

# PEREZ V. MORTGAGE BANKERS ASSOCIATION AND THE FUTURE OF *SEMINOLE ROCK*

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## INTRODUCTION

Courts differentiate two types of agency rules. Legislative rules, issued according to the Administrative Procedure Act's ("APA") notice-and-comment requirements,<sup>1</sup> bind regulated parties with "the force and effect of law."<sup>2</sup> Interpretive rules, in contrast, do not "purport to impose new obligations or prohibitions," and are exempt from the APA's rulemaking procedures.<sup>3</sup> Nevertheless, the regulatory impact of interpretive rules can be substantial. In a few recent examples, disputes over agencies' interpretations of their own regulations have determined the liability of logging operations with regard to polluted rainwater runoff,<sup>4</sup> the obligation of pharmaceutical companies to pay overtime to their product marketing agents,<sup>5</sup> and states' implementation monitoring requirements under the Clean Air Act.<sup>6</sup> In short, although interpretive rules ostensibly only narrow the scope of a regulation, they can impose "massive liability" on regulated parties without the protections of notice and opportunity for comment.<sup>7</sup>

When reviewing the meaning of a regulation, courts generally give an agency's interpretation of its own regulations "controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>8</sup> Though uncontroversial for decades, this grant of deference—known as *Seminole Rock*<sup>9</sup> or *Auer*<sup>10</sup> deference—has been subject to increasing judicial critique. The primary concern with *Seminole Rock* is that, because an agency can promulgate vague rules and later authoritatively interpret them, the agency can impose binding law without either the ex ante hurdles of notice and comment or the ex post check of independent judicial review.<sup>11</sup> In an effort to mitigate this risk, the D.C. Circuit

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\* J.D., Harvard Law School, Class of 2017. The author would like to thank Professor Matthew Stephenson, Professor Jody Freeman, Professor Richard Lazarus, Brenden Cline, Alex Miller, and the editorial staff of the *Harvard Environmental Law Review* for their help and guidance. Any mistakes are solely his own.

1. 5 U.S.C. § 553 (2012).
2. *Chrysler Corp v. Brown*, 441 U.S. 281, 302–03 (1979).
3. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).
4. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013).
5. *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156 (2012).
6. *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).
7. *Christopher*, 132 S. Ct. at 2167.
8. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).
9. *Id.*
10. *Auer v. Robbins*, 519 U.S. 452 (1997). Although the doctrine was first stated in *Seminole Rock*, it was roundly reaffirmed in modern jurisprudence in *Auer*. As a consequence, courts and scholars use both the *Seminole Rock* and *Auer* labels. To give full weight to the history of the doctrine and to align with the major pieces of legal analysis on the issue, this Comment uses the term "*Seminole Rock*" deference.
11. *See, e.g., Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. at 1326, 1340–42 (2013) (Scalia, J., concurring in part and dissenting in part).

established in *Paralyzed Veterans of America v. D.C. Arena L.P.*<sup>12</sup> that if an agency wanted to significantly revise its prior interpretation of its own regulations, it must issue the interpretation via a notice-and-comment rulemaking rather than as a mere interpretive rule.<sup>13</sup>

Last term, in *Perez v. Mortgage Bankers Association*,<sup>14</sup> the Supreme Court unanimously overturned *Paralyzed Veterans*. Writing for the Court, Justice Sotomayor reaffirmed the longstanding principle that the APA represents the “maximum procedural requirements” that courts may impose on an agency.<sup>15</sup> Justices Alito, Scalia, and Thomas each filed separate opinions that, though concurring in the Court’s judgment, praised the D.C. Circuit’s efforts as an “understandable”<sup>16</sup> or “practically sound”<sup>17</sup> solution to a set of perceived problems in federal administrative law. In their view, granting deference to agencies’ interpretations of their own regulations violates the motivating principles of the APA,<sup>18</sup> enables the promulgation of regulations without judicial oversight,<sup>19</sup> and raises separation-of-powers concerns.<sup>20</sup> Rather than resolving these concerns by imposing procedural hurdles like the “one-bite rule” of *Paralyzed Veterans*,<sup>21</sup> the *Mortgage Bankers* concurrences argue that they should be eliminated at the source—*Seminole Rock*.

But *Seminole Rock* need not, and should not, be overturned. First, the risk of agency self-aggrandizement expressed in the *Mortgage Bankers* concurrences is overblown. Even assuming that an unconditioned grant of controlling deference would permit agencies to bind the public without judicial oversight, critics of *Seminole Rock* fail to take into account the myriad ways that courts already address this problem. Second, the alternatives to *Seminole Rock*—de novo review and *Skidmore*<sup>22</sup> “deference”—would splinter the implementation of comprehensive federal legislation and expose regulated parties to significant uncertainty.

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12. 117 F.3d 579 (D.C. Cir. 1997).

13. *Id.* at 586–88.

