

## THE WORLD AFTER *SEMINOLE ROCK* AND *AUER*

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For more than seventy years, the Supreme Court of the United States has consistently held that the federal courts must defer to an agency's interpretation of its own vague or ambiguous rule. The Court first adopted that principle in 1945 in *Bowles v. Seminole Rock & Sand Co.*<sup>1</sup> and reaffirmed *Seminole Rock* two decades ago in *Auer v. Robbins*.<sup>2</sup> Moreover, from 1945 to today, the Court has consistently treated *Seminole Rock* as if it were a statute rather than an opinion by applying its ruling in a wide range of contexts with little regard to whether their facts resemble the ones that gave rise to the Court's original decision.<sup>3</sup> The upshot is that *Seminole Rock* produced what has become a well-settled administrative law rule, one that the Supreme

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1. 325 U.S. 410, 414 (1945).

2. 519 U.S. 452, 461 (1997).

3. See, e.g., *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 613–14 (2013); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 613 (2011); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 59–63 (2011); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208–11 (2011); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 284 (2009); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 94–95 (1995); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512–18 (1994); *Stinson v. United States*, 508 U.S. 36, 44–45 (1993); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *United States v. Larionoff*, 431 U.S. 864, 872–73 (1977); *INS v. Stansic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965).

Court and lower courts have cited on more than one thousand occasions.<sup>4</sup>

Despite all that, the Supreme Court should “retire” the *Seminole Rock* rule.<sup>5</sup>

Wrong when decided in 1945, *Seminole Rock* should have passed into history when Congress enacted the Administrative Procedure Act (APA) the following year. The APA directs courts to review and set aside agency actions that rest on an erroneous view of the law.<sup>6</sup> This command forbids the courts from granting agencies final law-interpreting authority, as *Seminole Rock* directs. The strongest argument for retaining *Seminole Rock* rests on the need to trust the expert judgment of agency officials on how to implement complex regulatory regimes. Yet, we can retain the value of that expert judgment without divesting the courts of their historic responsibility to define the law. Giving an agency’s opinion the same heft that a court would afford a treatise by Phil Areeda or Charles Allen Wright or a *Restatement of the Law* by the American Law Institute would preserve both the courts’ historic role and the benefits of agency expertise. In *Kisor v. Wilkie*, the Supreme Court has an op-

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4. A January 25, 2019, Westlaw search revealed that 1,280 cases have cited *Seminole Rock*.

5. The problem with *Seminole Rock* is not the holding in the case—*viz.*, that the government’s March 1942 price cap applies to executory contracts—but is with the Court’s articulation of the standard that was appropriate to review the agency’s action. Accordingly, the appropriate remedy is not to “overrule” *Seminole Rock*, but to “retire” the standard that the Court used. The Court used that approach in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), when it decided to dispense with the standard adopted in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), to measure the sufficiency of a pleading under FED. R. CIV. P. 12. See *Twombly*, 550 U.S. at 562–63 (“We could go on, but there is no need to pile up further citations to show that *Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion’s preceding summary of the complaint’s concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”). The Court’s approach in *Twombly* is also appropriate with respect to *Seminole Rock*.

6. Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (2012).

portunity this Term to correct its mistake in *Seminole Rock*.<sup>7</sup> It should.

I. OF ARTICLE III COURTS, ARTICLE II AGENCIES, AND LAW-INTERPRETING POWER

The ruling in *Seminole Rock* stands in tension with two far more deeply settled principles of Anglo-American law. One is the proposition set forth by Chief Justice John Marshall in 1803 in *Marbury v. Madison* that it is “emphatically the province and duty of the judicial department to say what the law is.”<sup>8</sup> That was no novel pronouncement. English courts crafted a common law of torts, contracts, and crimes for centuries before England populated North America.<sup>9</sup> American colonial and state courts exercised the same common law decision-making authority as English courts from the nation’s earliest days.<sup>10</sup> The Judicial Power Clause of Article III of the Constitution vested the authority to decide questions of law in federal courts.<sup>11</sup>

The second doctrine can be seen in the maxims “*Nemo iudex in causa sua*” — “No one may be a judge in his own cause” — and

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7. Petition for Writ of Certiorari at i, *Kisor v. O’Rourke*, No. 18-15 (U.S. June 29, 2018), 2018 WL 3239696 (“The questions presented are: 1. Whether the Court should overrule *Auer* and *Seminole Rock*.”); *Kisor v. Wilkie*, 139 S. Ct. 657, 657 (2018) (“Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit granted limited to Question 1 presented by the petition.”).

8. 5 U.S. (1 Cranch) 137, 177 (1803).

9. See, e.g., THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 56, 238, 455–56 (Liberty Fund 2010) (1929).

10. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 7, 14 (3d ed. 2005); O. W. HOLMES, JR., THE COMMON LAW 27–28, 325 (Lawbook Exch., Ltd. 2009) (1881).

11. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); THE FEDERALIST NO. 37, at 183 (James Madison) (Liberty Fund ed., 2001) (“All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 536–74 (2008). The Seventh Amendment also implicitly recognized that principle. See U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” (emphasis added)).

"*Audi alteram partem*"—"A judge must hear both sides of a case before deciding it." The former principle traces its lineage to Judge Edward Coke's 1610 decision in *Dr. Bonham's Case*.<sup>12</sup> Coke does not stand alone. William Blackstone,<sup>13</sup> James Madison,<sup>14</sup> a host of Supreme Court justices,<sup>15</sup> and others have endorsed that principle without hesitation or qualification since Coke first applied it. The second maxim reaches back even further—to Demosthenes, Euripides, and Cicero<sup>16</sup>—and reaches forward to both old and contemporary English and American law.<sup>17</sup> The English courts developed an adversarial system of adjudication, rather than the inquisitorial system used on the European continent. Together those maxims presume that judges will be independent from the parties to a dispute. The

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12. *Thomas Bonham v. College of Physicians*, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610).

13. 1 WILLIAM BLACKSTONE, COMMENTARIES \*91 ("[I]t is unreasonable that any man should determine his own quarrel.").

14. THE FEDERALIST NO. 10, at 44 (James Madison) (Liberty Fund ed., 2001) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties, at the same time . . .").

