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Chipping Away at the Rock: *Perez v. Mortgage Bankers Association* and the *Seminole Rock* Deference Doctrine

Kevin O. Leske

Barry University School of Law

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CHIPPING AWAY AT THE ROCK: *PEREZ V. MORTGAGE BANKERS ASSOCIATION* AND THE SEMINOLE ROCK DEFERENCE DOCTRINE

*Kevin O. Leske**

Largely escaping judicial and scholarly examination for close to seventy years, the Seminole Rock deference doctrine directs federal courts to defer to an administrative agency's interpretation of its own regulation unless such interpretation "is plainly erroneous or inconsistent with the regulation." But at long last the United States Supreme Court is poised to re-evaluate the doctrine.

*In March 2015, in *Perez v. Mortgage Bankers Association*, the Court addressed whether a federal agency was required to follow the notice-and-comment procedures of the Administrative Procedure Act after it changed a prior interpretation of its regulation under the "Paralyzed Veterans doctrine." Although the Supreme Court unanimously found the Paralyzed Veterans doctrine impermissible, thereby restoring the plain language requirements of the Administrative Procedure Act, the case implicated the Seminole Rock deference doctrine, especially through the several concurring opinions, which focused exclusively on the doctrine.*

Accordingly, this Article explores the justices' various opinions in order to explain the compelling practical and constitutional reasons why the Seminole Rock regime cannot be ignored any further. The Article concludes that when the Supreme Court re-examines the doctrine, it should do so with the intent to bring clarity to this important area of federal administrative law.

* Associate Professor of Law, Barry University School of Law. I would like to thank Dean Leticia Diaz for her support. I am also grateful to the editors and staff of the *Loyola of Los Angeles Law Review* for their excellent work.

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I. INTRODUCTION

In 1945, the United States Supreme Court, in *Bowles v. Seminole Rock & Sand Co.*,¹ held federal courts must defer to an administrative agency's interpretation of its own regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation."² This deference doctrine has significant practical ramifications because, through the evolution of our administrative state, agency regulations have become the key way whereby the rights and obligations of private parties are established.³

It is therefore unsurprising that *Seminole Rock* questions "arise as a matter of course on a regular basis" during judicial review.⁴ However, despite its importance to the regulated community (and to the administrative state, in general), the *Seminole Rock* deference regime has not received anywhere near the attention lavished on the *Chevron* doctrine,⁵ its "doctrinal cousin," which applies to a court's review of a statutory provision.⁶

But why should we be concerned with the existing *Seminole Rock* standard? In short, there are several constitutional and practical problems with affording agencies a level of deference that scholars

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

2. *Id.* at 414. The *Seminole Rock* doctrine has been more recently referred to as "*Auer* deference" as a result of the case of *Auer v. Robbins*, 519 U.S. 452, 461 (1997). It remains a mystery why the courts, as well as the legal community, began calling it *Auer* deference, instead of *Seminole Rock* deference. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1088–89 & n.26 (2008) (observing and seeking to explain Justice Scalia's use of the term in his dissent in *Gonzales v. Oregon*, 546 U.S. 243, 277 (2006) (Scalia, J., dissenting)).

3. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614–15 (1996) (explaining because agency rules affect the public's legal rights more directly than statutes, the *Seminole Rock* doctrine requires closer scrutiny); see also *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring) (stating that the *Seminole Rock* doctrine goes "to the heart of administrative law").

4. *Decker*, 133 S. Ct. at 1339 (Roberts, C.J., concurring).

5. Kevin O. Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 229 (2013) [hereinafter Leske, *Between Seminole Rock and a Hard Place*] (asserting unlike *Chevron*, the *Seminole Rock* deference doctrine has "gone largely unexamined"); Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 99 (2000) (The *Seminole Rock* deference doctrine has "lurked beneath the surface and evaded scholarly and judicial criticism."); see also cf. Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587, 589 (1984) ("Although commentators have lavished attention on the subject of statutory construction, they have virtually ignored the problem of how to interpret regulations.").

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

have referred to as “controlling” deference because it essentially compels a court to accept the agency’s interpretation of an ambiguous regulatory provision.⁷

One constitutional concern is that the *Seminole Rock* standard raises separation of powers issues. Professor John F. Manning’s 1996 law review article details how deferring to an administrative agency under *Seminole Rock* effectively permits the agency to both make the law (because its regulation has the force of law) and also interpret that “law” (because it receives controlling deference for its subsequent interpretation).⁸ According to Manning, such an ability of “self-interpretation”⁹ “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.”¹⁰

And leading up to the Court’s recent interest in the doctrine, scholars have asserted the *Seminole Rock* standard can encourage an agency “to promulgate excessively vague legislative rules” and “leave the more difficult task of specification to the more flexible and unaccountable process of later ‘interpreting’ these open-ended regulations.”¹¹ More simply stated, an agency need not speak with

7. As I did in my past articles on the *Seminole Rock* doctrine, Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5, at 230, and Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787 (2014) [hereinafter Leske, *Splits in the Rock*], I will refer to *Seminole Rock* deference as “controlling” deference because it conforms to the Court’s view that the agency’s “administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Bowles*, 325 U.S. at 414; *accord* Weaver, *supra* note 5, at 591 (calling certain deference rules, including *Seminole Rock*’s, “controlling” because they are outcome determinative).

Although other scholars have referred to it as “binding deference,” the effect is the same. See Manning, *supra* note 3, at 617 (discussing the concept of “binding deference,” which requires “a reviewing court to accept an agency’s reasonable interpretation of ambiguous legal texts, even when a court would construe those materials differently as a matter of first impression”).

8. See Manning, *supra* note 3, at 638–39, 654, 696 (discussing the “separation of lawmaking from law-exposition,” and arguing that the *Seminole Rock* standard fails the separation of powers analysis).

9. See Manning, *supra* note 3, at 655 (“The right of self-interpretation under *Seminole Rock* removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean (unless the agency’s view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision.”).

10. Manning, *supra* note 3, at 617.

11. Lars Noah, *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules*, 51 HASTINGS L.J. 255, 290 (2000); see also Robert A. Anthony & Michael Asimow, *The Court’s Deferences—A Foolish Inconsistency*, 26 ADMIN. & REG. L. NEWS, 10, 10–11 (2000) (suggesting if an agency knows that a court will defer to its regulatory interpretation, it creates “a

clarity when promulgating regulations because it knows it will be given deference when it subsequently interprets its vague regulation informally (i.e., without engaging in the notice-and-comment process of the Administrative Procedure Act (APA)).¹²

Relatedly, the *Seminole Rock* deference doctrine—as it has been currently interpreted and applied by courts—conflicts with the APA. The APA directs courts to determine “the meaning or applicability of the terms of an agency action.”¹³ But *Seminole Rock*’s controlling deference standard completely undermines the court’s role in this respect. By applying the *Seminole Rock* standard, no longer do “affected persons . . . [have] recourse to an independent judicial interpreter of the agency’s legislative act.”¹⁴ The loss of the court as a “check” on the propriety of an agency regulation is especially troublesome because “the agency is often an adverse party” in a case involving the interpretation of that regulation.¹⁵

Starting in 2011, however, members of the Court have begun to highlight their interest in re-evaluating the *Seminole Rock* doctrine.¹⁶ Justice Scalia has been especially insistent in conveying his newfound discontent with the doctrine. First, in *Talk America, Inc. v.*

powerful incentive for agencies to issue vague regulations, with the thought of creating the operative regulatory substance later through informal interpretations”).

12. Administrative Procedure Act (APA), 5 U.S.C. § 552 (2012); see *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (“It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.”); see also Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1309 (2007) (stating “the [*Seminole Rock*] doctrine may tempt agencies to issue vague regulations through the relatively burdensome notice-and-comment process”).

13. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. 1, 9–10 (1996) (arguing § 706 of the APA requires a court to determine the meaning of the terms of an agency action thereby “arm[ing] affected persons with recourse to an independent judicial interpreter of the agency’s legislative act, where, after all, the agency is often an adverse party”).

14. Anthony, *supra* note 13, at 9. Professor Anthony asserts that the *Seminole Rock* doctrine contradicts the APA’s purpose in another way: by allowing an “exception for interpretative rules in § 553” because such rules should be subject to “plenary judicial review.” Anthony & Asimow, *supra* note 11, at 11 (citation omitted).

15. Anthony, *supra* note 13, at 9.

16. This is not to say the Court has been completely silent on the doctrine. See, e.g., *Mullins Coal Co. of Va. v. Dir., Office of Workers’ Comp. Programs*, U.S. Dep’t of Labor, 484 U.S. 135, 170 (1987) (Marshall, J., dissenting) (*Seminole Rock* deference must not be “a license for an agency effectively to rewrite a regulation through interpretation.”) (citing *Bowles*, 325 U.S. at 414); *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting) (stating “agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency’s understanding of the law.”); see generally, Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5 (reviewing the development of the doctrine).

Michigan Bell Telephone Co.,¹⁷ he observed that he “in the past [had] uncritically accepted that [deference] rule,” but now he had “become increasingly doubtful of its validity.”¹⁸ He expressly indicated he would be receptive to reconsidering the doctrine in a future case.¹⁹ The following year, in *Decker v. Northwest Environmental Defense Center*,²⁰ Justice Scalia took his objections a step further by stating he would abandon the doctrine because it had “no principled basis [and] contravenes one of the great rules of separation of powers [that he] who writes a law must not adjudge its violation.”²¹ No doubt prompted by Justice Scalia’s opinion, Chief Justice Roberts, joined by Justice Alito, wrote separately to concede that it “may be appropriate to reconsider that principle in an appropriate case” where “the issue is properly raised and argued.”²² The chief justice concluded by emphasizing the legal community should now be “aware that there is some interest in reconsidering those cases.”²³

The Court’s concern for the issues raised by the *Seminole Rock* doctrine reached its apex in 2015 in *Perez v. Mortgage Bankers Association*.²⁴ Although the case did not directly raise the doctrine, the Court addressed a related doctrine conceived by the United States Court of Appeals for the District of Columbia Circuit involving the notice-and-comment procedures under the APA.²⁵ Under the *Paralyzed Veterans* doctrine “[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.”²⁶

In its March 2015 decision, the Court unanimously struck down the D.C. Circuit’s *Paralyzed Veterans* doctrine.²⁷ Notably, however,

17. 131 S. Ct. 2254 (2011).

18. *Id.* at 2266 (Scalia, J., concurring).

19. *Id.*

20. 133 S. Ct. 1326 (2013).

21. *Id.* at 1342 (Scalia, J., concurring in part and dissenting in part) (stating that “I believe that it is time to do so”).

22. *Id.* at 1338–39 (Roberts, C.J., concurring).

23. *Id.*

24. 135 S. Ct. 1199 (2015).

25. *Id.*

26. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). The court revisited (and re-affirmed) this holding later in *Alaska Professional Hunters Ass’n v. Federal Aviation Administration*, 177 F.3d 1030, 1034 (D.C. Cir.1999), but the doctrine is most often cited as the *Paralyzed Veterans* doctrine.