14. 135 S. Ct. 1199 (2015).

15. *Id.* at 1206 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

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

17. *Id.* at 1221 (Thomas, J., concurring in the judgment).

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

19. *Id.* at 1221–22 (Thomas, J., concurring in the judgment).

20. *Id.* at 1215–21.

21. First recognized by the D.C. Circuit in *Alaska Prof'l Hunters Ass'n v. Fed. Aviation Admin.*, 177 F.3d 1030 (D.C. Cir. 1999), the “one-bite rule” would give agencies the initial opportunity to definitively interpret their regulations, but would subject re-interpretations to more rigorous judicial review. See *The Supreme Court, 2013 Term—Leading Cases*, 127 HARV. L. REV. 328, 333 (2013).

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

## I. PEREZ V. MORTGAGE BANKERS ASSOCIATION

## A. Paralyzed Veterans and the APA

*Mortgage Bankers* concerns an interpretation of the implementing regulations of the Fair Labor Standards Act of 1938 (“FLSA”). The FLSA exempts from its minimum wage and overtime compensation protections those “employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman.”<sup>23</sup> Mortgage-loan officers, who advise customers on various mortgage financing products, do not neatly fit this definition.

In 1999 and 2001, the U.S. Department of Labor (“DOL”) issued opinion letters stating that mortgage-loan officers did not qualify for the “administrative exemption.”<sup>24</sup> Three years later, DOL changed course, promulgating new regulations for the FLSA that contained examples of employees who would qualify for the exemption.<sup>25</sup> “Employees in the financial services industry” whose primary work duties include “collecting and analyzing information,” “advising the customer,” and “marketing, servicing, or promoting the employer’s financial products” generally meet the requirements for the administrative exemption, but “an employee whose primary duty is selling financial products does not.”<sup>26</sup> Interpreting these regulations, DOL issued an opinion letter in 2006 stating that the exemption now applied to mortgage-loan officers. In a final reversal four years later, DOL issued new interpretations in 2010 withdrawing their previous opinion letters.<sup>27</sup> Citing the 2004 regulations, the agency reasoned that mortgage-loan officers “have a primary duty of making sales for their employers, and, therefore, do not qualify” for the exemption.<sup>28</sup>

The Mortgage Bankers Association filed suit in United States District Court for the District of Columbia,<sup>29</sup> contending that, *inter alia*, the opinion letter violated the D.C. Circuit’s 1997 holding in *Paralyzed Veterans*. In that case, the court reasoned that when an interpretation represents a “fundamental change” to the agency’s prior view, it functions as an amendment to the underlying regulation.<sup>30</sup> Because the APA obliges agencies to engage in notice-and-comment rulemaking for both new regulations and amendments of existing

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23. 29 U.S.C. §§ 201, 213(a)(1) (2012).

24. WAGE & HOUR DIV., U.S. DEP’T OF LABOR, WL 1558764 (2001); WAGE & HOUR DIV., U.S. DEP’T OF LABOR, WL 1002401 (1999).

25. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (codified at 29 C.F.R. § 541).

26. 29 C.F.R. § 541.203 (2015).

27. WAGE & HOUR DIV., U.S. DEP’T OF LABOR, ADM’R’S INTERPRETATION No. 2010-1, APPLICATION OF THE ADMINISTRATION EXEMPTION UNDER SECTION 13(A)(1) OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 213(A)(1), TO EMPLOYEES WHO PERFORM THE TYPICAL JOB DUTIES OF A MORTGAGE LOAN OFFICER 8 (2010).

28. *Id.* at 9.

29. *Mortg. Bankers Ass’n v. Solis*, 864 F. Supp. 2d 193 (D.D.C. 2012), *rev’d sub nom.* *Mortg. Bankers Ass’n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *rev’d sub nom.* *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015).

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

rules,<sup>31</sup> “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”<sup>32</sup>

Applying *Paralyzed Veterans* at trial, the Mortgage Bankers Association argued that DOL’s 2010 opinion letters, overturning its previous interpretation, represented new, procedurally invalid regulations.<sup>33</sup> The district court granted summary judgment to DOL, ruling that although *Paralyzed Veterans* provided the governing standard, the complainant had not satisfied the additional requirement of “substantial and justifiable reliance” imposed by *Paralyzed Veterans*’ progeny.<sup>34</sup> On appeal, the D.C. Circuit vacated the 2010 interpretation and remanded, rejecting the government’s call to abandon the doctrine.<sup>35</sup>

The Supreme Court unanimously reversed.<sup>36</sup> In a majority opinion by Justice Sotomayor, the Court concluded that *Paralyzed Veterans* represents a fundamental misreading of the APA. Though the D.C. Circuit held, and the Mortgage Bankers Association argued, that an interpretive rule that functions as an amendment should be treated as a legislative rule, the majority described the exemption from notice and comment for interpretive rules as “categorical,”<sup>37</sup> applying equally to new and revised interpretations. The Court continued that the “interpretation-as-amendment” argument failed because it misconstrued the two operations. An interpretation that conflicts with a prior interpretation does not amend the regulation any more than an initial interpretation amends a regulation.<sup>38</sup> Arguments to the contrary “[are] impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law.”<sup>39</sup>