15. See, e.g., *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905–06 (2016); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876–77 (2009); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 428–29 (1995); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986); *In re Murchison*, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (ruling that the Due Process Clause incorporates the common law rule that a judge must recuse himself if he has "a direct, personal, substantial, pecuniary interest" in a case); *Spencer v. Lapsley*, 61 U.S. (20 How.) 264, 266 (1858); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("[A] law that makes a man a Judge in his own cause . . . is against all reason and justice.").

16. See John M. Kelly, Note, *Audi Alteram Partem*, 9 NAT. L.F. 103, 104, 106–07 (1964).

17. See, e.g., *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . ."); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864) ("Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence."); *Rex v. Chancellor of the University of Cambridge*, 1 Str. 557, 567, 93 Eng. Rep. 698, 704 (K.B. 1723) ("The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence.").

*Seminole Rock* decision, however, effectively empowers one party to a lawsuit—a federal agency—to decide a legal issue in any case where the federal government is a party.<sup>18</sup> By so doing, the *Seminole Rock* decision trespasses on the principles underlying those maxims. If, as the Supreme Court has often held, notice of the issues to be resolved in a dispute is essential to the proper functioning of the adversarial process,<sup>19</sup> so too is a party's ability to persuade the judge that he is correct on the law. Empowering an adversary to decide a case renders notice useless. All that notice does is tell a party how it will lose.

To date, the Supreme Court has never recognized the existence of the conflict between *Seminole Rock* and Anglo-American legal tradition, let alone attempted to resolve it. The result is that *Seminole Rock*, on the one hand, and *Marbury v. Madison* and *Dr. Bonham's Case*, on the other, resemble a pair of overhead steam pipes running in infinitely parallel contrariety, oblivious to each other.<sup>20</sup>

Recently, however, there has been considerable pushback against the growth of the administrative state.<sup>21</sup> All three

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18. Of course, the *Seminole Rock* decision applies even where the federal government is not a party. See *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997).

19. See, e.g., *Lankford v. Idaho*, 500 U.S. 110, 126–28, 126 n.22 (1991) (collecting cases).

20. The authors are indebted to Professor Anthony Amsterdam for thinking of the image. See Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67 (1960).

21. Historians would say that we have seen this movie before. Consider how one scholar described the state of administrative law in 1940:

Americans' reaction to their new government included both apprehension about administrative power and new interest in its rules and limits. On the eve of World War II, criticism of the agencies was at a fever pitch. Individual agencies, administrative practices, and the administrative state as a whole were the subject of questions, concerns, and hostility—from conservative members of Congress disturbed by the political activity of bureaucrats, from executive and legislative reformers troubled by the broader shift in policy-making authority, from regulated parties and their lawyers worried about their own economic interests, from Democrats and Republicans concerned about the administration of substantive laws, from law professors and political scientists wondering what this change meant for democracy and for the logic of the constitutional system, and from agency officials and their defenders who repeatedly stressed the legitimacy of administrative action.

JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 4 (2012) (footnote omitted). The more things change, the more they remain the same.

branches of the federal government, as well as the academy, the bar, and the public, have vigorously debated the issue of whether the Supreme Court has excessively delegated law-interpreting power to unelected and unknown officials at administrative agencies.<sup>22</sup> The legitimacy of the *Seminole Rock-Auer* rule, along with its companion *Chevron* rule affording deference to an agency's interpretation of an ambiguous statute,<sup>23</sup> has been a central aspect of that debate.<sup>24</sup> Most importantly, a number of current Supreme Court justices have expressed concerns about the problems with an interpretive rule permitting agencies to combine legislative, executive, and judicial functions.<sup>25</sup> Some of them have expressed interest in reconsidering

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22. See, e.g., ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* 86 (2016); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475 (2016); Cory R. Liu, *Chevron's Domain and the Rule of Law*, 20 TEX. REV. L. & POL. 391 (2016); Aaron L. Nielson, *Confessions of an "Anti-Administrativist"*, 131 HARV. L. REV. F. 1 (2017); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 COLUM. L. REV. 1143 (2012). Even members of the federal judiciary have chimed in on that subject, before or after assuming the bench. See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990).

23. The principal difference between *Chevron* and *Seminole Rock* or *Auer* is in the form that a law takes. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) (“In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes.”). Yet an agency can receive deference under *Auer* in circumstances where it cannot under *Chevron*. Compare *Auer*, 519 U.S. at 461–63 (affording deference to an agency's interpretation in an amicus brief), with *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001), and *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (denying deference under *Chevron* to an agency position that was not the product of notice-and-comment rulemaking).

24. See, e.g., Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for De Novo Review*, 8 J. LEGAL ANALYSIS 47, 48–50 (2016); Aaron L. Nielson, *Cf. Auer v. Robbins*, 21 TEX. REV. L. & POL. 303, 305 (2016); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1451–52 (2011). See generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103 (2018).

25. See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1215–22 (2015) (Thomas, J., concurring in the judgment); *id.* at 1210–11 (Alito, J., concurring in part and in the judgment); *Decker*, 568 U.S. at 615–16 (2013) (Roberts, C.J., concurring); *id.* at 621 (Scalia, J., concurring in part and dissenting in part); Talk America,

the *Seminole Rock-Auer* rule, but have said that the Court should wait for a case that squarely poses the issue whether to reconsider those decisions.<sup>26</sup>

That case has arrived.

## II. *KISOR* V. *WILKIE*

In 1982, James Kisor filed a claim with the Veterans Administration (now the Department of Veterans Affairs (DVA)) seeking disability benefits for post-traumatic stress disorder resulting from a combat operation that took the lives of thirteen other Marines.<sup>27</sup> The DVA denied his claim the following year.<sup>28</sup> In 2006, Kisor asked the DVA to reopen his claim,<sup>29</sup> arguing that it failed to consider relevant records discussing his combat history during its initial review.<sup>30</sup> The DVA concluded that the identified records were not “relevant” under the pertinent agency regulations<sup>31</sup> because they were not “outcome determinative.”<sup>32</sup> On appeal to the U.S. Court of Appeals for the Federal Circuit, Kisor argued that the DVA misread its rule because records are “relevant” if they have any tendency to prove or disprove a relevant fact, even if they are not “dispositive.”<sup>33</sup> Finding the term “relevant” to be ambiguous,<sup>34</sup> the Circuit

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Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); cf. Kavanaugh, *supra* note 22, at 2150–51 (reviewing ROBERT KATZMANN, *JUDGING STATUTES* (2014)).