27. *Perez*, 135 S. Ct. 1199 (2015).

the majority opinion was narrowly written and was accompanied by several concurring opinions that wrote more broadly on agency deference issues.²⁸ Specifically, Justices Alito, Scalia, and Thomas each penned opinions concurring in the judgment, but they focused on the *Seminole Rock* deference doctrine and expressed their views that the doctrine should be re-evaluated.²⁹

With now four justices (which is generally regarded as the number of “votes” necessary to grant a petition for a writ of certiorari)³⁰ expressly interested in re-evaluating the doctrine in an appropriate case, there seems little doubt that the Court will soon hear a case implicating the doctrine. Accordingly, this Article analyzes the Court’s various opinions in *Mortgage Bankers*, which will likely prove pivotal to *Seminole Rock*’s future.

Part I of this Article begins by briefly reviewing the *Seminole Rock* doctrine, its theoretical underpinnings, and the Supreme Court’s recent interest in the doctrine.³¹ Part II explains the *Paralyzed Veterans* doctrine, which was the basis for the appeal in the *Mortgage Bankers* case. Part III then analyzes the Court’s opinions in *Mortgage Bankers* to highlight the key concerns, as well as to evaluate the views of members of the Court, which will likely be “in play” during the full Court’s near certain re-examination. The Article concludes that the legitimate constitutional and practical problems expressed by these justices favor re-evaluating the doctrine in a way that would mitigate these concerns to bring more fairness and consistency to our administrative state.

II. THE *SEMINOLE ROCK* DEFERENCE DOCTRINE

Before analyzing the *Paralyzed Veterans* doctrine and *Mortgage Bankers* case, it is valuable to briefly examine the *Seminole Rock* doctrine, which was implicated by the Supreme Court’s decision. Accordingly, this Part begins by summarizing the facts and the Court’s ruling in *Seminole Rock*.³² Next, it identifies the legal foundation for establishing the doctrine that was not specified by the Court until nearly half a century later. Last, it introduces the recent

28. *Id.* (addressing *Paralyzed Veterans* doctrine only).

29. *Id.* See Part II.

30. See *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 529 (1957) (Frankfurter, J., dissenting) (describing “rule of four”).

31. See Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5, at 244–71 (describing the Supreme Court’s interpretation and application of the *Seminole Rock* doctrine).

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

cases where the Court has demonstrated an interest in the doctrine to help place the opinions in the *Mortgage Bankers* case in context.

A. *Bowles v. Seminole Rock & Sand Co.*

In the Supreme Court's 1945 decision in *Seminole Rock*, the Court created the standard to apply when courts review an agency's interpretation of its own regulation.³³ Under *Seminole Rock*, a court must defer to an agency's interpretation of its regulation unless it "is plainly erroneous or inconsistent with the regulation."³⁴

In *Seminole Rock*, the Court was required to analyze "Maximum Price Regulation No. 188," which mandated "each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942."³⁵ This regulation had been enacted under the Emergency Price Control Act of 1942, which was aimed at preventing inflation during World War II by controlling prices.³⁶

The controversy involved whether *Seminole Rock & Sand* had violated the regulation by negotiating a contract to sell crushed stone for more than the price established during the base period.³⁷ Chester Bowles, the Administrator of the Office of Price Administration, sought to enjoin *Seminole Rock & Sand* from selling based on the fact that there had been an actual delivery in March 1942 for a lower price.³⁸ Although it conceded it had delivered crushed stone for a lower price, *Seminole Rock & Sand* argued that there must have been both a charge and a delivery at a given price to fix the ceiling price.³⁹ Because the contract for that delivery occurred in October 1941, it asserted the ceiling limit had not been exceeded.⁴⁰

The district court held *Seminole Rock & Sand* had not violated the Maximum Price Regulation and, on appeal, the Fifth Circuit affirmed.⁴¹ Thus, the central issue for the Supreme Court was whether *Seminole Rock & Sand* charged a price that was greater than the maximum established during the regulatory period.⁴² The Court first noted the Administrator's interpretation of the regulation would

33. *Id.* at 411.

34. *Id.* at 414.

35. *Id.* at 413.

36. *Id.* at 411, 413.

37. *Id.* at 412, 415.

38. *Id.*

39. *Id.* at 415.

40. *Id.*

41. *Id.* at 412-13.

42. *Id.* at 413.

only be helpful if the regulation was ambiguous.⁴³ If ambiguous, the Court found “a court must necessarily look to the administrative construction of the regulation.”⁴⁴ And as to the deference a court should afford an agency’s view, the Court held “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”⁴⁵

The Court found the regulation contained an ambiguous phrase: “highest price charged during March, 1942.”⁴⁶ It then looked to the “administrative construction” of the regulation set forth in a bulletin issued at the time the Maximum Price Regulation was issued.⁴⁷ Based on “the consistent administrative interpretation” set forth in the Bulletin interpreting that phrase, the Court found that the highest price of an *actual* delivery during March 1942 established the price ceiling.⁴⁸ Thus, in deferring to the agency’s interpretation of the regulation, the Court reversed the judgment of the court of appeals.⁴⁹

B. A Brief Doctrinal Explanation of *Seminole Rock*

In its opinion in *Seminole Rock*, the Court did not provide a justification for giving the agency’s interpretation “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”⁵⁰ The basis for the *Seminole Rock* standard emerged in two cases over thirty years later.

In the 1991 case of *Martin v. Occupational Safety & Health Review Commission*,⁵¹ the Court stated that judicial deference to agency interpretations was rooted in the agency’s delegated lawmaking powers. That same year, in *Pauley v. BethEnergy Mines, Inc.*,⁵² the Court further explained the authority to interpret

43. *Id.* at 413–14.

44. *Id.* at 414.

45. *Id.*

46. *Id.* at 415.

47. *Id.* at 417.

48. *Id.* at 415, 418. The Court also seemed to place significant weight on the fact that the public had been placed on notice of this consistent interpretation. *Id.* at 417–18.

49. *Id.* at 418.

50. *Id.* at 414.

51. 499 U.S. 144, 151 (1991) (“Because applying an agency’s regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers.”) (citation omitted). For additional background on *Martin*, see Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5, at 227.

52. 501 U.S. 680 (1991).

regulations was embedded in the delegation to an agency by Congress.⁵³ And the controlling deference standard of *Seminole Rock* applied by courts to these interpretations naturally follows from this congressional delegation.⁵⁴

During these cases, the Court did not critically analyze the doctrine or identify any perceived problems associated with the *Seminole Rock* standard. Nor did the doctrine garner any immediate attention by either scholars or the justices. And in the following years, the Supreme Court and appellate courts began developing various factors to look to when applying the standard without regard to whether those factors were consistent with the doctrine's underpinnings or might otherwise be problematic.⁵⁵ But nonetheless the standard developed into an immensely important principle of administrative law that has largely "lurked beneath the surface and evaded scholarly and judicial criticism."⁵⁶

C. *The Supreme Court's Recent Interest in Seminole Rock*

Although the Court has been somewhat faithfully applying the *Seminole Rock* standard ever since it established the doctrine in 1945, it has not further elaborated on its foundation or engaged in a meaningful analysis of the doctrine.⁵⁷ But this is not to say that members of the Court have not signaled their apprehension of applying the standard or of granting an agency controlling deference in some cases. For instance, Justice Thurgood Marshall warned that *Seminole Rock* deference must not be "a license for an agency

53. *Id.* For further background on *Pauley*, see Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5.

54. *Pauley*, 501 U.S. at 698 ("As delegated by Congress, then, the Secretary's authority to promulgate interim regulations 'not . . . more restrictive than' the HEW [Health, Education, and Welfare] interim regulations necessarily entails the authority to interpret HEW's regulations and the discretion to promulgate interim regulations based on a reasonable interpretation thereof. From this congressional delegation derives the Secretary's entitlement to judicial deference.").

55. Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5, at 248–71 (describing factors applied in U.S. Supreme Court). For a detailed analysis of the interpretation of the courts of appeals, see Leske, *Splits in the Rock*, *supra* note 7.

56. Angstreich, *supra* note 5, at 99 (The *Seminole Rock* deference doctrine has "lurked beneath the surface and evaded scholarly and judicial criticism."); Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5, at 229 (asserting that unlike *Chevron*, the *Seminole Rock* deference doctrine has "gone largely unexamined").

57. For a detailed review of the Supreme Court's interpretation and application of the *Seminole Rock* doctrine, see Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5, at 248–71.

effectively to rewrite a regulation through interpretation.”⁵⁸ Similarly, Justice Clarence Thomas (joined by three colleagues) opined “agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency’s understanding of the law.”⁵⁹

Yet only within the last five years have justices suggested they would consider reassessing the doctrine, including an explicit statement to that effect by Chief Justice Roberts during the Court’s 2012–2013 Term.⁶⁰ And as the opinions in the *Mortgage Bankers* case demonstrate, there are now enough members of the Court interested in the *Seminole Rock* doctrine to make a future grant of a writ of certiorari in a case that raises the issue a virtual certainty.

Justice Scalia’s brief concurrence in the Court’s June 2011 decision in *Talk America, Inc. v. Michigan Bell Telephone Co.*,⁶¹ signaled his first of several efforts to make his colleagues aware of his newfound skepticism toward the *Seminole Rock* doctrine.⁶² In *Talk America*, the Court was called upon to decide whether the Telecommunications Act mandates that local telephone service providers offer competitors use of their transmission facilities at cost-based regulated rates.⁶³ After determining the Telecommunications Act provision at issue and that the Federal Communications Commission’s (FCC) regulations were ambiguous, the Court looked to the FCC’s interpretation of its regulations.⁶⁴ Applying the *Seminole Rock* standard, the Court stated the application of the doctrine was dispositive: “The FCC as *amicus curiae* has advanced a reasonable interpretation of its regulations, and we defer to its views.”⁶⁵

58. *Mullins Coal Co. of Va. v. Dir., Office of Workers’ Comp. Programs*, U.S. Dep’t of Labor, 484 U.S. 135, 170 (1987) (Marshall, J., dissenting) (referencing *Bowles*, 325 U.S. at 414). See generally Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5 (reviewing development of the doctrine).

59. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

60. *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring).

61. 131 S. Ct. 2254 (2011).

62. *Id.* at 2265–66 (Scalia, J., concurring) (discussing how he would reach the same holding as the majority without relying on the *Seminole Rock* doctrine, since “the FCC’s [Federal Communications Commission’s] interpretation is the fairest reading of the orders in question”).

63. *Id.* at 2257 (majority opinion).

64. *Id.* at 2260–61. The FCC’s interpretation was that facilities must be made available if they were to be used “to link the incumbent provider’s telephone network with the competitor’s network for the mutual exchange of traffic.” *Id.* at 2257.

