accords with Professor Manning's argument that the Court should substitute the *Skidmore* principle for *Seminole Rock* deference. He argues that *Skidmore* is readily adapted to assessing agency interpretations of their regulations because it reflects due respect for the agency's technical expertise and insight. *See* Manning, *supra* note 13, at 618–19. These are quintessentially efficiency-related concerns.

157 *See Mistretta*, 488 U.S. at 426 (Scalia, J., dissenting) (noting that the framers determined the preferred amount of commingling of powers, presumably to protect liberty).

158 THE FEDERALIST NO. 47, *supra* note 146, at 239; *see also* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 453 (1991) (arguing that "the separation of powers provisions of the Constitution are tremendously important . . . because the fears of creeping tyranny that underlie them are at least as justified today as they were at the time the Framers established them").

159 *See supra* notes 15–21 and accompanying text.

160 *See supra* notes 20–21 and accompanying text.

161 *See supra* notes 17–21 and accompanying text.

162 Perez v. Mortg. Bankers Ass'n, 135 U.S. 1199, 1212 (Scalia, J., concurring in the judgment) ("Of course an interpretive rule must meet certain conditions before it gets deference . . . but once it does so it is every bit as binding as a substantive rule. So the point stands: By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures.").

163 An agency can interpret a regulatory text well after the rule was promulgated, it can promulgate regulations with ambiguities provisions to be resolved by later interpretations, or it can reinterpret a regulatory provision with a previously settled meaning. Assuming these interpretations are "reasonable," the agency receives binding deference. *See supra* note 162 and accompanying text.

dards Act of 1938 ("FLSA" or the "Act"), the DOL was delegated the responsibility to promulgate regulations to determine employee qualifications for "administrative exemptions," which would free employers from overtime pay requirements for those employees.[164] In 2006, the Mortgage Bankers Association (MBA) sought the opinion of the DOL regarding the status of certain mortgage-loan officers,[165] and the DOL determined that the mortgage-loan officers qualified for the exemption.[166] In 2010, just four years later, the DOL changed course and concluded that these same officers no longer qualified for the exemption.[167] While the Court did not opine on or apply *Seminole Rock*, these facts raised genuine concerns among some of the Justices regarding the consequences of binding deference to agency interpretations,[168] and these concerns will likely persist until the Court either abandons *Seminole Rock* or significantly limits its reach.

To be sure, *Seminole Rock* provides certain efficiency-related benefits to agencies and regulated parties.[169] However, efficiency-based principles are secondary to the liberty-protecting values built into the Constitution.[170] While the resolution of regulatory ambiguities may be considered policy choices reserved for politically accountable agencies, this does not justify the conclusion that Congress delegated final interpretive authority to agencies.[171] As previously discussed, the judicial power of the United States is vested in the judicial branch, and courts are obliged, when necessary, to utilize their judicial check to protect against the excesses of the other branches.[172] Permitting the agency to exercise each of the different govern-

164 *Mortg. Bankers*, 135 S. Ct. at 1204 (quotations omitted).

165 *Id.* at 1205.

166 *Id.*

167 *Id.*

168 *See id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment) (noting his concerns with *Seminole Rock* and indicating an interest to address the doctrine after proper briefing and argument); *id.* at 1211–13 (Scalia, J., concurring in the judgment) (arguing that interpretive rules' exemption from notice and comment establishes a far different balance between power and procedure than what was contemplated under the APA, and concluding that *Seminole Rock* should be abandoned); *id.* at 1213 (Thomas, J., concurring in the judgment) (indicating that the line of precedents beginning with *Seminole Rock* was based on questionable principles).

169 *See* Manning, *supra* note 13, at 616–17 ("Viewed in isolation, *Seminole Rock* may be an understandable reaction to the exigencies of modern regulatory governance; it cuts agencies helpful interpretive slack in a world in which life is short, resources are limited, and agencies must address complex issues that have unpredictable twists and turns."); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part) (noting that one practical benefit of *Seminole Rock* is that it reduces the likelihood of extended delay in determining the meaning of an ambiguous regulation).

170 *See Decker*, 133 S. Ct. at 1342 (arguing that "however great may be the efficiency gains derived from [*Seminole Rock*] 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: He who writes a law must not adjudge its violation").