26. See, e.g., *Mortg. Bankers Ass’n*, 135 S. Ct. at 1210–11 (Alito, J., concurring in part and in the judgment); *Decker*, 568 U.S. at 615–16 (Roberts, C.J., concurring). Ironically, Justice Antonin Scalia, the author of *Auer*, later came to regret his decision. See *Decker*, 568 U.S. at 616–21 (Scalia, J., concurring in part and dissenting in part); Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 *YALE L.J.* 1600, 1603 (2017) (“[A] few Terms ago, as we came off the bench after hearing arguments in a case involving judicial deference to agencies, Nino announced that *Auer v. Robbins* was one of the Court’s ‘worst decisions ever.’ Although I gently reminded him that he had written *Auer*, that fact hardly lessened his criticism of the decision or diluted his resolve to see it overruled.”).

27. *Kisor v. Shulkin*, 869 F.3d 1360, 1361 (Fed. Cir. 2017).

28. *Id.* at 1362.

29. *Id.*

30. *Id.*

31. 38 C.F.R. § 3.156(c)(1) (2018).

32. Petition for Writ of Certiorari at 7, *Kisor v. O’Rourke*, No. 18-15 (U.S. June 29, 2018), 2018 WL 3239696.

33. *Id.*

34. *Kisor*, 869 F.3d at 1367.

Court deferred to the DVA's reading because it was not clearly mistaken or inconsistent with the rule's text.<sup>35</sup> Kisor sought review in the Supreme Court, which granted certiorari limited to the question whether to overrule *Seminole Rock* and *Auer*.<sup>36</sup>

*Kisor v. Wilkie* squarely poses the question whether to jettison *Seminole Rock*.<sup>37</sup> It therefore makes sense to examine *Seminole Rock* carefully.

### III. BOWLES V. SEMINOLE ROCK & SAND CO.

*Seminole Rock* involved a dispute over the interpretation of a rule issued by a World War II-era agency, the Office of Price Administration (OPA).<sup>38</sup> Created shortly after the attack on Pearl Harbor to avoid wartime inflation, the OPA Administrator imposed price controls on virtually all goods, capping their price to whatever a company had charged during March 1942.<sup>39</sup> The specific issue in *Seminole Rock* involved determining, for purposes of the cap, what price Seminole Rock & Sand Co. had charged for crushed stone during that month: the price agreed in the crushed stone contract, which predated March 1942 (Seminole Rock's position) or the capped price when the product was later delivered (the Administrator's position).<sup>40</sup> When framing the relevant legal analysis, the Court wrote that, because "an interpretation of an administrative regulation" was at issue, "a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt."<sup>41</sup> When so doing, the Court wrote, "[t]he intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions" of an agency rule.<sup>42</sup>

Had the Court stopped there, the *Seminole Rock* case might have disposed of numerous similar contractual disputes, but it

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35. *Id.* at 1368.

36. *See supra* note 7.

37. *See supra* note 7.

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

39. *Id.* at 413.

40. Before March 1942, the parties had agreed upon a price of \$1.50 per ton, but the crushed rock had not yet been delivered when the Administrator capped the price at 60 cents per ton. *Id.* at 412–13.

41. *Id.* at 413–14.

42. *Id.* at 414.



would not have produced a severe change in the law. The decision would have come to stand only for the limited and obvious proposition that a court should consider one party's construction of a relevant legal rule. Nevertheless, in the next sentence, the Court went on to make clear that an agency's interpretation of a rule is far more than merely "relevant." "[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>43</sup> To make clear that the agency effectively possessed law-interpreting authority, the Court went on to specify precisely what was relevant to the disposition of the case. "Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator."<sup>44</sup> Using only those guides, the Court went on to accept the OPA's position.<sup>45</sup>

Consider what the Court wrote. A factor that "may be relevant" suddenly transformed into the "ultimate criterion" and took on "controlling weight" in less than thirty-five words, all without a shred of logical or legal support.<sup>46</sup> The Court cited no provision of the Constitution, no statute, and no precedent justifying the proposition that a court must defer to one party's interpretation of the critical issue in a lawsuit.<sup>47</sup> To be sure, if an agency's interpretation of a rule conflicted with the rule's text, a court could reject the agency's position.<sup>48</sup> But, according to the Court those were the "only tools" that a court may use when deciding what a regulation means.<sup>49</sup>

Really? When did literacy become the deciding factor in legal interpretation? Suppose the agency's interpretation was literally correct but led to an irrational result. Terms in a rule might be simple and straightforward, but so too is the phrase "Sleeping in the railway station is prohibited." Just as a court might

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43. *Id.*

44. *Id.*

45. *Id.* at 414–18.

46. *Id.* at 414.

47. See *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 617–18 (2013) (Scalia, J., concurring in part and dissenting in part) (*Seminole Rock* "offered no justification whatever—just the *ipse dixit*" quoted above); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 619 (1996).

48. See *Seminole Rock*, 325 U.S. at 414.

49. *Id.* (emphasis added).

legitimately inquire whether a commuter who nods off while waiting for a train has violated that ordinance,<sup>50</sup> a court should also be free to inquire whether the agency's interpretation is irrational or unreasonable, creates unforeseen and unforeseeable harmful results, undermines other valuable goals, conflicts with settled legal doctrines, or is quite mistaken on other grounds. It was for reasons such as those that Judge Learned Hand wrote that we should not "make a fortress out of the dictionary."<sup>51</sup>

*Seminole Rock* took a common sense admonition that an executive official's application of an agency rule might bear on the proper legal interpretation it should receive and made the agency's understanding the dispositive factor in determining, as *Marbury* put it, "what the law is."<sup>52</sup> If read literally, the effect of the *Seminole Rock* ruling, whether or not intended, was to grant executive branch officials the final say in the interpretation of a vague or ambiguous agency rule when the issue arose in litigation in a federal court, or even if the government was not a party to the lawsuit. Given the off-hand manner in which the Court adopted the rule in *Seminole Rock* and the Spartan justification that it gave, it seems that the Supreme Court could not possibly have meant what it said.