65. *Id.* at 2265. The FCC was not a party to the litigation but submitted an *amicus curiae* brief. *Id.*

Despite having joined the opinion of the Court, Justice Scalia wrote separately to make known his disinclination to accept the *Seminole Rock* doctrine any longer: “For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity.”⁶⁶ He ended his brief concurrence by announcing, “We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so.”⁶⁷

In the 2012 case of *Christopher v. SmithKline Beecham Corp.*,⁶⁸ the Court explicitly declined to grant the Department of Labor (DOL) *Seminole Rock* deference.⁶⁹ In *SmithKline Beecham*, the Court analyzed whether the DOL’s regulation defining “outside salesman” included pharmaceutical sales representatives.⁷⁰ After reviewing the DOL regulations and DOL’s interpretation, it analyzed whether *Seminole Rock* deference should apply.⁷¹ Despite recognizing that deference was generally appropriate, the Court noted, “[T]his general rule does not apply in all cases.”⁷²

The Court looked to instances where it had declined to grant *Seminole Rock* deference, such as “when there is reason to suspect that the agency’s interpretation ‘does not reflect the agency’s fair and considered judgment on the matter in question.’”⁷³ After exploring these contours, the Court refused to grant *Seminole Rock* deference to DOL’s interpretation.⁷⁴ While the Court did not express

66. *Id.* at 2266 (Scalia, J., concurring). Justice Scalia opined the doctrine encourages agencies to enact vague regulations, potentially violates the separation of powers doctrine, “frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.” *Id.* He also referred to the *Seminole Rock* doctrine as “*Auer* deference.” *Id.*

67. *Id.*

68. 132 S. Ct. 2156 (2012).

69. *Id.* at 2166–67. To support its decision to withhold agency deference, the Court cited several past cases, some of which are not even part of the *Seminole Rock/Auer* line of cases. *Id.* (referencing *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 158 (1991) and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)).

70. *Id.* at 2161.

71. *Id.* at 2166.

72. *Id.*

73. *Id.* at 2166 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). The Court detailed two instances when an agency’s interpretation might not reflect its fair and considered judgment: “when the agency’s interpretation conflicts with a prior interpretation,” *id.* (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)), and when an agency’s interpretation appears to be “nothing more than a ‘convenient litigating position,’” or a “‘post hoc rationalizatio[n]’ advanced by an agency seeking to defend past agency action against attack,” *SmithKline Beecham*, 132 S. Ct. at 2166–67 (alteration in original) (citation omitted) (quoting *Auer*, 519 U.S. at 462).

74. *SmithKline Beecham*, 132 S. Ct. at 2168–69. The Court found that acceptance of the DOL’s interpretation would not give fair warning to the public and would constitute “unfair surprise.” *Id.* at 2167 (citation omitted).

reservation with the existence of the *Seminole Rock* doctrine *vel non*, it does represent the Court acknowledged the doctrine had limitations.⁷⁵

Following these cases, the *Seminole Rock* doctrine appeared at the forefront of two opinions in 2013 penned in *Decker v. Northwest Environmental Defense Center*.⁷⁶ At issue in *Decker* was whether storm water runoff channeled from logging roads fell within a regulation promulgated under the federal Clean Water Act (CWA) defining discharges into navigable waters.⁷⁷ The United States, appearing as *amicus curiae*, asserted “[t]he EPA [Environmental Protection Agency] interprets its regulation to exclude the type of storm water discharges from logging roads at issue.”⁷⁸ The Court found this to be a “reasonable interpretation of its own regulation,” and applying the *Seminole Rock* standard deferred to this interpretation.⁷⁹ It explained not only was the “EPA’s interpretation . . . a permissible one,” but “there is no indication that the [EPA’s] current view [was] a change from prior practice or a post hoc justification adopted in response to litigation.”⁸⁰

Once again, Justice Scalia wrote separately express his disdain for the *Seminole Rock* doctrine.⁸¹ He decried “[e]nough is enough” with respect to “giving agencies the authority to say what their rules mean . . . under the harmless-sounding banner of” *Seminole Rock* deference.⁸² Prior to turning to facts at issue, he summed up his problem with the *Seminole Rock* doctrine as follows: “[H]owever

75. *Id.* at 2167.

76. 133 S. Ct. 1326, 1326 (2013).

77. *Id.* at 1330. A permit for such runoff is necessary if the discharge is “deemed to be ‘associated with industrial activity.’” Those terms are interpreted under the Clean Water Act (CWA) and the implementing regulations issued by the Environmental Protection Agency (EPA). *Id.* (citation omitted). In turn, an EPA regulation defines “the term ‘associated with industrial activity’ to cover only discharges ‘from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.’” *Id.* (citation omitted).

78. *Id.* at 1331.

79. *Id.*

80. *Id.* at 1329–30, 1337 (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012)).

81. *Id.* at 1339 (citing *Talk America, Inc.*, 131 S. Ct. at 2266 (Scalia, J., concurring in part and dissenting in part)). Justice Scalia also distinguished this case from *Talk America*, where the “agency’s interpretation of the rule was also the fairest one, and no party had asked [the Court] to reconsider.” *Id.* Here, he argued, the application of the *Seminole Rock* doctrine “ma[de] the difference.” *Id.*

82. *Id.* (citing *Talk America, Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring in part and dissenting in part)).

great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.”⁸³

Justice Scalia’s opinion, standing alone, represented a significant milestone in the emerging debate on the *Seminole Rock* doctrine. But the concurring opinion of Chief Justice Roberts, joined by Justice Alito, was also notable for its clear goal to make the legal community aware that there were members of the Court interested in the *Seminole Rock* line of cases.⁸⁴ Moreover, the opinion acknowledged that Justice Scalia’s opinion had raised “serious questions about the principle set forth” in *Seminole Rock* and *Auer*.⁸⁵

Based on the justices’ opinions in *Decker*, as well as in *Talk America* and *SmithKline Beecham*, it seemed beyond serious dispute that the Court would accept a case for review with the goal of reevaluating the *Seminole Rock* doctrine.⁸⁶ But now, given the Court’s opinions in *Mortgage Bankers*, this event is inevitable. With that in mind, exploring the *Mortgage Bankers* case yields several important results. First, the analysis provides additional support for the need to re-examine *Seminole Rock* for doctrinal, rather than pragmatic, reasons as soon as possible. Next, the analysis serves a valuable point of reference for practitioners seeking to bring a case involving the *Seminole Rock* doctrine to the Supreme Court. Finally, the analysis contributes to the scarce, but now growing, scholarship in this important area of federal administrative law.

III. THE *PARALYZED VETERANS* DOCTRINE AND THE *MORTGAGE BANKERS* CASE

A. Introduction

The recent case of *Mortgage Bankers* has thrust the *Seminole Rock* deference doctrine into the spotlight. To help understand the justices’ impetus for highlighting the *Seminole Rock* doctrine in this

83. *Id.* at 1342. Justice Scalia would have determined regulation’s meaning by applying “familiar tools of textual interpretation,” such as the fairest reading of the regulations. *Id.*

84. *Id.* at 1339 (Roberts, C.J., concurring) (making the legal bar “aware that there is some interest in reconsidering” *Seminole Rock* and *Auer*).

85. *Id.* at 1338 (Roberts, C.J., concurring) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). (The chief justice noted although “[i]t may be appropriate to reconsider that principle in an appropriate case,” he “would await a case in which the issue is properly raised and argued.”).

86. *See infra* Part III.

case, this section briefly explores the *Paralyzed Veterans* doctrine and the journey of the *Mortgage Bankers* case to the Supreme Court.

B. *The Paralyzed Veterans Doctrine*

In *Paralyzed Veterans of America v. D.C. Arena L.P.*,⁸⁷ the Paralyzed Veterans of America (PVA) brought suit in the United States District Court for the District of Columbia under the Americans with Disabilities Act (ADA).⁸⁸ The PVA maintained the wheelchair seating to be built in the new MCI Center in Washington, D.C., must provide lines of sight over standing spectators.⁸⁹

In the ADA, Congress mandated that the U.S. Department of Justice (DOJ) promulgate regulations implementing this requirement.⁹⁰ At issue in the case was a regulation called Standard 4.33.3, which states:

Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location.⁹¹

The main controversy between the parties was whether the requirement for there to be “lines of sight comparable to those for members of the general public” meant that wheelchair seats be situated to allow sightlines over standing spectators.⁹² DOJ interpreted this phrase to require all wheelchair seats provide a clear line of sight.⁹³ DOJ’s interpretation, however, appeared to “constitute . . . a fundamental modification of its previous interpretation.”⁹⁴

87. 117 F.3d 579 (D.C. Cir. 1997).

88. *Id.* at 580; 42 U.S.C. §§ 12181 et seq. (1994).

89. *Paralyzed Veterans of Am.*, 117 F.3d at 580; see 42 U.S.C. § 12182(a) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”); see also 42 U.S.C. § 12183(a)(1) (2012) (requiring that new facilities subject to the ADA must be “readily accessible to and usable by individuals with disabilities”).

90. *Paralyzed Veterans of Am.*, 117 F.3d at 580; see 42 U.S.C. § 12186(b).

91. *Paralyzed Veterans of Am.*, 117 F.3d at 580–81 (citing 28 C.F.R. Part 36, App. A, § 4.33.3 (1996)).

92. *Id.* at 586.

93. *Id.* at 582.

94. *Id.* at 586.

In analyzing this issue, the D.C. Circuit found, “Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself.”⁹⁵ In other words, the DOJ was required to go through the process of notice-and-comment rulemaking if it had definitively interpreted the regulation at issue and now wanted to alter its prior interpretation.⁹⁶

The court explained agencies do not have the identical leeway to change their interpretations of regulations as they do when they change their interpretations of statutory provisions.⁹⁷ The district court reasoned that an animating principle under *Chevron* deference, which applies to the review of an agency’s interpretation of a statute, is that “Congress has delegated *implicitly* to administrative agencies and departments the authority to reconcile, within reason, ambiguities in statutes that the agencies and departments are charged with administering.”⁹⁸ And this delegation is “a continuing one” so that an agency may change its initial interpretation to take a different one (so long as it remains a reasonable construction of the statute).⁹⁹

The court further explained that although the deference doctrine relating to an agency’s interpretation of its regulation and the deference doctrine that applies to an agency’s interpretation of a statute (established in *Chevron*) are “analogous,” Congress has “said more . . . on the subject of regulations” in the APA.¹⁰⁰ It pointed out that under the APA, agencies must follow notice-and-comment procedures while developing regulations, which includes “repeal” or “amendments” of regulations.¹⁰¹ With this requirement in mind, the court concluded “to allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements.”¹⁰²

In the end, however, the court found that DOJ had not initially set forth an authoritative interpretation of the phrase “lines of sight comparable” so as to constitute an amendment or modification of its

95. *Id.*

96. *Id.*; see 5 U.S.C. § 553 (1982) (APA notice-and-comment provision).

97. *Paralyzed Veterans of Am.*, 117 F.3d at 586.

98. *Id.* (emphasis in original) (citing *Kelley v. Env'tl. Prot. Agency*, 15 F.3d 1100, 1108 (D.C. Cir. 1994); *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 90 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 821 (1995)).

99. *Paralyzed Veterans of Am.*, 117 F.3d at 586 (citing *Chevron*, 467 U.S. at 863).

100. *Id.* at 586; 5 U.S.C. §§ 551 et seq. (2012).

101. *Paralyzed Veterans of Am.*, 117 F.3d at 586 (citing 5 U.S.C. § 551(5)).