The Court also rejected the Mortgage Bankers Association’s policy argument that the APA should be read functionally in order to deter an agency from “cloaking its actions in the mantle of mere interpretation.”<sup>40</sup> Whether or not it would be prudent to restrict agencies in this way, the Court held that the APA represents “the maximum procedural requirements” for agency action<sup>41</sup> and defines “the full extent of judicial authority to review executive agency action for procedural correctness.”<sup>42</sup>

31. See 5 U.S.C. § 551(5).

32. *Paralyzed Veterans*, 117 F.3d at 586.

33. *Solis*, 864 F. Supp. 2d at 210.

34. *Id.*; see also *MetWest, Inc., v. Sec. of Labor*, 560 F.3d 506, 511 (D.C. Cir. 2009); *Alaska Prof'l Hunters Ass'n., Inc. v. Fed. Aviation Admin.*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

35. *Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966, 972 (2013).

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

37. See 5 U.S.C. § 553(b)(A) (“Except when notice or hearing is required by statute, this subsection does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”).

38. *Mortg. Bankers*, 135 S. Ct. at 1208.

39. *Id.*

40. *Id.* (citation omitted).

41. *Id.* at 1206 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

42. *Id.* at 1207 (quoting *Fed. Comm'n Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)).

Justices Alito,<sup>43</sup> Scalia,<sup>44</sup> and Thomas<sup>45</sup> each filed separate opinions concurring in the judgment. They agreed that, notwithstanding *Paralyzed Veterans'* incompatibility with the APA, the doctrine was an earnest attempt to solve a legitimate problem. In their view, administrative agencies have a dangerous amount of power due to the conflation of three issues: broad legislative delegation to agencies, an uncertain boundary between interpretive and legislative rules, and *Seminole Rock* deference.<sup>46</sup> Offering a range of arguments against the doctrine, the three Justices “await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.”<sup>47</sup>

### B. *Seminole Rock and Its Critics*

The oft-told tale is that *Seminole Rock* doctrine emerged—as Athena from the head of Zeus—fully formed and without precedent.<sup>48</sup> In determining the proper meaning of a wartime price-control regulation imposed by the Administrator of the Office of Price Administration, the Supreme Court in 1945 held:

Since [the dispute] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. 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.*<sup>49</sup>

Although the doctrine's originating rationale is not apparent in the *Seminole Rock* opinion, courts usually justify the Court's holding by invoking one of three arguments. The first posits that agencies, as the drafters of the regulation, have particular insight into its meaning, and so their interpretation is likely to be closest to the intended meaning of the regulation.<sup>50</sup> Deference to the

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

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

45. *Id.* at 1213 (Thomas, J., concurring in the judgment).

46. *Id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment).

47. *Id.*

48. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339–40 (2013) (Scalia, J., concurring in part and dissenting in part) (stating that the Court has been giving deference “for no good reason,” and that the initial formulation was nothing more than an “*ipse dixit*”).

49. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945) (emphasis added).

50. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991); *Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 208 (2d Cir. 2006); *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006); *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1363–64 (Fed. Cir. 2005). As noted by Professor Matthew Stephenson and Miri Pogoriler, this “originalist” rationale rests on two assumptions: the agency's disputed interpretation captures the original intent of the agency, and the original intent should limit the scope of later interpretation. These assumptions would seem to restrict the breadth of *Seminole Rock*. If the original intent of the agency is authoritative, then interpretations that are issued long after the regulations are promulgated or that conflict with

agency's interpretation, then, helps effectuate the regulatory intent of the enacting agency. The second argument is familiar from *Chevron*<sup>51</sup> literature. Because an agency commands expertise in a particular area of policy, it is in a better position to analyze the legal text against the backdrop of its regulatory regime.<sup>52</sup> Generalist courts might be better served by deferring to the judgment of agency administrators who are adept at the "identification and classification of relevant criteria,"<sup>53</sup> particularly when "a technically complex statutory scheme is backed by an even more complex and comprehensive set of regulations."<sup>54</sup> A third argument put forth in favor of *Seminole Rock* is that the power to interpret a statute's implementing regulations is an implicit corollary to the congressional delegation of lawmaking power.<sup>55</sup> "Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, . . . the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."<sup>56</sup>

The *Mortgage Bankers* concurrences are hardly the Court's first critique of *Seminole Rock*, but they neatly summarize the predominant arguments against the doctrine.<sup>57</sup> Justice Alito's brief opinion hinted at the essence of the conservative critique—*Seminole Rock* lies at the core of "an understandable concern about the aggrandizement of power of administrative agencies."<sup>58</sup> As described in *Paralyzed Veterans*, deference to an agency's interpretations of its own regulations gives the agency the perverse incentive to "promulgate mush" via notice-and-comment rulemaking, and then "give it concrete form only through subsequent . . . interpretations."<sup>59</sup> Because agencies wielding this flexibility could create binding law without even the minimum procedural requirements of the APA, *Seminole Rock* is "a dangerous permission slip for the arrogation of power."<sup>60</sup>

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prior interpretations would be denied deference. In any event, the originalist rationale seems to be on the decline. See Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1454 (2011).