Indeed, it is possible that the Court did not intend its *Seminole Rock* decision to have such precedent shattering importance for the law. From all appearances, the case involved a simple, run-of-the-mill application of a wartime regulation to an executory contract for a rather pedestrian item (crushed rock) produced, not for overseas military use, but for a domestic railroad roadbed.<sup>53</sup> The Court did not explain why the exigencies of the war or the intricacies of government contracts and price caps demanded that executive officials displace judges from their historic role as adjudicators. The Court also did not discuss the oddity that would follow from a rule demanding that courts abstain from acting as neutral decision makers by turning over to one of the parties (the federal government)

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50. The hypothetical is taken from Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664 (1958).

51. *Cabell v. Markhan*, 148 F.2d 737, 739 (2d Cir. 1945).

52. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

53. *Bowles v. Seminole Rock & Sand Co.*, 145 F.2d 482, 483 (5th Cir. 1944), *rev'd*, 325 U.S. 410 (1945).

the responsibility for deciding the only legal issue in the case. Nor did the Court cite, let alone distinguish, what Chief Justice Marshall wrote in *Marbury* about the courts' law-interpreting function. In fact, the Court did not cite *any* of its (or anyone else's) decisions in the relevant portion of its opinion.<sup>54</sup> Although one justice dissented, he wrote nothing about the majority's analysis, saying only that the Court of Appeals was correct.<sup>55</sup> As such, there was reason to hope that the Court would not read literally its rather novel and unsettling statement in *Seminole Rock* about the executive's new law-interpreting power.<sup>56</sup>

Unfortunately, the law went in a different direction. The Court has read and applied the *Seminole Rock* opinion on numerous occasions in widely assorted contexts with the same military discipline required if the decision were a statute.<sup>57</sup> Moreover, the Court has made clear that the agency's interpretation need not be the best reading of a rule; a "plausible" interpretation will do.<sup>58</sup> The Court not only reaffirmed *Seminole Rock* in 1997 in *Auer v. Robbins*,<sup>59</sup> but also applied the deference rule well beyond the original limited context of *Seminole Rock*.<sup>60</sup> Rather than become, as Justice Felix Frankfurter once wrote, "a

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54. At the tail end of its decision, the Court cited two precedents—*Lockerty v. Phillips*, 319 U.S. 182 (1943), and *Yakus v. United States*, 321 U.S. 414 (1944)—in the context of expressly declining to decide "the constitutionality or statutory validity" of the rule. *Seminole Rock*, 325 U.S. at 418–19.

55. *Id.* at 419 (Roberts, J., dissenting) ("MR. JUSTICE ROBERTS thinks the judgment should be affirmed for the reasons given in the opinion of the Circuit Court of Appeals, 145 F.2d 482.").

56. See Jonathan H. Adler, *Auer Evasions*, 16 GEO. J.L. & PUB. POL'Y 1, 7 (2018) ("commentators largely ignored" *Seminole Rock* and the Court did not rely on it to justify deferring to an agency's regulatory interpretation "for another two decades"); Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 597 (1950) (describing *Seminole Rock*'s discussion of the standard of review as "hardly more than dictum").

57. *Supra* note 3.

58. See *Ehlert v. United States*, 402 U.S. 99, 105 (1971) (noting that the agency's interpretation need only be a "plausible construction of the language of the actual regulation").

59. 519 U.S. 452, 461.

60. See Adler, *supra* note 56, at 8–9 (noting that *Auer* gave deference to an agency position advanced decades after the rule had been promulgated, not contemporaneously with its issuance, and in an amicus brief filed at the Supreme Court's urging, not in a public document sent to the regulated community).

derelict on the waters of the law,"<sup>61</sup> *Seminole Rock* stands as a fixture of contemporary administrative law.

Or so it seemed.

#### IV. "THINGS FALL APART; THE CENTRE CAN NOT HOLD"<sup>62</sup>

The Supreme Court decided *Seminole Rock* during a tumultuous period in regulatory policy history. The principle that courts should independently scrutinize the legality of executive actions followed logically from the tripartite system of government that the Framers created at the Convention of 1787. By separately allocating the legislative, executive, and judicial powers to only one of the three discrete branches, the Vesting Clauses in Articles I, II, and III implement a government in which Congress enacts the laws, the President enforces them, and the courts interpret and apply them.<sup>63</sup>

Beginning with the New Deal, Congress modified that design. Relying on Progressive philosophy, which posited that educated, trained, expert administrators could fashion scientific solutions to any public policy problem, Congress created a bevy of new regulatory agencies.<sup>64</sup> Some combined legislative, executive, and adjudicative powers.<sup>65</sup> With few exceptions,<sup>66</sup> the Court rejected constitutional challenges to laws transferring legislative power to newly created agencies and laws restraining the President's ability to remove their officials.<sup>67</sup>

61. *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).

62. William Butler Yeats, *The Second Coming*, 69 THE DIAL 466, 466 (1920).

63. See Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y 337, 355–56 (2015).

64. See, e.g., JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 124–25 (2d ed. 1954); RALPH HENRY GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT: AN INTELLECTUAL HISTORY SINCE 1815, at 337 (1940); ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM 36 (1983); PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE 60–61, 65–66 (2018).

65. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994).

66. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (both holding unconstitutional statutes delegating broad power to an agency).

67. See, e.g., *Yakus v. United States*, 321 U.S. 414, 425–26 (1944) (rejecting a Delegation Doctrine challenge to a statute authorizing the head of the World War II-era Office of Price Administration to set "fair and equitable" prices); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631–32 (1935) (rejecting a constitutional chal-

*Seminole Rock* came along at a time when the Supreme Court appeared willing to abandon the assignment of particular, specific, and discrete powers to separate branches. Like some of the Court's other decisions in this period,<sup>68</sup> *Seminole Rock* granted Congress flexibility to reshape the Framers' chosen structural constraints on federal power by treating the Constitution's text as if it were guidance rather than an immutable restraint on old-fashioned common law judicial decision making. With that in mind, *Seminole Rock*'s willingness to grant executive officials the law-interpreting authority normally enjoyed only by judges comes less as a surprise. Such willingness to do so and failure to acknowledge or justify the novelty of its approach are natural consequences of the Court's decision to treat the separation of powers more as a presumptive ordering than a fixed architecture.