102. *Id.*

prior view.¹⁰³ Nonetheless, the case was soon regarded as having created the *Paralyzed Veterans* doctrine: “Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”¹⁰⁴

C. Mortgage Bankers’ Journey to the Supreme Court

Before reaching the Supreme Court, the *Mortgage Bankers* case was heard by the U.S. District Court for the District of Columbia and then on appeal in the U.S. Court of Appeals for the District of Columbia Circuit. A brief summary of their decisions follows. Interestingly, neither court mentioned the *Seminole Rock* doctrine.

1. The District Court’s Decision

In *Mortgage Bankers Association v. Solis*,¹⁰⁵ the Mortgage Bankers Association (MBA), a national trade association that represents the real estate finance industry, filed suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against the Department of Labor (DOL) under the APA.¹⁰⁶ More specifically, MBA sought review of a DOL administrative interpretation that had conflicted with a previous DOL interpretation.¹⁰⁷

The case involved the Fair Labor Standards Act (FLSA), where DOL had promulgated regulations to implement the FLSA.¹⁰⁸ In general, the FLSA requires covered employers to pay overtime wages to employees who work more than forty hours per week.¹⁰⁹ However, there are exemptions in the FLSA such as one in section 213(a)(1), which provides “any employee employed in a bona fide executive, administrative, or professional capacity[,] . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . .),” is

103. *Id.* at 587.

104. *Id.* at 586. The court revisited (and re-affirmed) this holding later in *Alaska Professional Hunters Ass’n v. Federal Aviation Administration*, 177 F.3d 1030, 1034 (D.C. Cir. 1999), but the doctrine is most often cited as the *Paralyzed Veterans* doctrine.

105. 864 F. Supp. 2d 193 (D.D.C. 2012).

106. *Id.* at 195. The defendants were Hilda Solis, in her official capacity as secretary of the United States Department of Labor, Nancy Leppink, in her official capacity as deputy administrator of the Wage and Hour Division of DOL, and DOL itself. *Id.*

107. *Id.* at 195.

108. *Id.*; 29 U.S.C. §§ 201–19 (2012).

109. *Solis*, 864 F. Supp. 2d at 195–96; 29 U.S.C. § 207(a)(1).

exempt from the “[m]inimum wage and maximum hour requirements” otherwise required by the Act.¹¹⁰

Over the years, DOL had allegedly changed its interpretation of the scope of the exemption.¹¹¹ Of specific interest to MBA was whether certain employees, such as mortgage loan officers, were subject to the FLSA exemption (meaning that they would not be eligible for over-time pay).¹¹² For example, the DOL had released various opinion letters, as well as issued an administrative interpretation bulletin on the issue, which had explicitly withdrawn one of the previous opinion letters.¹¹³ In this bulletin, DOL allegedly changed its position by suggesting mortgage loan officers were not exempt from overtime pay requirements. It was this new interpretation that MBA challenged arguing, under the *Paralyzed Veterans* doctrine, the DOL was required to go through the process of notice-and-comment rulemaking to make such a change.¹¹⁴

The district court began its analysis noting as a threshold matter it was permissible for an agency to change “its initial interpretation to adopt another reasonable interpretation.”¹¹⁵ But to do so under binding D.C. Circuit precedent the court further recognized that the *Paralyzed Veterans* doctrine might compel the agency to follow the notice-and-comment provisions.

The court then addressed arguments by DOL that the *Paralyzed Veterans* doctrine conflicted with U.S. Supreme Court precedent.¹¹⁶ For example, DOL asserted that the Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*¹¹⁷ held the APA’s notice-and-comment provisions “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.”¹¹⁸ According to DOL, because the *Paralyzed Veterans* doctrine requires an agency to follow the notice-and-comment

110. *Solis*, 864 F. Supp. 2d at 196; 29 U.S.C. § 213(a)(1).

111. *Solis*, 864 F. Supp. 2d at 196–201.

112. *Id.* at 198.

113. *Id.* at 201.

114. *Id.* MBA also argued that the bulletin conflicted with existing DOL regulations and was therefore arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA. *Id.*; *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

115. *Solis*, 864 F. Supp. 2d at 203 (citing *Paralyzed Veterans of Am.*, 117 F.3d at 586).

116. *Id.* at 204.

117. 435 U.S. 519 (1978).

118. *Solis*, 864 F. Supp. 2d at 203; *Vt. Yankee*, 435 U.S. at 524.

process if the agency wants to change a prior interpretation of its own regulations, such a requirement constitutes an additional procedural requirement and is impermissible.¹¹⁹

Without addressing the merits of DOL's argument, the court found it was bound to adhere to controlling circuit precedent.¹²⁰ It noted *Vermont Yankee* had been decided close to twenty years before *Paralyzed Veterans* so that the district court was "presumably aware" of *Vermont Yankee* when it created the doctrine.¹²¹ Moreover, it observed that the *Paralyzed Veterans* case has "remained good law in this Circuit for almost fifteen years."¹²²

The court likewise dismissed DOL's argument that the *Paralyzed Veterans* doctrine was invalidated by the Court's 2009 decision in *FCC v. Fox Television Stations, Inc.*¹²³ There, DOL argued, the Court found the APA made no distinction "between initial agency action and subsequent agency action undoing or revising that action."¹²⁴ The district court, however, distinguished *Fox Television* on the basis that the Court was focused on whether the new interpretations contained in administrative orders at issue were arbitrary and capricious—not whether the new interpretations needed to have gone through the notice-and-comment process.¹²⁵ Therefore, the court found the *Paralyzed Veterans* doctrine remained the dispositive case on point.¹²⁶

Next, the court addressed DOL's argument that two "purported exceptions" to the *Paralyzed Veterans* doctrine applied.¹²⁷ First, according to DOL, the doctrine should not apply (i.e., it should not have to go through notice-and-comment rulemaking) unless the challenging party "substantially and justifiably" relied on the previous interpretation.¹²⁸ Second, it asserted an "invalid prior interpretation" exception found in another D.C. Circuit case should apply.¹²⁹

119. *Solis*, 864 F. Supp. 2d at 204.

120. *Id.* (quoting *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir.1997)).

121. *Id.*

122. *Id.* at 205.

123. *Id.*; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

124. *Solis*, 864 F. Supp. 2d at 205 (citing *Fox Television*, 556 U.S. at 515).

125. *Id.*

126. *Id.*

127. *Id.* at 205–06.

128. *Id.* (citing *MetWest Inc. v. Sec'y of Labor*, 560 F.3d 506 (D.C. Cir. 2009)).

129. *Id.* at 206 (citing *Monmouth Med. Ctr. v. Thompson*, 257 F.3d 807 (D.C. Cir. 2001)).

With respect to whether a showing of substantial and justifiable reliance on the prior interpretation was required for the *Paralyzed Veterans* doctrine to apply, the court agreed with DOL that it was.¹³⁰ It found that a “core tenant” of the *Paralyzed Veterans* doctrine line of cases was a “substantial and justifiable reliance on a well-established agency interpretation.”¹³¹ And because MBA had not met its burden to demonstrate sufficient reliance, the court held notice-and-comment rulemaking was not required under the *Paralyzed Veterans* doctrine.¹³²

2. The Decision by the Court of Appeals

Although, as discussed above, the district court assessed many arguments raised by both parties, the only issue presented to the court of appeals was whether a party’s justifiable reliance on a previous interpretation is “a separate and independent requirement” when determining whether the *Paralyzed Veterans* doctrine applies.¹³³ Significantly, DOL conceded on appeal that if the court found reliance was not a separate requirement, then the *Paralyzed Veterans* doctrine would apply thereby requiring them to go through the notice-and-comment process for its revised interpretation.¹³⁴

In analyzing the issue, the court of appeals rejected the lower court’s view that previous D.C. Circuit opinions held a party must demonstrate “substantial and justifiable reliance on a well-established agency interpretation.”¹³⁵ To the contrary, the court found there was no separate reliance element under the *Paralyzed Veterans* doctrine.¹³⁶

The court explained the *Paralyzed Veterans* analysis consists of two elements: a definitive interpretation and a significant change in such interpretation.¹³⁷ It rejected the view that some of its more recent cases had grafted an “independent third element: substantial and justified reliance.”¹³⁸ The court explained the view that inquiring whether there had been reliance was merely part of the analysis as to

130. *Id.* at 207.

131. *Id.* at 208 (citing *MetWest*, 560 F.3d at 511).

132. *Id.* at 210.

133. *Mortgage Bankers Ass’n v. Harris*, 720 F.3d 966, 967–68 (D.C. Cir. 2013).

134. *Id.* at 968.

135. *Id.* at 969 (quoting *Solis*, 864 F. Supp. 2d at 204–05).

136. *Id.* at 968.

137. *Id.* at 969.

138. *Id.* (citing *Honeywell Int’l, Inc. v. Nuclear Regulatory Comm’n*, 628 F.3d 568 (D.C. Cir. 2010) and *MetWest Inc. v. Sec’y of Labor*, 560 F.3d 506 (D.C. Cir. 2009)).

whether the agency had set forth a “definitive interpretation.”¹³⁹ It reasoned that “significant reliance functions as a rough proxy for definitiveness” because “regulated entities are unlikely to substantially—and often cannot be said to justifiably—rely on agency pronouncements lacking some or all the hallmarks of a definitive interpretation.”¹⁴⁰

Finally, the court rejected the DOL’s argument that “the only way to protect agencies from inadvertently locking in disfavored, informally promulgated positions is to impose a separate and independent reliance element.”¹⁴¹ It found since a party’s reliance should properly be treated as part of the definitiveness analysis, agencies will be adequately protected without making reliance a distinct element.¹⁴² The court therefore found for MBA and remanded the case with instructions to vacate the DOL’s bulletin containing the new interpretation.¹⁴³

IV. CHIPPING AWAY AT THE ROCK

A. Introduction

As my past articles on *Seminole Rock* detailed, the Supreme Court and lower courts have somewhat consistently applied the doctrine over the past seventy years.¹⁴⁴ Yet it is not until very recently that justices have begun to analyze the doctrine critically. With respect to the *Seminole Rock* doctrine, several key observations can be made.

First, the Supreme Court’s *Seminole Rock* doctrine jurisprudence shows a more searching review on whether to defer than the standard seems to require. But these opinions also show substantial inconsistency, even confusion, on how they interpret and apply the standard.¹⁴⁵

Second, it is evident that at least four justices would like to hear a case that raises the doctrine, so that the full Court can re-examine the doctrine. This is supported by the views expressed by Chief

139. *Id.* at 970.

140. *Id.*

141. *Id.* at 971.

142. *Id.* at 971–72.

143. *Id.* at 972.

144. Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5, at 235.

145. *Id.*

Justice Roberts and Justices Scalia, Thomas, and Alito in recent opinions.¹⁴⁶

Third, it is safe to say that at least two justices (Justices Scalia and Thomas) would like to over-turn the *Seminole Rock* doctrine. Other members, however, have shown allegiance to the doctrine without thorough examination.¹⁴⁷

Fifth, and in sum, based on the recent interest and recognized importance of the *Seminole Rock* doctrine in our administrative state, Supreme Court review is certainly imminent where it will re-evaluate the doctrine.