171 *See supra* note 142 and accompanying text.

172 *See supra* note 141 and accompanying text.

mental powers is tantamount to ratifying a governmental structure directly at odds with constitutional principles. This structure enables enterprising agencies to serve as lawmaker and judge of their regulatory regime.[173] In the words of Justice Scalia: "Enough is enough."[174] The Court should move quickly to provide an independent judicial check on agency interpretations of their regulations. The contours of that independent check are considered in the next Part.

III. Navigating the Road Ahead

As the influence of administrative agencies reaches into our daily lives, the concentration of governmental powers in administrative hands is immensely troubling.[175] Given the heightened potential for infringements against personal liberty interests,[176] it seems abundantly clear that the Court should revise its approach to agency interpretations of their regulations. Professor Manning argues, and this Note largely agrees, that the Court should impose an independent judicial check on agency interpretations of their regulatory ambiguities.[177] In addition, Manning claims that the *Skidmore* principle provides the proper constitutional balance for evaluating agency decisionmaking.[178] While the *Skidmore* principle promises the middle ground of an independent judicial check with an appropriate consideration for agency expertise and experience, the principle appears to operate in a manner identical to de novo review. Given the potential for confusion from the indefinite *Skidmore* principle, the Court should utilize de novo review to evaluate agency interpretations of their regulations.

A. *Abandoning* Seminole Rock *Deference for an Independent Judicial Check*

The Constitution is "a framework[ ] for the conduct of government."[179] In that document, the framers determined "how much commingling [of governmental powers] was . . . acceptable" within our constitutional structure.[180] Because that structure was designed to disperse power as a liberty-preserving mechanism, efforts to discard it "on the basis of currently perceived utility

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

174 *Id.* at 1339.

175 Some scholars argue that the administrative state is unlawful, which would make this concentration of powers even more concerning. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (arguing that "[t]he post-New Deal administrative state is unconstitutional"); *see generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

176 *See* Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 601 (1986) (observing that "[t]he doctrine [of separation of powers] has afforded less and less adequate protection for the individual as government has grown into the Leviathan it has become").

177 Manning, *supra* note 13, at 618–19.

178 *Id.* at 618.

179 Mistretta v. United States, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting).

180 *Id.*

will be disastrous."[181] Thus, the doctrines of deference must be evaluated for consistency with our constitutional structure.[182] While there is doubt and disagreement on the matter, there is a modern consensus that *Chevron* can be conceptually reconciled under constitutional principles.[183] Congress passes a law and delegates the execution of that law to an administrative agency, recognizing "that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive . . . action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be."[184] A reviewing court satisfies its obligation to provide an independent judicial check by accepting an agency's reasonable exercise of discretion within the bounds provided by Congress.[185]

Assuming that an agency's resolution of a regulatory ambiguity is policymaking,[186] the operative premise behind *Seminole Rock* becomes problematic—it presumes that the delegation of "lawmaking authority implicitly carries with it a concomitant power of law-exposition,"[187] and it prevents reviewing courts from disturbing agency interpretations that are not "plainly erroneous." This fails to adhere to the constitutional structure in two important respects. At a minimum, *Seminole Rock* allows the power to make the law and the final authority to say what it means to be placed in the same hands, and it strips the judicial branch of their obligation to serve as a check against the excesses of the legislative and executive branches. As previously discussed, this structure is often justified by reference to an agency's technical expertise in administering a highly technical and complex regulatory scheme. This incorrectly presumes that the primary inquiry should be to determine the institution most capable of making the best decisions.[188] The

181 *Id.* at 427.

182 *See* Manning, *supra* note 13, at 637. After evaluating the importance of constitutional structure to the interpretation of ambiguities in statutory text, Professor Manning concludes: "[I]f a court must assign meaning to an agency-ordaining or agency-regulating statute in the face of legislative indeterminacy, it should presume, absent a clear indication to the contrary, that the statute opts for arrangements that best conform to the basic structural commitments of our constitutional scheme of government." *Id.*

183 *See id.* at 623 (arguing that *Chevron* adopts a categorical presumption that silence by Congress is an implied delegation of authority to an agency); Stephenson & Pogoriler, *supra* note 12, at 1449–50 (noting that *Chevron* "is grounded in a presumption . . . about congressional intent"); *see also* Angstreich, *supra* note 117, at 110–11 (reviewing Professor Manning's argument about *Chevron*).