The Supreme Court, however, has left that mindset behind. Just as the Constitution "does not enact Mr. Herbert Spencer's Social Statics,"<sup>69</sup> it also does not incorporate Woodrow Wilson's Progressivism.<sup>70</sup> Today, the Court begins its analysis not with the policy that the Constitution or a statute might, or might not, advance, but with the text.<sup>71</sup> This starting point is critical here. Congress enacted the Administrative Procedure Act (APA)<sup>72</sup> a year after the Court decided *Seminole Rock*, and the text of that act speaks directly to this issue. The APA makes clear that "*the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.*"<sup>73</sup>

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lenge to a for-cause restriction on the President's power to remove a Federal Trade Commissioner).

68. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947).

69. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

70. Woodrow Wilson was the leading Progressive advocate even before he became President. See, e.g., WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (Transaction Publishers 2002) (1908); WOODROW WILSON, *THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS* (Boston, D.C. Heath 1889); WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* (15th ed. 1901); Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887).

71. See, e.g., *Culbertson v. Berryhill*, 139 S. Ct. 517, 521–22 (2019); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016); *Nixon v. United States*, 506 U.S. 224, 228 (1993); *INS v. Chadha*, 462 U.S. 919, 945–46 (1983).

72. 5 U.S.C. §§ 701–706 (2012).

73. *Id.* § 706 (emphasis added).

The APA also specifies precisely what “the reviewing court” should do when carrying out those responsibilities, including the directive to “hold unlawful and set aside agency action, findings, and conclusions” that it finds “contrary to constitutional right, privilege, or immunity” or “in excess of statutory jurisdiction, authority, or limitations” or “short of statutory right.”<sup>74</sup> It would be difficult for Congress to be more clear who is to make those decisions than to say “the reviewing court.” It is as if Congress wrote the APA to expressly overrule *Seminole Rock*.<sup>75</sup>

Perhaps for that reason, *Seminole Rock* defenders do not rely on (what passes for) the majority’s reasoning in that decision to defend its delegation of law-interpreting responsibility. Those advocates maintain that *Seminole Rock* adopted a sensible rule given Congress’s decision to entrust lawmaking, law-implementing, and policy-balancing responsibility to regulatory agencies.<sup>76</sup> To some extent, they are right. Expert agency personnel are far better equipped than generalist Article III judges to know how best to implement a complex, technical regulatory scheme. Senior agency officials are also politically

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74. *Id.* (emphasis added) (“The reviewing court shall—  
 (1) compel agency action unlawfully withheld or unreasonably delayed; and  
 (2) hold unlawful and set aside agency action, findings, and conclusions found to be—  
 (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;  
 (B) contrary to constitutional right, power, privilege, or immunity;  
 (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;  
 (D) without observance of procedure required by law;  
 (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or  
 (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.  
 In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”).

75. For this reason, stare decisis considerations should count for little in the *Kisor* case. The Court has cited *Seminole Rock* as if the APA did not exist. *Kisor* will require the Court to reconcile *Seminole Rock* with the APA. Because statutes trump judicial decisions in cases that do not involve interpreting the Constitution, the Court cannot invoke stare decisis to reject the plain meaning of the APA.

76. See, e.g., Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017).

accountable for their actions in ways that life-tenured judges are not and cannot be. Agency civil servants also provide a stability, consistency, and uniformity in their understanding of a statutory scheme that can serve the public better than reliance on the judgments of various different federal judges spread across thirteen circuit courts of appeals. Whatever the weaknesses of the *Seminole Rock* decision might be, the demands of the modern administrative state justify relying on the guidance that expert career personnel can offer the public.

Finally, the argument goes, consider the alternative. Do we want to transfer the authority to decide what drugs are safe and effective, what pesticides can damage human and animal health, and a range of other highly scientific decisions from agencies like the Food and Drug Administration and the Environmental Protection Agency, respectively, to judges trained, not in medicine or biochemistry, but in the law? There is much to be said, the argument goes, for the proposition that Congress has acquiesced in, maybe even quietly approved of, the current allocation of responsibility. In sum, the subtext of the argument defending *Seminole Rock* is this: Leave well enough alone. The current system is not perfect—none could be—but it is a better one than any possible substitute.<sup>77</sup>

That argument is appealing, principally as a practical matter, but, ultimately, it is unpersuasive as a legal matter. In addition, the correct legal answer still preserves the practical benefits of agency expertise.<sup>78</sup>

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77. The difference between applying and not applying the *Seminole Rock-Auer* rule matters. Some estimates are that the government has between a 76 and 91 percent affirmance rate of cases in which a court applies those decisions. Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of Seminole Rock*, 22 GEO. MASON L. REV. 647, 652 n.58, 659 (2015) (citing Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 62 ADMIN. L. REV. 77, 83–85 (2011) and Richard J. Pierce & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 519–20 (2011)).

78. Scholars have argued that *Seminole Rock* and *Auer* are flawed because they allow an agency to draft a vague or ambiguous rule governing a politically controversial subject and then adopt its preferred interpretation of the rule in, for example, a later enforcement proceeding. See, e.g., Adler, *supra* note 56, at 14–15 (“[B]y enabling agencies to provide legally binding interpretations of their own regulations and allowing agencies to do so in letters, guidance documents, and even legal briefs, *Auer* facilitates the evasion of multiple administrative law norms: accountability, responsibility, notice, and finality.”); Knudsen & Wildermuth, *supra* note 77, at 654–55. The Supreme Court appears troubled by that prospect. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158–59 (2012).

One problem with that theory of deference to agency expertise is that it is neither always right nor always wrong. Some agency officials—physicians, veterinarians, biochemists, epidemiologists, hydrologists, nuclear engineers, astrophysicists, and so forth—will know far more about a particular subject matter than Supreme Court Justices think they know and also will have a better grasp of the on-the-ground tasks necessary to make a regulatory program work. Other agency officials will be no smarter or better equipped to manage a complicated regulatory program than are the people behind the counter at your local DMV. Uttering that conclusion certainly is not politically correct, and it is highly unlikely that the Supreme Court would ever endorse it in a written opinion published for posterity in the United States Reports. Nonetheless, Supreme Court justices are people—actually, very savvy people—and, like everyone else, they will hold different views regarding the competencies of different agencies and different administrative officials. It therefore makes little sense to pretend that every regulatory official is entitled to the same deference as a former president of Cal Tech (former Secretary of Defense Harold Brown) or a Nobel Prize laureate (former Secretary of Energy Steven Chu).