Therefore, the goal of this Part is to explain how the Court addressed the *Seminole Rock* doctrine and related administrative law issues in the recent case of *Perez v. Mortgage Bankers Association*. In addition, given the Court's interest in re-evaluating the doctrine in a future case, another goal of this Part is to facilitate the Court's consideration of the doctrine. As such, this Part seeks to provide additional insight on the justices' views on the *Seminole Rock* doctrine.

B. The Court's Majority Opinion

After making its way through the D.C. Circuit, *Mortgage Bankers* was heard by the Supreme Court in its 2014–2015 term.¹⁴⁸ On March 9, 2015, the Court released its opinion with Justice Sotomayor delivering the judgment on behalf of a unanimous court.¹⁴⁹ In addition, Justices Scalia, Thomas, and Alito each penned separate opinions concurring in the judgment.¹⁵⁰ The central question presented in the case was whether the *Paralyzed Veterans* doctrine was consistent with the APA.¹⁵¹ And although the case did not directly raise the *Seminole Rock* doctrine, it was clear from the concurring opinions that the doctrine was directly on the minds of several justices.

The Court began by introducing and summarizing the applicable provisions in the APA that federal administrative agencies institute

146. *See infra*.

147. *See infra*.

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

149. *Id.*

150. *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211 (Scalia, J., concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment).

151. *Id.* at 1203; *see* 5 U.S.C. § 551 (2012).

when they promulgate rules.¹⁵² It noted the APA rulemaking provision also applies when agencies amend or repeal an existing rule, which is broadly defined to encompass “statement[s] of general or particular applicability and future effect” that are intended to “implement, interpret, or prescribe law or policy.”¹⁵³

The process, set forth in APA section 553, which has been called “notice and comment rulemaking,” requires agencies to complete three steps.¹⁵⁴ The agency must first give “notice” to the public, which is normally accomplished by publishing a notice of proposed rulemaking in the Federal Register.¹⁵⁵ Next, the agency is required to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments”¹⁵⁶ and then the agency must consider and reply to such comments.¹⁵⁷ Finally, the APA requires an agency to include “a concise general statement of [the rule’s] basis and purpose” in its final rule.¹⁵⁸ These notice-and-comment rules, the Court explained, have the “force and effect of law” and have become known as “legislative rules.”¹⁵⁹

The Court next distinguished legislative rules from other types of rules, which are not subject to the notice-and-comment rulemaking process, such as “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”¹⁶⁰ It focused on interpretive rules noting that such rules are “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”¹⁶¹ Although it is generally easier for an agency to issue an interpretive rule (because it does not

152. *Perez*, 135 S. Ct. at 1203; *see* 5 U.S.C. § 551.

153. *Perez*, 135 S. Ct. at 1203; 5 U.S.C. §§ 551(4)–(5).

154. *Perez*, 135 S. Ct. at 1203; 5 U.S.C. § 553.

155. *Perez*, 135 S. Ct. at 1203; 5 U.S.C. § 553(b).

156. *Perez*, 135 S. Ct. at 1203; 5 U.S.C. § 553(e).

157. *Perez*, 135 S. Ct. at 1203; *see* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984).

158. *Perez*, 135 S. Ct. at 1203; 5 U.S.C. § 553(e).

159. *Perez*, 135 S. Ct. at 1203 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979)).

160. *Id.* at 1203–04; 5 U.S.C. § 553(b)(A). The Court noted that the APA does not define the term “interpretive rule” and “its precise meaning is the source of much scholarly and judicial debate.” *Id.* at 1204 (citing generally Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000); Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004)). The Court declined to “wade into that debate here.” *Id.*

161. *Perez*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995)).

have to complete the notice-and-comment process), such rule does not have “the force and effect of law.”¹⁶²

Turning to the facts, the Court explained how the case involved DOL’s changing views on whether mortgage loan officers were covered by the FLSA’s minimum-wage and overtime compensation requirements.¹⁶³ In 1999 and 2001, the DOL had determined in separate opinion letters that mortgage loan officers were not exempt from these requirements.¹⁶⁴ In 2004, DOL promulgated regulations, using notice-and-comment procedures, suggesting that they might no longer be eligible.¹⁶⁵

Following the promulgation of these regulations, in 2006, the DOL issued yet another opinion letter, this time finding that mortgage loan officers were not subject to protection.¹⁶⁶ The Court observed that this position was short-lived because in 2010 DOL changed course again by finding that because mortgage loan officers “have a primary duty of making sales for their employers,” they are protected under the FLSA’s wage and overtime provisions.¹⁶⁷ As with its other opinion letters, the DOL did not follow notice-and-comment procedures when issuing its 2010 interpretation.¹⁶⁸

The Court explained it was the 2010 interpretation that gave rise to the litigation.¹⁶⁹ It briefly summarized both the opinion of the district court granting summary judgment to DOL and the opinion of

162. *Id.* (quoting *Shalala*, 514 U.S. at 99).

163. *Id.* at 1204–05; *see* 52 Stat. 1060, as amended, 29 U.S.C. §§ 201 et seq.

164. *Perez*, 135 S. Ct. at 1204–05 (citing Loan Officers/Exempt Status, [6A WHM], Lab. Rel. Rep. (BNA) 99:8351 (Feb. 16, 2001) and Mortgage Loan Officers/Exempt Status, [6A WHM], Lab. Rel. Rep. (BNA) 99:8249 (May 17, 1999)).

165. *Id.* at 1205. The Court noted that the 2004 regulations featured a new section that contained several examples of employees who would not be eligible for minimum-wage and overtime compensation. *Id.* at 1204. (*See* 29 C.F.R. § 541.203 (2014)). For example, certain “[e]mployees in the financial services industry” would not be protected unless their “primary duty is selling financial products.” *Id.* (citing 29 C.F.R. § 541.203(b)).

166. *Id.* at 1205 (citing U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, at 70a–84a (Sept. 8, 2006), http://www.dol.gov/whd/opinion/FLSA/2006/2006_09_08_31_FLSA.pdf).

167. *Id.* (citing U.S. Dep’t of Labor, *supra* note 166, at 49a, 69a). DOL rescinded the 2006 opinion letter and explained that the reasoning in the letter had improperly relied on “misleading assumption[s] and selective and narrow analysis” of the issue. *Id.* (citing U.S. Dep’t of Labor, *supra* note 166, at 68a).

168. *Id.* at 1205.

169. *Id.* The Court reviewed MBA’s argument that DOL’s interpretation was inconsistent with the 2004 regulation and was therefore arbitrary and capricious under the APA, 5 U.S.C. § 706 (2012). *Id.* The Court also explained MBA’s argument that DOL’s interpretation was “procedurally invalid in light of the D.C. Circuit’s decision in *Paralyzed Veterans*.” *Id.* It also noted how three former mortgage loan officers, named Beverly Buck, Ryan Henry, and Jerome Nickols, had intervened to support the DOL’s interpretation. *Id.*

the D.C. Circuit reversing the lower court's decision.¹⁷⁰ The Court then turned to the central question of whether the *Paralyzed Veterans* doctrine was consistent with the APA.¹⁷¹ Simply put, it had no problem concluding the doctrine was “contrary to the clear text of the APA’s rulemaking provisions.”¹⁷²

In finding that the *Paralyzed Veterans* doctrine “improperly impose[d] on agencies an obligation beyond the ‘maximum procedural requirements’ specified in the APA,” the Court turned to the plain text of the APA.¹⁷³ The Court explained the APA explicitly provides that unless “notice or hearing is required by statute,” the notice-and-comment requirement “does not apply . . . to interpretative rules.”¹⁷⁴ Because of the categorical exemption of interpretive rules from the APA’s notice-and-comment provisions, the Court found the *Paralyzed Veterans* doctrine was fatally flawed.¹⁷⁵

The Court faulted the D.C. Circuit for ignoring this crucial provision when it analyzed the 2010 interpretation, which qualified as an interpretive rule.¹⁷⁶ The D.C. Circuit had been correct when it concluded that the APA requires an agency to use the same procedure (such as notice and comment for legislative rules) when amending or repealing a rule as it does when it issues the rule in the first place.¹⁷⁷ But the court of appeals had failed to account for the APA’s exemption for interpretive rules from the notice-and-comment requirements that apply to legislative rules.¹⁷⁸

In other words, since an agency does not have to adhere to the notice-and-comment requirements when issuing an initial

170. *Id.*; *Solis*, 864 F. Supp. 2d at 209–10 (finding on summary judgment that the 2010 interpretation was not arbitrary or capricious); *Harris*, 720 F.3d at 971–72 (concluding that reliance was not a required element of the *Paralyzed Veterans* doctrine and holding that because DOL had conceded that it had made a prior, conflicting interpretation, its 2010 interpretation had to be vacated).

171. *Perez*, 135 S. Ct. at 1205.

172. *Id.* at 1205–06.

173. *Id.* (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

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

175. *Id.* at 1206.

176. *Id.*

177. *Id.*

178. *Id.* (citing 5 U.S.C. § 551(5)). *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (The APA “make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.”).

interpretive rule, it does not have to follow those procedures if it subsequently chooses to amend or repeal that interpretive rule.¹⁷⁹ The Court reasoned such a conclusion was harmonious “with longstanding principles of . . . administrative law jurisprudence.”¹⁸⁰ Under prior precedent, courts are not empowered “to impose upon [an] agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good,” beyond what is required under the APA.¹⁸¹ The Court stated “[t]o do otherwise would violate ‘the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.’”¹⁸²

The Court further explained the *Paralyzed Veterans* doctrine’s requirement that an agency must go through notice and comment for an interpretive rule is precisely an example of a “judge-made procedural right” that is the “responsibility of Congress or the administrative agencies, not the courts” to fashion.¹⁸³ In the Court’s view, Congress had “weighed the costs and benefits of placing more rigorous procedural restrictions on the issuance of interpretive rules,” but “decided to adopt standards that permit agencies to promulgate freely such rules—whether or not they are consistent with earlier interpretations.”¹⁸⁴

Next, the Court addressed MBA’s arguments on why the *Paralyzed Veterans* doctrine should be found permissible.¹⁸⁵ It first rejected MBA’s attempt to “bolster the D.C. Circuit’s reading of the APA” by arguing that a change in interpretation should qualify as a “repeal” or “amendment” of a regulation so as to require notice-and-comment rulemaking.¹⁸⁶ The Court found MBA’s argument unpersuasive because MBA had failed to reconcile that because

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

180. *Id.* at 1207.

181. *Id.*

182. *Id.* (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978)).

183. *Id.*; see also *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 524 (Section 4 of the APA “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.”); *id.* (“Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.”).

184. *Perez*, 135 S. Ct. at 1207 (citing *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 523 (In enacting the APA, Congress “settled long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest.”) (quoting another source)).