51. *Chevron*, U.S.A, Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
52. See, e.g., *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009); *Amerada Hess Pipeline Corp. v. Fed. Energy Regulatory Comm'n*, 117 F.3d 596, 604 (D.C. Cir. 1997); *Pac. Coast Med. Enters. v. Harris*, 633 F.2d 123, 131 (9th Cir. 1980); *Jicarilla Apache Tribe v. Fed. Energy Regulatory Comm'n*, 578 F.2d 289, 292 (10th Cir. 1978).
53. *Thomas Jefferson Univ.*, 512 U.S. at 512.
54. *Howmet Corp. v. EPA*, 614 F.3d 544, 549 (D.C. Cir. 2010) (citing *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995)).
55. See Henry Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983).
56. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991).
57. See, e.g., *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring); *Thomas Jefferson Univ.*, 512 U.S. at 518 (Thomas, J., dissenting).
58. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment).
59. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997).
60. *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

Justices Scalia and Thomas offered distinct legal arguments undermining *Seminole Rock*. Justice Scalia attacked the doctrine on statutory grounds, arguing that judicial deference amplifies the power of the APA's exemption for interpretive rules far beyond congressional intent.<sup>61</sup> The APA, enacted shortly after *Seminole Rock* was decided, gives courts the authority to "interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action."<sup>62</sup> In Justice Scalia's view, Congress could not have intended for interpretive rules to have legally binding force, "because it remains the responsibility of the court to decide whether the law means what the agency says it means."<sup>63</sup> When a court defers to an agency's view, it relinquishes its duty to interpret the regulation itself, and "allow[s] agencies to make binding rules unhampered by notice-and-comment procedures."<sup>64</sup> Justice Scalia concluded that the Court, in order to "restor[e] the balance originally struck by the APA," should replace *Seminole Rock* with de novo review.<sup>65</sup>

Justice Thomas built his argument on constitutional grounds.<sup>66</sup> Tracing the development of the separation of powers doctrine from John Locke to James Madison, Justice Thomas argued that the Framers intended for the authority to resolve legal ambiguities to reside exclusively in the judicial branch.<sup>67</sup> The Constitution makes the executive and legislative branches accountable to the people,<sup>68</sup> but judges are insulated from external pressure in order to foster the independent judgment necessary for unbiased legal interpretation.<sup>69</sup> Such a framework, he argued, is incompatible with *Seminole Rock*. The judiciary, after all, has the responsibility to "say what the law is."<sup>70</sup> Because *Seminole Rock* "giv[es] legal effect to the interpretations rather than the regulations themselves," it transfers the inherently judicial power to interpret laws to the executive branch.<sup>71</sup> If courts are bound to accept an agency's interpretation—even if it is not the most natural interpretation—then the judicial branch has abdicated its constitutionally-mandated duty, and so threatens to disrupt the separation of powers.<sup>72</sup> Like Justice Scalia, Justice Thomas concluded that the Constitution requires de novo review of agency interpretive rules.<sup>73</sup>

61. *Mortg. Bankers*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).

62. 5 U.S.C. § 706 (2012).

63. *Mortg. Bankers*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).

64. *Id.* at 1212.

65. *Id.* at 1213.

66. *Id.* at 1213 (Thomas, J., concurring in the judgment).

67. *Id.* at 1217–18.

68. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 3, cl. 1.

69. *See Mortg. Bankers*, 135 S. Ct. at 1218 (Thomas, J., concurring in the judgment); *see also* U.S. CONST. art. III.

70. *Mortg. Bankers*, 135 S. Ct. at 1222–23 (Thomas, J., concurring in the judgment) (quoting *Marbury v. Madison*, 1 Cranch 137, 178 (1803)).

71. *Id.* at 1213.

72. *See id.* at 1219–20. *See generally*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996) (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").

73. *See Mortg. Bankers*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

## II. AN UNNECESSARY AND INJURIOUS “SOLUTION”

Since *Talk America*<sup>74</sup> in 2011, four members of the Supreme Court have drafted opinions calling for the review of *Seminole Rock*—strongly suggesting a place on the Court’s docket.<sup>75</sup> Although leading scholars downplay the risk of the doctrine’s demise,<sup>76</sup> agency administrators would be justified in worrying. The applicable standard of review “dictate[s] the extent to which an agency’s decision will survive judicial review when the agency deviates from the judiciary’s preferred construction,”<sup>77</sup> and so determines the range within which the agency can navigate in its statutory and regulatory framework.