Another flaw in *Seminole Rock* and *Auer* is that they ignore the well-settled common law doctrines noted above demanding that a judge must be impartial and willing to listen to the

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Other scholars argue that this fear is groundless. *See, e.g.,* Sunstein & Vermeule, *supra* note 76, at 309–10 (“There is a palpable lack of realism, and a lack of empirical grounding, to the widespread concern that *Auer* is a significant part of the constellation of considerations that lead agencies to speak specifically or not. We do not believe that agencies often preserve ambiguity on purpose—in fact we think that that is highly unusual—but when they do, *Auer* is hardly ever, and possibly never, part of the picture. The critics speak abstractly of possible abuses, but present no empirical evidence to substantiate their fears.”). There is support for the fear of agency manipulation in an analogous context. One of the authors of this article formerly worked in the U.S. Justice Department Office of the Solicitor General, whose permission is necessary for the federal government to take an appeal to a circuit court of appeals, to file a suggestion for rehearing en banc, or to petition the Supreme Court to review a case. 28 C.F.R. § 0.20 (2018). In his experience, parties seeking to turn defeat into victory will try to spin the facts, the law, or both to achieve that goal. There is no reason to believe that the people who work in agencies would not take advantage of the option of using vague or ambiguous draft rules to achieve a similar end by not tipping off the Office of Management and Budget how the agency intends to act. In any event, even if only half of agency rule drafters are aware of *Auer* and just shy of 40 percent use it when drafting rules, *see* Walker, *supra* note 24, at 106–07 n.14, that is hardly a trivial number of game players.



competing positions of the parties to a dispute. Whether the parties disagree over the facts, the law, or both, Anglo-American law has always rested on the principle that each side to a lawsuit is entitled to have the judge decide what facts and law are relevant, how much weight each side's arguments should receive, and how ultimately to resolve the case. *Seminole Rock* and *Auer*, however, give the government a benefit that no court would ever afford a private party: the ability to decide what a vague or ambiguous legal rule means. By so doing, "deference" becomes a "systematic judicial bias" in favor of the federal government, "the most powerful of parties," and against everyone else.<sup>79</sup> There is no evidence that Congress intended to upset the balance that the common law had developed over hundreds of years to ensure a fair outcome of a lawsuit.<sup>80</sup> Rather than "keep the balance true,"<sup>81</sup> the Court took it upon itself in *Seminole Rock* and *Auer* to make up a new rule of decision without explaining why it had the power to do so. To be sure, the federal courts have devised rules of statutory analysis ever since Congress passed the Judiciary Act of 1789,<sup>82</sup> and those rules apply to the interpretation of agency rules.<sup>83</sup> But those are rules for *courts* to apply when they call balls and strikes. They are not a justification for a court to hand over that decision-making responsibility to one of the competitors.

The biggest problem with the defense of the *Seminole Rock-Auer* rule is that it conflicts with the text and background of the APA. After years of debate, Congress enacted the APA to govern the administrative state.<sup>84</sup> Congress wanted the courts to

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79. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1189, 1190 n.5, 1195 (2016).

80. See Adler, *supra* note 56, at 12–13 (finding no proof that Congress delegated the federal courts authority to adopt the *Seminole Rock-Auer* rule). The argument that the courts should adopt the legal "fiction" that Congress implicitly delegated agencies the authority to adopt the *Seminole Rock-Auer* rule turns a fictive legislative intent into a lie. The honest approach would require courts to admit that they are engaged in common law decision making, which would be impermissible under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

81. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

82. Ch. 20, 1 Stat. 73 (1789).

83. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 51, 246 (2012).

84. For discussions of the background to the APA, see, for example, DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014); GRISINGER, *supra* note 21; KIMBERLY JOHNSON, *GOV-*

constrain the actions of administrative agencies. Section 706 of Title 5 clearly serves that role.<sup>85</sup> The *Seminole Rock-Auer* rule, which hands law-interpreting power back to an agency, hardly respects the judgment that Congress made. The APA's text and the background against which the statute became law—the longstanding common law principles that no party can judge his own case—combine to demonstrate that a court must independently decide the legal issues in a dispute. *Seminole Rock* and *Auer* assume without proof or evidence that Congress del-

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ERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877–1929 (2007).

85. See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985–95 (2016) (arguing that *Chevron* is inconsistent with Section 706 of Title 5).

egated law-interpreting power to an agency.<sup>86</sup> That is the fatal flaw in those decisions.<sup>87</sup>

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86. In *Kisor*, the government concedes that the *Seminole Rock-Auer* deference standard is flawed and that the APA does not adopt it. See Brief for the Respondent 15–27, *Kisor v. Wilkie*, No. 18-15 (U.S. Feb. 25, 2019), 2019 WL 929000. The government nonetheless urges the Court to retain that standard in limited circumstances: namely, where a court, after using the traditional tools of legal interpretation, finds that a rule is ambiguous and that the agency’s reading satisfies three requirements: the agency’s reading has been consistent, it rests on the agency’s technical or policy expertise (rather than its legal analysis), and it represents the views of the agency’s politically accountable senior officials. *Id.* at 27–34. An agency interpretation failing that test cannot receive deference under *Seminole Rock*, the government admits, but it argues that the rule might still receive whatever deference *Skidmore* offers. *Id.* at 28. The government’s new-fangled theory is multiply flawed. First, if the APA endorses the settled common law standard that courts must independently resolve issues of law, the case is over, because the APA is controlling. The Supreme Court must leave it to Congress to decide whether to amend the APA to adopt the *Seminole Rock* standard. Second, the government tries to salvage *Seminole Rock* by conflating it with *Skidmore*. The factors that the government invokes to trigger *Seminole Rock* deference are sensible ones under *Skidmore* because they help a court decide whether an agency’s interpretation is persuasive. *Seminole Rock*, by contrast, said that the only relevant factor is the text of the rule. It makes less sense to reshape *Seminole Rock* as *Skidmore* than simply to apply *Skidmore* itself. Third, in many instances an agency interpretation of its own rules will not be entitled to any deference whatsoever. The Congressional Review Act (CRA), 5 U.S.C. §§ 801–808 (2012), requires agencies to publish in the Federal Register and to submit to Congress all post-CRA “rules”—a term that would include every agency interpretation of its own regulations. Any rule not so published and submitted cannot receive deference of any type, because the CRA renders those rules of no force and effect. See Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 40 HARV. J.L. & PUB. POL’Y 187 (2018). The government’s effort to preserve *Seminole Rock* therefore cannot work in most cases where the government would have its new standard applied. In sum, the Supreme Court should “retire” the *Seminole Rock-Auer* deference standard. *Supra* note 5.