184 *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting).

185 Manning, *supra* note 13, at 627.

186 *See supra* notes 138–42 and accompanying text.

187 Manning, *supra* note 13, at 682.

188 For example, assume that a federal judge has over thirty years of experience as an Assistant United States Attorney (AUSA) prosecuting all types of drug-trafficking offenses. If the judge were to come into possession of information tending to support probable cause that a leader of a well-known drug cartel was involved in a conspiracy to engage in drug trafficking, he could not bring the relevant charges himself—and he certainly could not prosecute those charges and preside as judge simultaneously. It is beyond doubt that

framers have already made decisions regarding institutional competence in the Constitution itself,[189] so the primary inquiry is to determine *to whom* the Constitution has assigned the power to act. To the extent that the Constitution does not directly prescribe the proper use of a government power, the use of that power must be made consistent with our constitutional structure before pragmatic considerations are addressed.[190] While *Seminole Rock* cannot be conceptually reconciled with our constitutional structure,[191] it is important to consider whether the concerns for agency abuse that it creates are academic or practical in nature.

The concerns with *Seminole Rock* deference are more than academic. The proliferation of the administrative state, with agencies that often concurrently exercise powers closely resembling those assigned to the legislative, executive, and judicial branches, has significantly extended the reach of administrative power.[192] Allowing an agency to simultaneously exercise these powers without any independent check threatens to subject regulated parties—of whom there are many—to arbitrary governance.[193] Some scholars have argued that the solution to the concerns of arbitrary governance in a *Seminole Rock* regime lie in imposing limitations on the doctrine designed to avoid common agency abuses.[194] These suggestions include adopting an antiplaceholder principle,[195] reserving deference for regulatory interpretations within formal orders,[196] refusing to permit an agency to enforce a regulation as interpreted against a party without notice,[197] evaluating pre-

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the judge's thirty years of experience would make him as *competent* as many current AUSAs, and it would be of little surprise if the judge were *more competent*. However, the judge's *capacity* to handle the case is irrelevant. The question is whether the judge has the *authority* to bring the charges and prosecute the case simultaneously—which he clearly does not. To be sure, there are important distinctions between the manner in which an agency promulgates and interprets a regulation and the example of a judge exercising executive and judicial powers simultaneously. Nevertheless, this hypothetical structure bears an uncomfortably close resemblance to the structure of regulatory governance permitted under *Seminole Rock*.

189 *Mistretta*, 488 U.S. at 426 (Scalia, J., dissenting).

190 *See supra* note 182 and accompanying text.

191 *See* Manning, *supra* note 13, at 631 (noting that "*Seminole Rock* effectively unifies lawmaking and law-exposition—a combination of powers decisively rejected by our constitutional structure").

192 *See* Kurland, *supra* note 176, at 601 (arguing that "[t]he doctrine [of separation of powers] has afforded less and less adequate protection for the individual as government has grown into the Leviathan it has become").

193 *See* Manning, *supra* note 13, at 617 (arguing that *Seminole Rock* "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").

194 Angstreich, *supra* note 117, at 145–47; Stephenson & Pogoriler, *supra* note 12, at 1467–71, 1481–96.

195 Stephenson & Pogoriler, *supra* note 12, at 1467–71.

196 *Id.* at 1481–96.

197 Angstreich, *supra* note 117, at 146.

promulgation materials to ensure the interpretations are not contrivances,[198] and, finally, stricter enforcement of the line between legislative rules or amendments and interpretive rules.[199] Each of these suggestions is compelling in their own right, but they all embody a questionable assumption—namely, that *pragmatic and efficiency-related concerns may outweigh constitutional concerns.* For all its merits, this assumption improperly orders our priorities under the Constitution.[200] Thus, the question is not whether we can sufficiently fix an unconstitutional doctrine to retain efficiency gains, but whether, once reconciled, a constitutional doctrine may be utilized to retain certain efficiencies. The first step is to ensure that the evaluation of agency interpretations of their regulations is consistent with the constitutional structure. Thus, it is imperative that the Court establishes an independent judicial check against agency interpretations. The next question is whether an independent judicial check can be implemented in a manner that does not entirely relinquish the efficiency benefits of *Seminole Rock.*