The Supreme Court should not, however, strike down *Seminole Rock*. As noted above, the primary objection to *Seminole Rock* is that it gives agencies “[an] incentive to speak vaguely and broadly, so as to retain a flexibility that will enable clarification with retroactive effect.”<sup>78</sup> Agencies could thus effectively “create new law without observance of notice and comment procedures,”<sup>79</sup> and by “demand[ing] that courts give controlling weight”<sup>80</sup> to their interpretations, bypass the threat of judicial sanction. Such a scheme would, of course, be bad. The authority to pass binding law without either the APA’s minimum rulemaking processes or judicial review would indeed implicate fundamental issues of separation of powers and fair notice.

But recent academic literature, both empirical and anecdotal, suggests that this risk is unsubstantiated. There is little hard evidence to support the claim that agencies actively exploit the APA’s interpretive rule exemption, and Professor Sunstein observes that “[i]n nearly four years in the federal government . . . [I have] never heard even a single person suggest, or come close to suggesting, that a regulation should be written vaguely or ambiguously in light of *Auer*, or so that the agency should later interpret it as it saw fit.”<sup>81</sup>

74. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254 (2011).

75. The four likely Justices whose votes would meet the threshold for a grant of certiorari are Justices Scalia, Thomas, Alito, and Roberts. See *Mortg. Bankers*, 135 S. Ct. at 1210 (Alito, J., concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring); *Talk Am., Inc.*, 131 S. Ct. at 2265–66 (Scalia, J., concurring).

76. See Cass R. Sunstein & Adrian Vermuele, *The New Coke: On the Plural Aims of Administrative Law*, SUP. CT. REV. (forthcoming) (manuscript at 9) (“[T]here is no evidence at all that the Justices opposed to [*Seminole Rock*] can assemble five votes . . . . The center seems to be holding . . .”).

77. Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 530 (2006); see also Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 TEX. L. REV. 625, 636–44 (2015).

78. *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

79. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. AM. U. 1, 12 (1996).

80. *Mortg. Bankers*, 135 S. Ct. at 1219 (Thomas, J., concurring in the judgment).

81. See, e.g., Connor Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 798–805 (2010); Sunstein & Vermuele, *supra* note 76, at 24 n.142.

Even assuming for the sake of argument that agencies stealthily take advantage of judicial deference, scholars and judges alike have given inadequate attention to two considerations that urge in favor of upholding *Seminole Rock*. First, the threat of agency aggrandizement posited by the conservative justices is successfully mitigated by existing doctrines, and so overruling *Seminole Rock* would be unnecessary. Second, abandoning *Seminole Rock* would fracture the federal implementation of comprehensive regulatory programs, frustrating congressional intent and disrupting fair notice to regulated parties.

### A. Effective Safeguards Already Exist

Although the conservative justices argue that the judiciary lacks sufficient authority to constrain agency interpretive action, they fail to consider the various ways in which courts already guard against the promulgation of mush. First, an interpretive rule that acts with the force of law is subject to challenge as a procedurally invalid legislative rule.<sup>82</sup> Although the distinction between legislative and interpretive rules is “enshrouded in considerable smog,”<sup>83</sup> the D.C. Circuit has made clear that the content and impact of the rule, and not its form, determine its legal effect.<sup>84</sup> As a result, courts can strike down an agency interpretation if it provides the basis for an enforcement action, has an immediate or direct effect on regulated parties, or is otherwise viewed as “controlling in the field.”<sup>85</sup> Therefore, *Seminole Rock* does not protect agency interpretations that plainly operate with the force of law.

Critics argue, however, that it is through the application of *Seminole Rock* that agency interpretive rules become binding.<sup>86</sup> According to that view, because courts are bound to a grant of controlling deference, the promulgation of an interpretive rule necessarily has a legally binding effect. In other words, “[i]nterpretive rules that command deference *do* have the force of law.”<sup>87</sup> This claim is the crux of the constitutional argument. If agencies can decree authoritative, unreviewable interpretations, the case against *Seminole Rock* becomes much stronger.

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82. See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (holding that a guidance document promulgated by EPA “in effect amended” the underlying rule, which it “cannot legally do without complying with the rulemaking procedures required by 42 U.S.C. § 7607”).

83. *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975).

84. *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (noting that “our cases . . . make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding”).

85. *Id.* at 382; see generally Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

86. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment) (arguing that “after all, 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, which are accorded similar deference”).