87. It has been argued that, just as a writer knows best what his book says, so too the agency that authored a rule knows best what it means. See 1 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.11, at 532 (5th ed. 2010). That argument is at odds with the fairness and separation of powers principles that no one party should both promulgate and apply the law. See *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 619–21 (2013) (Scalia, J. concurring in part and dissenting in part). Atop that, a court’s role is to interpret the written law, not psychoanalyze the author’s state of mind. See *id.* at 618 (“The implied premise of this argument—that what we are looking for is the agency’s *intent* in adopting the rule—is false. There is true of regulations what is true of statutes. As Justice Holmes put it: ‘We do not inquire what the legislature meant; we ask only what the statute means.’ Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). 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.”); Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J.L. & PUB. POL’Y 87, 89 (2018).

As the Supreme Court made clear in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the APA “was not only a new, basic and comprehensive regulation of procedures in many agencies, but was also a legislative enactment which settled long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.”<sup>88</sup> Just as the federal courts cannot “engraft[] their own notions of proper procedures upon [federal] agencies,”<sup>89</sup> so too the courts cannot punt their law-interpreting responsibility over to administrative officials. The APA reflects Congress’s considered judgment regarding the respective roles that agencies and courts must play in the administrative state. While the Court did not have the benefit of the APA when it decided *Seminole Rock* in 1946, the APA came along a year later, and the judicial review provisions in that act are in effect today. It is time to correct the Court’s error in *Seminole Rock*.<sup>90</sup>

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88. 435 U.S. 519, 523 (1978) (citations and internal quotations omitted).

89. *Id.* at 525.

90. One final point: Then-Harvard Law School Professor (now Dean) John Manning has argued that *Seminole Rock* and *Chevron* trench on separation of powers principles. See Manning, *supra* note 47, at 618. In response, fellow Harvard Law School Professors Sunstein and Vermeule have claimed that Dean Manning’s argument is “overheated” and that his reliance on “the heavy constitutional artillery” of separation of powers “appears to be a stalking horse for much larger game—namely, a wholesale critique of the administrative state.” Sunstein & Vermeule, *supra* note 76, at 297, 299. That debate raises the question whether Congress could revise the APA by adopting the *Seminole Rock-Auer* standard. By greatly affecting how an Article III court can adjudicate a lawsuit, the debate potentially raises the question whether such a statute would exceed the restrictions that Article III imposes on Congress to create courts without granting their judges the life tenure and salary protections that Article III demands.

That is a difficult issue. Congress can require federal courts to give some degree of weight to an agency’s factual findings, *see, e.g.*, *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 583 (1985); *Crowell v. Benson*, 285 U.S. 22, 51 (1932), but there is a limit to how far Congress can go with regard to deciding questions of law, *see, e.g.*, *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325 (2016) (noting that Congress can change the substantive law underlying a dispute and require the courts to apply it retroactively); *Union Carbide*, 473 U.S. at 592–93 (noting that the relevant arbitration scheme allowed for review for constitutional errors and an arbitrator’s abuse of his authority); *United States v. Klein*, 80 U.S. 128, 146–48 (1871) (ruling that Congress cannot direct a federal court how to resolve a case). For example, it is doubtful that Congress could order a court to issue judgment in favor of a party whose actions, the court believes, were legally wrong. Also relevant is the question of whether Congress may entrust the determination of legal and factual issues to what have been described as “Article I” courts, *viz.*, courts lacking the tenure and salary protections required by Article III, § 1. *See Den v. Hoboken*

## V. QUO VADIS?

There is a way to respect the expertise of agency officials without handing them the power to decide a legal issue. The Supreme Court identified the appropriate standard in its unanimous opinion by Justice Robert Jackson in *Skidmore v. Swift & Co.*,<sup>91</sup> which predates *Seminole Rock* by only six months but went unmentioned in that decision. The issue in *Skidmore* was whether employees were entitled to overtime pay for the hours they spent at or nearby their job in a state of readiness in case of a fire.<sup>92</sup> The relevant statute, the Fair Labor Standards Act of 1938, did not answer this question, but the Administrator of Wages and Hours issued an agency bulletin concluding that a

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Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855). (“[W]e do not consider [whether] congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.”); see also, e.g., *Stern v. Marshall*, 564 U.S. 462, 473–88 (2011) (collecting cases reaffirming *Den*). When an issue arises under the Constitution, federal trial and appellate courts must independently decide questions of law, as well as so-called mixed questions of law and fact. See, e.g., *Ornelas v. United States*, 517 U.S. 690, 693, 696–97 (1996) (Fourth Amendment probable cause determinations); *Miller v. Fenton*, 474 U.S. 104, 110, 113, 115 (1985) (Fifth Amendment Self-Incrimination Clause confession-voluntariness determinations); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–11 (1984) (First Amendment “actual malice” determinations in defamation cases); *Jackson v. Virginia*, 443 U.S. 307, 309, 326 (1979) (sufficiency of the evidence to support a conviction). At the same time, Congress can create non-Article III courts in the District of Columbia, see *Palmore v. United States*, 411 U.S. 389, 390 (1973), and the territories, see *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828), and also can empower non-Article III courts to adjudicate issues arising entirely under acts of Congress, viz., the so-called “public rights doctrine,” see *Stern*, 564 U.S. at 488–95 (collecting cases). Accordingly, the question of what weight Congress can demand that an Article III court give to an agency’s decision does not have an obvious answer. See generally Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL’Y 27 (2018).