B. Skidmore *Deference,* Skidmore *Weight, or Something Else?*

Professor Manning argues that courts should evaluate agency interpretations of regulations under the *Skidmore* framework.[201] Under this standard, reviewing courts give weight to an agency's interpretation of their regulations on the basis of the "thoroughness evident in [the agency's] 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.*"[202] He argues that this approach is consistent with the separation-of-powers requirements, as it provides an independent judicial check on agency action.[203] In addition, he contends that this standard of review recognizes the potential benefits of an agency's insight and experience during the interpretive process.[204] While the substance of *Skidmore* appears to provide an appropriate balance for judicial review, its articulation suggests a standard that appears either to be something more than de novo review or something less than *Seminole Rock* deference. It is not clear where *Skidmore* falls on this continuum, nor is there a satisfactory guiding principle beyond the fact that

198 *Id.* at 147.

199 *Id.* at 145.

200 *See supra* notes 155–58 and accompanying text.

201 Manning, *supra* note 13, at 618.

202 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (emphasis added).

203 Manning, *supra* note 13, at 618–19. Manning offers two noteworthy explanations for how *Skidmore* provides the requisite constitutional check for agency interpretations of their regulations. First, *Skidmore* provides an independent check by placing the burden of persuasion upon an agency to convince a reviewing court of the meaning of the regulatory text. *Id.* at 687. Second, in addition to independence, *Skidmore* incentivizes clarity in both the regulatory text and in interpretive explanations, which limits the potential for abusive agency behavior. *Id.* at 687–88. Each of these factors reconciles the review of an agency's regulatory interpretations with our constitutional structure.

204 *Id.* at 619.

courts should consider "all those factors which give it power to persuade."[205] Given *Skidmore*'s potential for confusion, the Court should instead engage in de novo review of agency interpretations.

While Professor Manning appears to carefully avoid referring to the standard announced in *Skidmore* as deference,[206] the standard is often referred to as just that—*Skidmore* deference.[207] While this is sloppy nomenclature, it is more than a semantically constructed issue. Deference is defined as "submission to or compliance with the will . . . of another,"[208] so that when a reviewing court "defers" to an agency they are "yield[ing] respectfully [to the] judgment or opinion"[209] of that agency. In practice, a reviewing court can (1) refuse to inquire further, (2) accept an agency interpretation that is one of two or more roughly equivalent, plausible interpretations, or (3) accept an agency's less persuasive, but reasonable, interpretation. Regardless of the form that deference takes, there is some submission to the will of another. *Skidmore*, however, neither utilizes the language of deference nor does it require a reviewing court to submit to, or comply with, an agency's interpretation.[210] It does quite the opposite, recognizing that a court need not accept an agency's interpretation unless it is persuaded by the agency's reasoned explanation.[211] Correcting the terminology—to something like "*Skidmore* weight"[212]—may more accurately describe the probative value of the *Skidmore* principle, but it does not eliminate the potential for confusion. Requiring that an agency persuade the reviewing court to accept their interpretation not only fails to insist on "deference" in any meaningful sense, but

205 *Skidmore*, 323 U.S. at 140; *see* United States v. Mead Corp., 533 U.S. 218, 250 (2001) (Scalia, J., dissenting) (arguing that "totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation"); Christensen v. Harris Cty., 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment) (arguing that "*Skidmore* deference" was "an anachronism").

206 *See* Manning, *supra* note 13, at 618, 681, 690 (referring to *Skidmore* as a "framework," an "approach," a "regime"). *But see id.* at 688 n.357 (referring to "*Skidmore* deference" in a footnote).

207 *See Mead*, 533 U.S. at 250 (Scalia, J., dissenting) (using the phrase "*Skidmore* deference"); *Christensen*, 529 U.S. at 589 (Scalia, J., concurring in part and concurring in the judgment) (same); Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1144–45 (2012) (noting that the principle in *Skidmore* is referred to as *Skidmore* deference).