87. *Id.*

What this argument ignores is that *Seminole Rock* does not “command” judicial deference any more than *Chevron* doctrine “commands” deference.<sup>88</sup> As Justice Sotomayor noted in *Mortgage Bankers*, courts perform a context-specific analysis of the agency’s interpretation prior to deciding how much weight it deserves.<sup>89</sup> If an agency’s interpretation is contrary to the regulation it purports to interpret,<sup>90</sup> or the regulation itself is unambiguous,<sup>91</sup> the agency’s view receives no deference. Further, reviewing courts look for evidence that the interpretation “does not reflect the agency’s fair and considered judgment on the matter in question.”<sup>92</sup> If the agency’s interpretation is inconsistent with its own prior views,<sup>93</sup> if the interpretation is published after a long period of acquiescence,<sup>94</sup> or if “it appears to be nothing more than [a] convenient litigating position,”<sup>95</sup> courts have grounds to deny deference. If the court has reason to believe that the agency is acting in bad faith by advancing a “post hoc rationalization [in order to] defend past agency action against attack,” it can also withhold deference.<sup>96</sup> In short, actual *Seminole Rock* jurisprudence prevents the constitutional infractions alleged in the concurrences by Justices Scalia and Thomas.

Finally, critics malign *Seminole Rock* for perceived implications on fair notice. A bedrock principle of administrative law is that a “standard must give [a regulated entity] fair warning of the conduct it prohibits or requires.”<sup>97</sup> The conservative argument is that under *Seminole Rock*, an ambiguous regulation “cannot serve as a reliable guide to one’s rights and duties.”<sup>98</sup> Because deference is warranted for an agency interpretation that is reasonable—whether or not it is the most obvious interpretation—the doctrine frustrates the ability of the average reader to determine what the regulation requires on its face.<sup>99</sup> Sanctioning conduct under such circumstances would violate principles of due process.<sup>100</sup>

This concern for fair notice is misplaced. For decades, courts have affirmed that regulated parties cannot be subjected to penalty, sanction, or a loss

88. Indeed, last term in *King v. Burwell*, Chief Justice Roberts wrote that *Chevron* deference is merely “often” applied by the Court. 135 S. Ct. 2480, 2483 (2015); see also Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 70 (arguing that “although formally stated as a one-step test, *Seminole Rock* implicitly involves a preliminary analysis that mirrors *Chevron* step one”).
89. See *Mortg. Bankers*, 135 S. Ct. at 1208 n.4 (arguing that “[e]ven in cases where an agency’s interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says”).
90. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945).
91. See *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000).
92. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).
93. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994).
94. *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2167–69 (2012).
95. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).
96. *Auer*, 519 U.S. at 462.
97. *Diamond Roofing Co. v. Occupational Safety & Health Review Comm’n*, 528 F.2d 645, 649 (5th Cir. 1976).
98. Manning, *supra* note 72, at 670.
99. See *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995).
100. See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment).

of vested rights on account of *Seminole Rock*.<sup>101</sup> Further yet, since the 2012 decision in *Christopher v. SmithKline Beecham*, the Supreme Court has held that a lack of fair notice is sufficient grounds for denying *Seminole Rock* in full. Justice Alito, writing for a 5-4 majority, concluded that an interpretation does not “reflect the agency’s fair and considered judgment on the matter” if it “impose[s] potentially massive liability” on the respondent.<sup>102</sup> In such a situation, granting deference to the agency’s interpretation would “result in precisely the kind of unfair surprise against which our cases have long warned.”<sup>103</sup> *Christopher* codified the import of fair notice on agency deference. An otherwise reasonable agency interpretation that fails to provide fair notice or violates regulated parties’ reliance interests does not represent the agency’s “fair and considered judgment,” and so it violates the requirements set forth in *Auer*.<sup>104</sup> Ambiguous regulation, regardless of whether deference applies, necessarily clouds fair notice somewhat. If courts determine that fair notice is deeply compromised, however, they have the authority to prevent penalties for past conduct and submit the interpretation to a stricter standard of review.

### B. *The Collateral Damage of Regime Change*

It is widely recognized that *Seminole Rock* enables consistent and effective regulatory administration.<sup>105</sup> As the familiar argument goes, agencies possess expertise in both the subject matter and structure of their respective regulatory programs. By deferring to the agency’s reasonable interpretations, courts promote efficient governance by encouraging a singular policy approach based in technical competence.<sup>106</sup> These practical benefits of *Seminole Rock*, far from being mere “efficiency gains,”<sup>107</sup> help ensure the legitimacy of executive agencies and promote the legislative purpose behind federal regulatory schemes. If the Supreme Court were to replace *Seminole Rock* with *Skidmore* deference, these supports would erode. Individual judges, unaccountable to the electorate, would

101. See, e.g., *Gates & Fox Co. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (arguing, in an opinion written by then-Judge Scalia, that although “[c]ourts must give deference to an agency’s interpretation of its own regulations . . . , the due process clause prevents that deference from vitiating the application of a regulation that fails to give fair warning”); *Satellite Broad. Co. v. Fed. Comm’n Comm’n*, 824 F.2d 1, 3-4 (1987) (“To be sure we normally defer to an agency’s reasonable interpretation of its own rules. . . . [B]ut if it wishes to use that interpretation to cut off a party’s right, it must give full notice of its interpretation.”).