The Court need not reach that issue in *Kisor*, for two reasons. One is that the APA’s text does not adopt the *Seminole Rock-Auer* standard, and Congress has not done so elsewhere. Adler, *supra* note 56, at 12–13. The other reason is that the background common law adjudicatory principles noted above—viz., “No one may be a judge in his own cause” and “A judge must hear both sides of a case before deciding it”—should inform the proper reading of the APA’s judicial review provisions, and they advance much the same concerns that underlie a constitutional challenge to *Seminole Rock* and *Auer*. Accordingly, there should be no need to fire off any “heavy constitutional artillery” to retire the standard adopted in *Seminole Rock* and *Auer*.

91. 323 U.S. 134, 140 (1944).

92. *Id.* at 135–36.

flexible approach was the best way to decide whether such “waiting” time should be deemed overtime.<sup>93</sup> The Court found that the Administrator’s ruling was sensible and persuasive, despite its being neither conclusive nor binding on the courts, and therefore decided that the Administrator should prevail.<sup>94</sup> As the Court explained:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>95</sup>

*Skidmore* articulates a standard that accommodates both an agency’s expert judgment how to make a statute work and a court’s responsibility to keep the agency within legal bounds.

The Court’s decision in *Skidmore* is still good law. In 2001, the Court reaffirmed *Skidmore* in *United States v. Mead Corp.*, which involved a tariff classification judgment made by the U.S. Customs Service.<sup>96</sup> The Court declined to afford the Customs Service deference under the Court’s *Chevron* decision, which created a doctrine parallel to *Seminole Rock* and *Auer*, one granting deference to an agency’s interpretation of a vague or ambiguous statute, instead of a regulation. Congress, the Court decided, had not intended that the Customs Service have dispositive law-interpreting power. At the same time, the Court said that the Customs Service’s decisions were entitled to respect insofar as they were well reasoned and persuasive. In the absence of *Seminole Rock* and *Auer*, judges would not ignore an agency’s reading of a regulation, but the courts also would not be hamstrung by the agency’s construction.

The upshot is that even if the Court were to abandon the *Seminole Rock-Auer* rule, agencies would still be in a position to invoke their expertise as a justification for their judgment about

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93. *Id.* at 136, 138.

94. *Id.* at 139–40.

95. *Id.* at 140.

96. 533 U.S. 218, 221 (2001).

how a regulatory program should operate. Courts would be likely to decide whether the agency's position is a persuasive one by asking the same type of questions they have long pondered when reviewing a regulatory decision: When did the agency first adopt its interpretation (e.g., when the statute became law or when the agency filed suit)? How long has the agency maintained that position (e.g., for fifty years or fifty days)? Has the agency's interpretation remained consistent over time or gone from pillar to post? Is the field a highly technical one? And so forth. A contemporaneous, consistent, long-standing interpretation of a technical rule is likely to receive deference. A construction that is in "the same class as a restricted railroad ticket, good for this day and train only," should not.<sup>97</sup>

A court would want to know what John Henry Wigmore said about an issue of evidence law, what Arthur Corbin thought about a matter of contract law, what William Prosser wrote about tort law, what Philip Areeda or Herbert Hovenkamp concluded about antitrust law, and what Herbert Wechsler, David Shapiro, and Charles Allen Wright believed about criminal law, federal jurisdiction, and federal civil procedure, respectively. Each one is or was a highly learned and respected scholar. The legal community, including members of the bench, eagerly seeks their views on an issue in a lawsuit. The same would be true when an agency has earned respect for its consistently well-reasoned opinions.

Of course, experts can be wrong; even Homer nodded.<sup>98</sup> When that is the case, courts should reject their opinions. Just as it would be irrational for a court to disregard a persuasive agency position because the agency's views are not dispositive, so too would it be irrational to reject an otherwise persuasive argument just because an agency offered it, not a law professor. Under *Skidmore*, a federal court would likely give an agency's opinion whatever persuasive force its reasoning deserved. The difference between *Skidmore* and *Seminole Rock* is that *Skidmore* lets a court decide what is persuasive. A persuasive agency ar-

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97. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

98. *Even Homer Nods*, OXFORD DICTIONARIES ("Even the best person makes a mistake due to a momentary lack of alertness or inattention."), [http://www.oxforddictionaries.com/us/definition/american\\_english/even-homer-nods](http://www.oxforddictionaries.com/us/definition/american_english/even-homer-nods) [https://perma.cc/SS4G-HCDJ].

gument is no less persuasive just because the court has the final say. Moreover, if an agency cannot persuade the courts that its position is a sound one, why would we want the agency to prevail?

Freed from the shackles of *Seminole Rock* and *Auer* deference, judges would independently interpret the language of regulations before them.<sup>99</sup> This would not lead to judges making policy determinations but instead would allow judges to fulfill their constitutional duty to say what the law is. As then-Judge (now Justice) Neil Gorsuch pointed out, “We managed to live with the administrative state before *Chevron*. We could do it again.”<sup>100</sup> Likewise, there was a time before *Seminole Rock* and *Auer*. We can live without them too.

## VI. CONCLUSION

The world as we know it would not end if the Supreme Court reconsidered *Seminole Rock* and *Auer*. While courts would no longer be constrained by an agency’s unpersuasive or unreasonable construction of a regulation, agencies would still operate much the same, issuing regulations that touch on nearly every aspect of Americans’ daily lives, from highways to healthcare. The Supreme Court did not justify the *Seminole Rock* standard when it decided that case, and there is no persuasive reason to keep repeating that mistake. It is time for courts to follow the command of *Marbury v. Madison* and the APA that judges—not agency officials—must decide questions of law. The Supreme Court should seize the opportunity presented in *Kisor v. Wilkie* and retire the *Seminole Rock-Auer* standard.

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99. Then-Judge Brett Kavanaugh provided a simple roadmap for finding the best reading of a statute, an approach that applies equally well to regulations: look to “(1) the words themselves, (2) the context of the whole statute, and (3) any other applicable semantic canons, which at the end of the day are simply a fancy way of referring to the general rules by which we understand the English language.” Kavanaugh, *supra* note 22, at 2145.

100. *Gutierrez-Brizuela v. Lynch*, 834 F.3d. 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).