208 *Deference*, DICTIONARY.COM, http://dictionary.reference.com/browse/deference?s=t (last visited Nov. 15, 2015) (defining deference as "respectful submission or yielding to the judgment, opinion, will, etc., of another.").

209 *Defer*, DICTIONARY.COM, http://dictionary.reference.com/browse/defer?s=t (last visited Nov. 15, 2015) (second listed definition for defer: "to yield respectfully in judgment or opinion (usually followed by *to*)").

210 *Skidmore* speaks in terms of things that have the "power to persuade, [yet] lack[ ] [the] power to control." *See Skidmore*, 323 U.S. at 140.

211 *See id.*

212 *See* Strauss, *supra* note 207, at 1144–45 (2012) (arguing that "*Skidmore* weight" more accurately describes the respective roles of the court and agency in a proceeding where the court is exercising their final interpretive authority).

it also appears to require the same showing from an agency that would be required under traditional de novo review. *Skidmore* deference, then, is essentially no deference at all. However, declaring that a reviewing court must give *Skidmore* deference suggests that the court is engaging in something less extensive than de novo review and more extensive than *Seminole Rock* deference. But where on that continuum *Skidmore* would fall is unclear, and this indeterminacy risks inconsistent application among the lower courts. In reality, the substance of *Skidmore*—the requirement that a court give weight to a well-reasoned agency explanation—is no different from de novo review. In the interest of clarity, the Court should abandon *Seminole Rock* in favor of de novo review.

Conclusion

While the doctrine of *Chevron* deference is rooted in our constitutional structure, *Seminole Rock* deference has developed from little more than judicially constructed dictum without a constitutional anchor. That dictum, however, is the proverbial acorn that has grown into an oak tree.[213] In its first sixty-five years, *Seminole Rock* grew, with little resistance, from a modest doctrine of deference to a firmly entrenched doctrine of administrative law. In recent years the Court has become increasingly more uncomfortable with the manner in which *Seminole Rock* permits essential government powers to be exercised by the same hands. That an agency can promulgate a regulation with ambiguous provisions, issue an interpretation at a later time to resolve the ambiguities, and receive binding deference from reviewing courts, is troubling. This problem has been amplified by the procedural exemptions in the APA and the Court's decision in *Mortgage Bankers*. Interpretive rules have long been exempt from the APA's notice-and-comment procedures, which allow an enterprising agency, in a *Seminole Rock* world, to minimize their exposure to these difficult procedures. Before *Mortgage Bankers*, once an agency interpreted an ambiguity in a regulation, the agency was required to subject any reinterpretations, which were treated as amendments under the APA, to notice and comment. After *Mortgage Bankers*, agencies are no longer required to submit reinterpretations that significantly revise earlier interpretations for notice and comment. Thus, despite the Court's growing concern with the *Seminole Rock* doctrine, there are now more avenues in which to invoke it.

While it is fair to conclude that resolving regulatory ambiguities is policymaking reserved for the politically accountable branches, it remains vitally important to our constitutional structure to ensure that agency interpretations are not insulated from judicial review. Adherence to the principles of

213 In 1975, then-Justice Rehnquist penned the "acorn-oak tree" analogy in the context of implied private causes of action under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the SEC. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975). The analogy aptly describes the development of the *Seminole Rock* doctrine as well.

the Constitution is justified because its structural provisions disperse power and preserve liberty, not because it ensures the most efficient governance. While regulatory efficiency is important, it must be pursued within constitutional limits. For these reasons, the Court should abandon *Seminole Rock* and review agency interpretations de novo, which will reconcile the modern approach to judicial review of agency interpretations with the minimum requirements of the separation-of-powers principle. When engaging in judicial review of an agency's interpretation, it is important that courts avoid imposing their policy preferences on the agency. Nevertheless, as some ambiguities inevitably inhere in even the most clearly written regulations, courts will unavoidably shape policy in ever so small amounts—but this is, and has always been, a necessary cost to the judicial department's obligation to "say what the law is." While this can be a tenuous balance to strike, it is a balance the Court has long been able to maintain outside the world of administrative law, and there is no reason to believe it cannot be maintained within.