185. *Id.*

186. *Id.* (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 544, 549).

interpretive rules do not have the force and effect of law, a change in an interpretation of a regulation cannot be deemed to have amended or repealed that regulation.¹⁸⁷

The Court directed most of the remainder of its opinion explaining why the “practical and policy grounds” raised by MBA to defend the *Paralyzed Veterans* doctrine were unconvincing.¹⁸⁸ In particular, the Court addressed MBA’s assertion the *Paralyzed Veterans* doctrine stops “agencies from unilaterally and unexpectedly altering their interpretation of important regulations.”¹⁸⁹

The Court first acknowledged there might be instances when an agency might choose to release an interpretive rule, instead of a legislative rule, in order to side-step the notice-and-comment requirement.¹⁹⁰ However, the Court explained affected parties have the ability to address such situations.¹⁹¹ For example, it highlighted the APA’s “arbitrary and capricious” standard imposes the requirement that an agency supply “more substantial justification when ‘its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.’”¹⁹²

The Court also was comforted by the fact that Congress, when drafting statutes, is aware agencies do sometimes change their interpretation, negatively affecting parties’ expectations.¹⁹³ The Court noted Congress’s inclusion of “safe harbor” provisions to shield parties that have relied on past interpretations.¹⁹⁴ And it cited to one example found in the FLSA, which states “no employer shall be subject to any liability” for failure “to pay minimum wages or overtime compensation” if it shows that the “act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation” of the Administrator of the Department’s Wage and

187. *Id.* at 1207–08.

188. *Id.* at 1209.

189. *Id.* (citing Brief for Respondent at 16, *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015) (Nos. 13-1041, 13-1052)).

190. *Id.* at 1209.

191. *Id.*

192. *Id.* (quoting *Fox Television Stations*, 556 U.S. at 515 (citation omitted)).

193. *Id.*

194. *Id.*

Hour Division, even when the guidance is later “modified or rescinded.”¹⁹⁵

Finally, the Court refused to address MBA’s argument that if the *Paralyzed Veterans* doctrine is invalid, DOL’s 2010 interpretation is still impermissible because it should “be classified as a legislative rule”—not an interpretive rule.¹⁹⁶ The Court explained, “[T]he parties litigated this suit on the understanding that the Administrator’s Interpretation was—as its name suggests—an interpretive rule.”¹⁹⁷ Indeed, the Court quipped, that MBA itself had seemed to concede that DOL’s interpretation was an interpretive rule in raising the *Paralyzed Veterans* doctrine because the doctrine only applies to interpretive rules.¹⁹⁸ Moreover—and more importantly—the Court found MBA had waived its argument by not raising it in the lower courts or in its brief in opposition to certiorari.¹⁹⁹ The Court reversed the judgment of the D.C. Circuit.²⁰⁰

C. Justice Alito’s Opinion

Justice Alito concurred in part and concurred in the judgment.²⁰¹ He first opined the *Paralyzed Veterans* doctrine was “incompatible” with the APA.²⁰² His opinion, however, did not focus on the *Paralyzed Veterans* doctrine or the facts presented in *Mortgage Bankers*. Switching gears, he recognized the D.C. Circuit might very well have fashioned the *Paralyzed Veterans* doctrine to address the “aggrandizement of the power of administrative agencies.”²⁰³ Such power, in his view, resulted from a combination of Congress’s delegation of broad lawmaking authority to agencies; agencies’ exploitation of the gray-area between legislative and interpretive rules; and the *Seminole Rock* deference doctrine.²⁰⁴

Although Justice Alito did not discount these issues, he viewed the D.C. Circuit’s creation of the *Paralyzed Veterans* doctrine as “not

195. *Id.* (citing 29 U.S.C. §§ 259(a), (b)(1) (2012)).

196. *Id.* at 1210.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* (citing SUP. CT. R. 15.2; *Carcieri v. Salazar*, 555 U.S. 379, 395–96 (2009)).

201. *Id.* (Alito, J., concurring in part and concurring in the judgment) (declining to join Part III-B).

202. *Id.*

203. *Id.*

204. *Id.*

a viable cure for these problems.”²⁰⁵ He further noted the Court could readily address one of the contributors to the amassment of agency power: the *Seminole Rock* doctrine.²⁰⁶ He cited to the separate opinions of both Justice Scalia and Justice Thomas to highlight “substantial reasons why the *Seminole Rock* doctrine may be incorrect.”²⁰⁷ He concluded his short concurrence by announcing he was “await[ing] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.”²⁰⁸

D. Justice Scalia’s Opinion

In his concurring opinion, Justice Scalia agreed with both the decision and reasoning on why the *Paralyzed Veterans* doctrine could not be reconciled with the APA.²⁰⁹ But he then made clear that he did not agree with the “Court’s portrayal of the result” as being justifiable in light of Congress’s desire to allow agencies leeway to issue interpretive rules.²¹⁰ Justice Scalia then immediately focused on the Court’s deference doctrines and on the *Seminole Rock* doctrine, in particular. He asserted the current deference doctrines that apply to agency determinations have skewed the balance that Congress originally sought when it created the APA.²¹¹ In other words, as a result of the Court’s development of an “elaborate law of deference to agencies’ interpretation of statutes and regulations,” agencies effectively can now “authoritatively resolve ambiguities” in both statutes and regulations.²¹²

Justice Scalia explained as a result of the dramatic growth of our administrative state, the APA was enacted as a “check” to agency “zeal.”²¹³ One principal method was to create the notice-and-comment provisions, which, as the name suggests, requires an agency to notify the regulated community of the proposed rule, solicit comments on the rule, consider and reply to comments, and

205. *Id.*

206. *Id.*

207. *Id.*; see also *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168–69 (2012) (citing, *inter alia*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996)).

208. *Perez*, 135 S. Ct. at 1210–11 (Alito, J., concurring in part and concurring in the judgment).

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

210. *Id.*

211. *Id.*

212. *Id.*

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

then to justify the final rule or decision when the rule is completed.²¹⁴ He pointed out another restraint on agency action was the APA's requirement that it was the court's role to then "interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."²¹⁵ Thus, according to Justice Scalia, Congress empowered courts to have the authoritative role to resolve ambiguities in statutes and regulations.²¹⁶

Although Justice Scalia conceded Congress carved out interpretive rules from these requirements, he asserted the import of this exemption has gone way beyond what Congress intended.²¹⁷ Properly construed and when read in conjunction with the commitment to courts to decide what regulations and statutes mean, Justice Scalia reasoned that the APA's interpretive rules exemption does not augment an agency's power.²¹⁸ This is so because although an agency can use a legislative rule to inform the public of its interpretation of the law, it should not effectively bind the public (and does not have the force of law) because the reviewing court has the final word.²¹⁹

But in Justice Scalia's view, the Court's deference doctrines, including the *Seminole Rock* doctrine, has upended this balance.²²⁰ As a result of the application of these agency deference doctrines during judicial review, the interpretive rules exemption from notice and comment has expanded an agency's power.²²¹ Instead of using interpretive rules as a method to notify the public, agencies can now bind the public because the agency will receive deference for its interpretation in its interpretive rule.²²² Justice Scalia quipped "[i]nterpretive rules that command deference *do* have the force of law."²²³

Justice Scalia next criticized the majority for failing to adequately address this unintended result.²²⁴ Although (as the Court

214. *Id.*

215. *Id.* (citing 5 U.S.C. § 706 (2012)).

216. *Id.*

217. *Id.* (citing 5 U.S.C. §§ 553(b)–(c)).

218. *Id.*

219. *Id.* at 1211–12 (Scalia, J., concurring in the judgment).

220. *Id.* at 1211. Justice Scalia also pointed out the Court has been relying on *Seminole Rock* even though it was decided before the APA was enacted. *Id.*

221. *Id.*

222. *Id.* at 1211–12 (Scalia, J., concurring in the judgment).

223. *Id.* at 1212 (Scalia, J., concurring in the judgment) (emphasis in original).

224. *Id.*

had asserted) it is a court that “ultimately decides whether [the text] means what the agency says,” he asserted such a role is illusory when the court is required to defer under the controlling deference standard established under cases such as *Chevron* and *Seminole Rock*.²²⁵ Moreover, the end result means that agencies are able to make binding rules without following the notice-and-comment provisions in the APA.²²⁶

Next, Justice Scalia zeroed in that the deference afforded to agency interpretation of its own regulations was especially problematic.²²⁷ In his view, *Seminole Rock* deference not only permits an agency to create binding regulations that are not subject to notice and comment, but allows an agency an even greater opportunity to expand its power than when it interprets statutory provisions.²²⁸ By creating broad and vague substantive regulations, an agency can later interpret these regulations through interpretive rules, which do not require notice and comment, and receive controlling deference for such interpretations.²²⁹ Congress, Justice Scalia contended, never envisioned this result in creating the APA.²³⁰

Justice Scalia concluded by musing what should be done to address these substantial concerns.²³¹ He acknowledged the creation of the *Paralyzed Veterans* doctrine by the D.C. Circuit was a “courageous (indeed, brazen) attempt” to address the problem as it relates to a revision of an earlier interpretation.²³² But he recognized that the doctrine could not be supported due to the APA’s crystal-clear exemption for interpretive rules from notice-and-comment procedures.²³³ He then proposed a solution that would “restore the balance originally struck by the APA with respect to an agency’s interpretation of its own regulations”: abandon *Seminole Rock*.²³⁴ Such a result, in his view, would allow the APA to be

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

226. *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 1212–1213 (Scalia, J., concurring in the judgment).

232. *Id.* at 1212.

233. *Id.*

234. *Id.* at 1213 (Scalia, J., concurring in part, dissenting in part).

applied as written with no deference to agencies' interpretations of their regulations.²³⁵

E. Justice Thomas's Opinion

Justice Thomas also concurred in the Court's holding that the *Paralyzed Veterans* doctrine was incompatible with the APA.²³⁶ And he too wrote separately because the *Paralyzed Veterans* and *Mortgage Bankers* cases "call into question the legitimacy" of the *Seminole Rock* doctrine.²³⁷ But unlike the short opinions of Justice Alito and Justice Scalia, Justice Thomas's opinion comprehensively laid out his view on the merits of the doctrine.²³⁸ In his view, *Seminole Rock* deference amounts to granting legal effect to an agency's interpretation—rather than to the regulation itself.²³⁹ In doing so, he asserted that the doctrine "effects a transfer of the judicial power to an executive agency," thereby "raising constitutional concerns."²⁴⁰ He concluded that the deference regime established by *Seminole Rock* undercuts the courts' duty to be a judicial check on the other branches and it "subjects regulated parties to precisely the abuses that the Framers sought to prevent."²⁴¹

Justice Thomas first reviewed the genesis of the doctrine by briefly exploring the Court's opinion in *Seminole Rock*.²⁴² He then asserted this "unsupported" standard "has taken on a life of its own."²⁴³ Canvassing the "broad spectrum of subjects" where the *Seminole Rock* doctrine has been applied,²⁴⁴ he further observed the doctrine had been used when analyzing an agency's interpretation of different agency's regulations;²⁴⁵ when an agency had interpreted a regulation inconsistently over time;²⁴⁶ when interpretations were

235. *Id.*

236. *Id.* (Thomas, J., concurring in the judgment).