102. *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2159 (2012).

103. *Id.* at 2167 (citations omitted).

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

105. See *Stephenson & Pogoriler*, *supra* note 50, at 1459-60; see also *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1340 (Scalia, J., concurring in part and dissenting in part).

106. See, e.g., *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Ohio Valley Env’tl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009); *Amerada Hess Pipeline Corp. v. Fed. Energy Regulatory Comm’n*, 117 F.3d 596, 604 (D.C. Cir. 1997); *Pac. Coast Med. Enters. v. Harris*, 633 F.2d 123, 131 (9th Cir. 1980); *Jicarilla Apache Tribe v. Fed. Energy Regulatory Comm’n*, 578 F.2d 289, 292 (10th Cir. 1978). But see *Decker*, 133 S. Ct. at 1342 (Scalia, J., concurring in part and dissenting in part).

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

decide significant legislative policy issues, potentially fracturing the cross-circuit consistency of comprehensive regulatory programs.

First, *Seminole Rock* helps agencies give full effect to Congress's legislative goals. For example, Congress designed the Clean Water Act ("CWA") to be a "comprehensive program for controlling and abating water pollution,"<sup>108</sup> necessarily "supervised by an expert administrative agency."<sup>109</sup> The success of such a program depends to a certain degree on technically informed decision-making. For example, the CWA requires EPA to regulate any point source discharges "associated with industrial activity."<sup>110</sup> EPA defined this phrase in its 2006 Industrial Stormwater Rule, but did not resolve the ambiguity as to whether the phrase included stormwater run-off from logging roads.<sup>111</sup> This is just one narrow ambiguity in a highly complex regulatory program. Still, it presented substantial economic and environmental issues<sup>112</sup>—precisely the type of matters that Congress intended EPA to resolve. In such a case, not deferring to EPA would threaten the successful implementation of the CWA's objectives.<sup>113</sup> *Seminole Rock*, by enabling EPA to resolve ambiguities with informed policy judgments, promotes the execution of its statutory mandate and gives life to congressional intent.

Second, *Seminole Rock* increases the consistency and predictability of judicial review.<sup>114</sup> By vesting the agency with the ability to authoritatively interpret regulations, courts receive a clear guide of the regulatory scheme. As a result, the legal boundaries of a regulatory program remain consistent across circuits, and regulated parties can plan their operations with the security of predictable cross-circuit review. In this regard, *Seminole Rock* actually advances the interests of fair notice—parties need not wait until the end of litigation to know what the law means. As Justice Scalia has noted, "[i]t is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of

108. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 319 (1981).

109. *Id.* at 317.

110. See 33 U.S.C. § 1342(p)(2)(B) (2012); 40 C.F.R. § 122.26(b)(14) (2006).

111. See *Decker*, 133 S. Ct. at 1330.

112. The sediment and pollutants from logging roads in the Pacific Northwest, after entering local waters, can "adversely affect the survival of . . . salmon, trout, other native fishes, amphibians and microinvertebrates . . . [and] can result in salmonid mortality where present." Notice of Intent to Revise Stormwater Regulations to Specify that an NPDES Permit is not Required for Stormwater Discharges from Logging Roads and to Seek Comment on Approaches for Addressing Water Quality Impacts from Forest Road Discharges, 77 Fed. Reg. 30,473, 30,476 (May 23, 2012). The decline of fishing runs due to environmental harm has devastating economic impacts—Oregon's salmon haul declined 86% between 1988 and 2011. Brief for the Pacific Coast Federation of Fishermen's Associations as Amici Curiae Supporting Respondents at 14, *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (Nos. 11-338, 11-347).

113. Although the majority opinion in *Decker* ruled on *Seminole Rock* grounds, Justice Scalia wrote that EPA's interpretation, while undeserving of deference, was the most reasonable interpretation of the regulation. See *Decker*, 133 S. Ct. at 1342 (Scalia, J., concurring in part and dissenting in part).

114. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (admitting that "since it usually produces affirmance of the agency's view without conflict in the Circuits, it imparts . . . certainty and predictability to the administrative process").

complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions.<sup>115</sup>

In contrast, a shift to either *Skidmore* or de novo review would eliminate the consistency and legitimacy that underlie modern federal regulatory administration. Under *Skidmore*, a reviewing court gives weight to an agency's interpretation of its own regulation in accordance with 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 the power to persuade, if lacking power to control."<sup>116</sup> In Professor Manning's analysis, *Skidmore* is the appropriate standard because it recognizes the value of agency expertise while still satisfying the minimum requirements of the separation of powers.<sup>117</sup>