237. *Id.*

238. *Id.* at 1213–25.

239. *Id.* at 1213.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 1214.

244. *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 358–59 (1989) (forests); *Ehlert v. United States*, 402 U.S. 99, 104–05 (1971) (Selective Service); *INS v. Stanisic*, 395 U.S. 62, 72 (1969) (deportation); *Udall v. Tallman*, 380 U.S. 1, 16–17 (oil and gas leases)).

245. *Id.* (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–99 (1991)).

246. *Id.* (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 159, 170–71 (2007)).

issued both formally and informally;²⁴⁷ and even in case that did not involve “traditional agency regulations,” criminal sentencing.²⁴⁸

In what Justice Thomas viewed as a “steady march toward deference,” he observed the only meaningful effort to cabin the doctrine was a sole case where the Court found an agency interpretation “plainly erroneous” under *Seminole Rock* in order to prevent an agency “under the guise of interpreting a regulation, to create de facto a new regulation.”²⁴⁹ And this “narrow limit” to the controlling deference standard, in his view, does not make up for constitutional infirmities inherent in the doctrine.²⁵⁰

Justice Thomas first criticized the Court for on one hand stressing the importance of “separation of powers” and “the constitutional system of checks and balances” as being “essential to the protection of individual liberty,” but on the other hand applying a “‘more pragmatic, flexible approach’ to that design when it has seemed more convenient to permit the powers to be mixed.”²⁵¹ He then proceeded to chart the history of the U.S. Constitution’s “particular blend of separated powers and checks and balances.”²⁵²

In particular, he discussed “events of the 17th and 18th centuries” as having played a pivotal role in educating the framers of the Constitution.²⁵³ For example, he pointed to the English Civil War as having exposed political theorists to “the conflict between the King and Parliament, and the dangers of tyrannical government posed by each, they began to call for a clear division of authority between the two.”²⁵⁴ Scholars such as John Locke and Baron de

247. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

248. *Id.* (citing *Stinson v. United States*, 508 U.S. 36, 44–45 (1993) (finding that the Sentencing Commission’s commentary on its sentencing guidelines was “analogous to an agency interpretation of its own regulations, entitled to *Seminole Rock* deference”).

249. *Id.* at 1214–15 (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)). He also noted that the Court on two occasions had “expressly found *Seminole Rock* deference inapplicable for other reasons.” *Id.* (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) and *Gonzales v. Oregon*, 546 U.S. 243, 256–57 (2006)). See Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5.

250. *Id.* at 1215.

251. *Id.* (citing *Stern v. Marshall*, 131 S. Ct. 2594, 2608–09 (2011) (quoting another source) and *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 442 (1977)).

252. *Id.* (citing M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 38, 168–69 (2d. ed. 1998)).

253. *Id.*

254. *Id.* (citing VILE, *supra* note 252, at 44–45, 48–49). Justice Thomas also quoted “a 1648 work titled *The Royalist’s Defence* that offered perhaps the first extended account of the theory of the separation of powers: “[W]hilst the Supremacy, the Power to Judge the Law, and Authority to make new Lawes, are kept in severall hands, the known Law is preserved, but united, it is

Montesquieu elaborated on this theory and emphasized that separation of powers was essential to protect individual liberty.²⁵⁵ In addition, Justice Thomas observed these scholars had also believed that a system of checks and balances among the branches was necessary to buttress this separation.²⁵⁶

He then explained the early development of the United States confirmed that both a separation of powers and checks and balances was important.²⁵⁷ While many state constitutions of the time did provide for separation of powers, there were no checks and balances in place.²⁵⁸ Later, when the Constitution was being drafted, the Framers, such as Madison, recognized this shortcoming: “experience has taught us a distrust” of the separation of powers alone as “a sufficient security to each [branch] [against] encroachments of the others” and “[i]t is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper.”²⁵⁹

Justice Thomas then described the separation of the main powers of the United States government into the legislative, executive, and judicial branches and the numerous examples of checks and balances to reinforce this separation.²⁶⁰ And according to Madison, this constitutional paradigm was a “great security” for liberty.²⁶¹ Justice Thomas elaborated the Framers viewed the separation of powers and checks and balances as “practical and real

vanished, instantly thereupon, and Arbitrary and Tyrannical power is introduced.” *Id.* (quoting CHARLES DALLISON, *THE ROYALIST’S DEFENCE* 80 (1648) (italics in original)).

255. *Id.* (citing VILE, *supra* note 252, at 63–64); *see also* JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT*, §§ 143–44, at 72 (J. Gough ed., 1947); BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151–52 (Oskar Piestedt, ed., Thomas Nugent trans., New York Hafner Publishing Co. 1949).

256. *Id.* at 1215–16 (citing VILE, *supra* note 252, at 72–73, 102).

257. *Id.* at 1216.

258. *Id.* (citing VILE, *supra* note 252, at 147). For instance, states “actively placed traditional executive and judicial functions in the legislature,” so that some “state legislatures arrogated power to themselves and began to confiscate property, approve the printing of paper money, and suspend the ordinary means for the recovery of debts.” *Id.* (citing G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 155–56, 403–09 (1969)).

259. *Perez*, 135 S. Ct. at 1216 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 77 (M. Farrand rev., 1966)).

260. *Id.* (The Framers “gave Congress specific enumerated powers to enact legislation, Art. I, § 8, but gave the President the power to veto that legislation, subject to congressional override by a supermajority vote, Art. I, § 7, cls. 2, 3. They gave the President the power to appoint principal officers of the United States, but gave the Senate the power to give advice and consent to those appointments. Art. II, § 2, cl. 2. They gave the House and Senate the power to agree to adjourn for more than three days, Art. I, § 5, cl. 4, but gave the President the power, “in Case of Disagreement between them,” to adjourn the Congress “to such Time as he shall think proper.” Art. II, § 3, cl. 3.”); *see* U.S. CONST. arts. I, II, III.

261. *Id.* (quoting *THE FEDERALIST* NO. 51, at 321 (James Madison) (C. Rossiter ed., 1961)).

protections for individual liberty,” which he believed the judiciary (like the other branches) must protect.²⁶² And to Justice Thomas, the *Seminole Rock* doctrine represented the Court’s abdication of this duty.²⁶³

Justice Thomas next detailed his reasoning on why the *Seminole Rock* doctrine raises constitutional concerns.²⁶⁴ In his view, the doctrine results in “a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a ‘check’ on the political branches.”²⁶⁵

First, Justice Thomas explained once a party invokes the power of Article III court to hear a case, the court has an obligation to “exercise its independent judgment in interpreting and expounding upon the laws.”²⁶⁶ And the Framers knew in many cases there would arise ambiguities in the law.²⁶⁷ Thus, inherent in the judicial power was the authority of courts to resolve ambiguities in adjudicating a case or controversy.²⁶⁸ Justice Thomas observed the legislative and executive branches are also empowered to interpret the law, but that “the judicial interpretation would be considered authoritative in a judicial proceeding.”²⁶⁹

In support of the view that courts should have the role to give the authoritative view of the law, Justice Thomas explained that judges were historically understood to be exercising their independent judgment.²⁷⁰ This “independent judgment” meant that a judge should follow the law without succumbing to personal biases

262. *Id.* at 1216–17 (citing *Mistretta v. United States*, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting) (“[The Constitution] is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers themselves considered how much commingling [of governmental powers] was, in the generality of things, acceptable, and set forth their conclusions in the document.”)).

263. *Id.* at 1217.

264. *Id.*

265. *Id.*

266. *Id.* (citing U.S. CONST. art. III, § 1 (“judicial Power of the United States”)).

267. *Id.* (citing Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 20–21 & n. 66 (2000) and Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–26 (2003)); *see also id.* (quoting James Madison, “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,” THE FEDERALIST NO. 37, at 229 (James Madison)).

268. *Id.* (noting that Alexander Hamilton agreed: “[t]he interpretation of the laws is the proper and peculiar province of the courts,” THE FEDERALIST NO. 78, at 467 (Alexander Hamilton)).

269. *Id.*

270. *Id.*

or “pressure from the political branches, the public, or other interested parties.”²⁷¹ He asserted to better insulate judges, the Framers built safeguards into the Constitution such as allowing judges to “hold their Offices during good Behaviour” and receive “a Compensation, which shall not be diminished during their Continuance in Office.”²⁷² By contrast, Justice Thomas explained, the Framers chose to not insulate the legislative and executive branches from external pressures; instead, the “Constitution tie[s] them to those pressures.”²⁷³

In his view, these differences in the branches support the notion that “judicial interpretations are definitive in cases and controversies before the courts.”²⁷⁴ Justice Thomas reasoned courts act as “an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”²⁷⁵ Unlike the uninsulated legislature and executive, which “may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law,” the judiciary “is duty bound to exercise independent judgment in applying the law.”²⁷⁶

Justice Thomas then asserted the interpretation of agency regulations requires such independent judgment because “substantive regulations have the force and effect of law.”²⁷⁷ And “[a]gencies and private parties alike can use these regulations in proceedings against regulated parties.”²⁷⁸ He noted, “Just as it is critical for judges to exercise independent judgment in applying statutes, it is critical for judges to exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties.”²⁷⁹ And

271. *Id.* at 1218 (quoting Philip Hamburger, *LAW AND JUDICIAL DUTY* 508–21 (2008)).

272. *Id.* (citing U.S. CONST. art. III, § 1).

273. *Id.* (citing U.S. CONST. art. I, § 2, cl. 1 (providing for election of members of the House of Representatives every two years); U.S. CONST. art. I, § 3, cl. 1 (providing for selection of members of the Senate every six years); U.S. CONST. art. II, § 1, cl. 1 (providing for the president to be subject to election every four years.)).

274. *Id.* at 1219.

275. *Id.* (citing *THE FEDERALIST* NO. 78, at 467 (Alexander Hamilton)).

276. *Id.*

277. *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001)).

278. *Id.* (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2164–65 (2012) (private party relying on Department of Labor regulations)); *see also* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency issuing notices of liability under regulations).

279. *Id.* (Thomas, J., concurring in the judgment).

“[d]efining the legal meaning of the regulation is one aspect of that determination.”²⁸⁰

Justice Thomas next revealed what his view on the *Seminole Rock* doctrine would likely be in a future case. In his view, *Seminole Rock* deference nullifies the courts’ role to give their independent judgment.²⁸¹ By giving “controlling weight” to an agency’s interpretation of a regulation, the courts’ power to interpret the regulation is essentially transferred to the agency.²⁸² In other words, by taking away traditional tools of interpretation to define the meaning of a regulation, a judge is instead confined to the narrow “plainly erroneous or inconsistent with the regulation” standard.²⁸³ And because the agency is part of the executive branch and “lacks the structural protections for independent judgment adopted by the Framers, including the life tenure and salary protections of Article III,” “the transfer of interpretive judgment raises serious separation of powers concerns.”²⁸⁴

He also maintained *Seminole Rock* was constitutionally suspect because it undercuts the check by the judiciary on the other branches.²⁸⁵ Justice Thomas asserted “the enforcement of the rule of law” is the judiciary’s principal check and that “Article III judges cannot opt out of exercising their check.”²⁸⁶ But in his view, there is no proper exercise of independent judgment (i.e., application of the rule of law) when courts defer to an agency that has both created the regulation and enforced that same regulation.²⁸⁷ By not engaging in the exercise of determining what the best interpretation of a regulation is, courts have abdicated their responsibility to provide a judicial check.²⁸⁸

Justice Thomas opined, under this deference paradigm, agencies amass power by permitting them to alter “the meaning of regulations

280. *Id.*

281. *Id.*

282. *Id.* at 1219–20 (citing 1 S. JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 499 (4th ed. 1773) (defining “[d]efer” as “to leave to another’s judgment”)).