How much weight *Skidmore* actually represents, however, is a matter of some confusion, as the Supreme Court has applied the doctrine inconsistently.<sup>118</sup> In *Mead*, the majority analyzed the factors outlined in Justice Jackson's *Skidmore* opinion, thoughtfully applying them to the dispute.<sup>119</sup> In *Christensen*,<sup>120</sup> however, Justice Thomas's opinion "gave little more than lip service to *Skidmore*."<sup>121</sup> This should not be dismissed as mere stylistic variation between Justices. After all, *Skidmore* requires judges, in determining the meaning of a legal text, to consider factors beyond the traditional tools of statutory construction.<sup>122</sup> For judges who believe that legal interpretation allows only for the examination of the text itself, *Skidmore* is an anachronism—simply an affirmation that the court agrees with the agency.<sup>123</sup> As Justice Scalia noted, "[the *Skidmore*] doctrine (if it can be called that) is incoherent . . . . If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement. Speaking of '*Skidmore* deference' to a persua-

115. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring).

116. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under Professor Peter Strauss's analysis, *Skidmore* should be interpreted as having the weight that "courts afford precedents of a coordinate, inferior, or foreign jurisdiction—if and to the extent they are persuasive, and bearing in mind the affirmative values of uniformity and how the legislature has assigned responsibility, they will be weighed." Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 826 (2001).

117. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 618 (1996); see also Nicholas R. Bednar, *Defying Auer Deference: Skidmore as a Solution to Conservative Concerns in Perez v. Mortgage Bankers Association*, MINN. L. REV.: DE NOVO (June 24, 2015), <http://perma.cc/KPY2-ENR2>.

118. *Compare* *United States v. Mead Corp.*, 533 U.S. 218, 227–30 (2001), *with* *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

119. See *Mead*, 533 U.S. at 227–30.

120. See *Christensen*, 529 U.S. at 587.

121. Strauss, *supra* note 116, at 826.

122. *Id.* at 836.

123. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1224 (2015) (Thomas, J., concurring in the judgment) (arguing that agency intent is irrelevant to the task of legal interpretation because "[o]nly the text of a regulation goes through the procedures established by Congress for agency rulemaking. And it is that text on which the public is entitled to rely").

sive agency position does nothing but confuse.”<sup>124</sup> Accordingly, Court-watchers should read skeptically the assertion that *Skidmore* “reflect[s] the values both of effective supervision of the bureaucracy and of providing reliable notice to the public of agency policies and understandings.”<sup>125</sup> *Skidmore*, in the hands of judges who are predisposed to constrain agency action, may be no more deferential than de novo review.

*Skidmore*, then, guarantees none of the practical efficiencies derived from *Seminole Rock*. Agency interpretations would be subject to each judge’s idiosyncratic analysis, fracturing comprehensive regulatory programs into a patchwork of circuit-split regulations.<sup>126</sup> Although an agency could amend its regulation in order to eliminate conflict among the circuits, the costs of the notice-and-comment process may outweigh the substantive benefits to the agency.<sup>127</sup> Moreover, switching to *Skidmore* or de novo review would delay the final interpretation of a regulation until the end of judicial review, subjecting regulated parties to significant uncertainty.<sup>128</sup> Finally, the regime change itself would be disastrous for the state of settled law. Abandoning *Seminole Rock* would allow parties to challenge the validity of any agency interpretation that a reviewing court has not held to be persuasive. In short, adopting *Skidmore* would “unsettle the meaning of almost every facially ambiguous regulation now in force.”<sup>129</sup> The Supreme Court should not take this risk lightly.

#### CONCLUSION

In *Mortgage Bankers*, the Supreme Court reaffirmed that courts cannot impose procedural obligations on agency rulemaking beyond those specified in the APA. Conservative jurists, unable to restrain agency action procedurally, have renewed their call to limit the “tyrannical” authority of administrative agencies by casting down *Seminole Rock*.<sup>130</sup> The Supreme Court should ignore the invitation. The threat of unchecked agency action posed by *Seminole Rock* is a specter—an abstract threat proved unsubstantiated by the light of day. Moreover, replacing the doctrine with de novo review or *Skidmore* “deference” would frustrate the legislative goals of Congress and subject both regulators and the

124. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting).

125. Strauss, *supra* note 116, at 811.

126. See Angstreich, *supra* note 88, at 121. This risk does not apply uniformly to all regulatory programs, however. In 2014, the D.C. Circuit held that the Clean Air Act’s “Regional Consistency” regulations prohibited EPA from applying divergent interpretations of the same regulation in different circuits. See Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA, 752 F.3d 999, 1009 (D.C. Cir. 2014). This policy presents its own perverse incentives, however, in that it incentivizes both forum shopping and a race to the courthouse by regulated parties.

127. See Angstreich, *supra* note 88, at 57.

128. See Manning, *supra* note 72, at 694–96.

129. Angstreich, *supra* note 88, at 122.

130. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring in the judgment).

entities they regulate to considerable delay and expenses. Such a ruling would be unwarranted and unwise.