283. *Id.*

284. *Id.* at 1220.

285. *Id.*

286. *Id.* at 1220–21 (noting that “[t]he Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid’”) (citation omitted).

287. *Id.* at 1221.

288. *Id.*

at their discretion and without any advance notice to the parties.”²⁸⁹ Although he applauded the D.C. Circuit’s attempt to address this issue by creating the *Paralyzed Veterans* doctrine as being “practically sound,” he recognized the doctrine was “legally erroneous” because of the plain language of the APA.²⁹⁰ He then used the facts presented in the case to illustrate his point by pointing to the 2006 and 2010 interpretations of the DOL.²⁹¹ If a court were to give controlling deference to both conflicting interpretations, he pointed out, “regulated entities are subject to two opposite legal rules imposed under the same regulation.”²⁹² In other words, a regulation could have two different meanings, depending on what interpretation an agency proffered at any given time.

He concluded the important goal of having regulations give proper notice to regulated parties is not fulfilled under *Seminole Rock*’s deference regime.²⁹³ Rather, although notice is given through the promulgation of the regulation, notice is accomplished “only [in] a limited sense,” because the agency can subsequently interpret it differently later.²⁹⁴ Therefore, to Justice Thomas, a new interpretation, which did not go through notice and comment, might as well be a new regulation.²⁹⁵

Justice Thomas next turned to a discussion that will be of immense importance when the Court examines the *Seminole Rock* doctrine in a future case. In this section, Justice Thomas identifies and then rejects various theoretical justifications that have been offered to support the *Seminole Rock* doctrine.²⁹⁶

First, he responded to the theory that came from one of the Court’s previous *Seminole Rock* cases that the doctrine is grounded in the agency’s experience and expertise when overseeing “‘a complex and highly technical regulatory program’ in which the identification and classification of relevant ‘criteria necessarily require significant expertise and entail the exercise of judgment

289. *Id.* (finding that this “abandonment permits precisely the accumulation of governmental powers that the Framers warned against” and citing THE FEDERALIST NO. 47, at 302 (James Madison)).

290. *Id.*

291. *Id.* at 1222.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 1221.

296. *Id.* at 1222.

grounded in policy concerns.”²⁹⁷ To him, this argument fails because the court’s role is to determine what the regulation means, rather than to ascertain what the preferred policy choice should be.²⁹⁸ He reasoned since “substantive agency regulations have the ‘force and effect of law,’” the courts should interpret such regulations like any other type of law.²⁹⁹ In the end, he asserted the agency-expertise rationale was more to support “the wisdom of according agencies broad flexibility to administer statutory schemes” rather than an agency’s own experience in interpreting its own regulation.³⁰⁰ This policy-rationale, however, remains cabined by constitutional limits and thus was unpersuasive as a basis to support the doctrine.³⁰¹

Second, Justice Thomas addressed the arguments that the *Seminole Rock* doctrine was justified because the original intent behind a particular regulation is best left to the agency that wrote it.³⁰² He rejected this basis by noting the Court had granted deference to an agency that had not been the original creator of the regulation.³⁰³ But this point aside, Justice Thomas stressed the agency’s intent should not be dispositive because “the *text* of the regulations . . . have the force and effect of law,” and thus should remain the focus of the inquiry.³⁰⁴ He pointed out that the APA

297. *Id.* (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); see Leske, *Between Seminole Rock and a Hard Place*, *supra* note 5, at 253–57 (discussing the *Thomas Jefferson University* case).

298. *Perez*, 135 S. Ct. at 1222.

299. *Id.* (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (stating courts should “assum[e] that the ordinary meaning of the regulation’s language expresses” its purpose and enforce it “according to its terms”).

300. *Id.* at 1223.

301. *Id.* (“But policy arguments supporting even useful ‘political inventions’ are subject to the demands of the Constitution which defines powers and . . . sets out . . . how those powers are to be exercised.” (quoting *INS v. Chadha*, 462 U.S. 919, 945 (1983))).

302. *Id.* (“Because the Secretary [of Labor] promulgates th[e] standards, the Secretary is in a better position . . . to reconstruct the purpose of the regulations in question.” (quoting *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 152 (1991))).

303. *Id.* (applying “*Seminole Rock* deference to one agency’s interpretation of another agency’s regulations because Congress had delegated authority to both to administer the program” (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–98 (1991))). He also pointed out that the Court had “likewise granted *Seminole Rock* deference to agency interpretations that are inconsistent with interpretations adopted closer in time to the promulgation of the regulations.” (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 159, 170–71 (2007))).

304. *Id.* at 1223–24 (emphasis added) (“Citizens arrange their affairs not on the basis of their legislators’ unexpressed intent, but on the basis of the law as it is written and promulgated.” (quoting *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting))).

rulemaking process applies to the text of a regulation and the public's reliance interests are based on that text.³⁰⁵

Third, Justice Thomas responded to the theory that *Seminole Rock* deference naturally follows from an implicit delegation from Congress.³⁰⁶ In other words, “[b]ecause 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.”³⁰⁷ But in Justice Thomas’s view, Congress cannot bestow such a power upon the agency because the Constitution does not grant such a power to Congress itself.³⁰⁸ Thus, because Congress cannot set forth “a judicially binding interpretation” of a law or regulation, it cannot vest an agency with that power.³⁰⁹

To support his view, he pointed to separation of power principles that require the legislative and judicial power to remain separate.³¹⁰ He asserted the Constitution contained an “essential balance” in which Congress is “possessed of power to ‘prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,’ but the power of ‘[t]he interpretation of the laws’ [is] ‘the proper and peculiar province of the courts.’”³¹¹ The power for agencies to definitively interpret their regulations would therefore upset this balance especially because “the power to create legally binding interpretations rests with the Judiciary.”³¹²

Fourth and finally, Justice Thomas responded to a 1907 remark in a speech that “independence and esteem” of judges might be called into question by “too much oversight of administrative

305. *Id.* at 1224 (suggesting that for similar reasons the courts should also not give binding deference “to post[-]enactment expressions of intent by individual Members of Congress” (citing *Sullivan v. Finkelstein*, 496 U.S. 617, 631–32 (1990) (Scalia, J., concurring in part))).

306. *Id.* (citing *Martin*, 499 U.S. at 151).

307. *Id.* (quoting *Martin*, 499 U.S. at 151).

308. *Id.*

309. *Id.* (comparing in a similar context that “[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess” (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986))).

310. *Id.* (noting the “sharp necessity to separate the legislative from the judicial power” (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995))).

311. *Id.* (citation omitted) (third brackets added) (quoting *Plaut*, 514 U.S. 211, 222 (1995)).

312. *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179–80 (1803)).

matters.”³¹³ He explained his theory that if courts were have to resolve administrative issues, which “lie close to the public impatience,” judges would be “expose[d] to the fire of public criticism.”³¹⁴ But Justice Thomas quickly dismissed this scenario as being yet another policy argument that could not trump the Constitution and its division of power among the branches; regardless of how unpopular a decision, the judiciary is required to interpret and apply the law.³¹⁵

Justice Thomas concluded his concurrence by noting although the resolution of the *Mortgage Bankers* case only required the Court to look to the text of the APA, “closer scrutiny reveal[ed] serious constitutional questions lurking beneath” with respect to the *Seminole Rock* doctrine.³¹⁶ And although he freely recognized that *stare decisis* was an important feature to keep our legal system stable, he made clear that because the Court’s ultimate goal was “to decide by our best lights what the Constitution means,” he would overrule *Seminole Rock* doctrine in an appropriate case.³¹⁷

E. The Justices’ Views on the Seminole Rock Doctrine

All the opinions in the *Mortgage Bankers* case shed light on the justices’ views on the *Seminole Rock* doctrine. While it is impossible to predict whether their views will remain consistent in a future case, it is possible to make observations based on these opinions.

Although Justice Sotomayor’s opinion announcing the judgment of the unanimous Court did not directly address the *Seminole Rock* doctrine, the judgment itself implicates the doctrine in a significant way. One main criticism of the doctrine lays at the heart of the *Mortgage Bankers* case in that giving an agency controlling deference for an interpretation of its regulation, as Justice Scalia had pointed out, can allow an agency to create a new regulation without going through the notice-and-comment process. Although the D.C. Circuit attempted to cure this issue by requiring an agency to follow the notice-and-comment provisions when an agency changes its interpretation of a regulation, the Court rejected this requirement. In

313. *Id.* at 1224–25 (quoting Charles Evans Hughes, Speech before the Elmira Chamber of Commerce (May 3, 1907), in ADDRESSES OF CHARLES EVANS HUGHES, 1906–1916, at 185, 185–7 (2d ed. 1916)).

314. *Id.* at 1225.

315. *Id.* at 1225.

316. *Id.*

317. *Id.* (quoting *McDonald v. Chicago*, 561 U.S. 742, 812 (2010) (Thomas, J., concurring)).

striking down the *Paralyzed Veterans* doctrine, the Court rejected a safeguard that courts and scholars had identified as a problem with the *Seminole Rock* doctrine. Therefore, the decision removed an existing safeguard in the D.C. Circuit and other circuits that followed the *Paralyzed Veterans* doctrine. Thus, when the Court re-examines the *Seminole Rock* doctrine, it will now have to grapple with this issue when determining whether the doctrine should remain or whether it needs modification to address the concerns identified by the other justices.

Next, despite being short, Justice Alito's opinion is significant for several reasons. First, there is now virtually no doubt that he will vote to hear a case that squarely raises a *Seminole Rock* issue. His opinion echoes the concurring opinion of Chief Justice Roberts in *Decker* that he joined in 2013.³¹⁸ In that opinion, the chief justice wrote it "may be appropriate to reconsider [*Seminole Rock*] in an appropriate case" where "the issue is properly raised and argued."³¹⁹ Thus, Supreme Court practitioners should be able to rely on his vote to grant certiorari in a future *Seminole Rock* case.

Second, it is likewise clear that Justice Alito is wary about the amount of power that agencies have under our current political and legal scheme—especially as it affects regulated entities.³²⁰ He expressed an "understandable concern" about agency power even though he voted to strike down the *Paralyzed Veterans* doctrine.³²¹ Likewise, it is probative that he did not join all of the Court's opinion.³²² Justice Alito declined to join Part III-B in which the Court found regulated entities "are not without recourse" when an agency takes advantage of the grey area between legislative and interpretive rules.³²³ The Court had cited to "a variety of constraints on agency decisionmaking," including the arbitrary and capricious standard and the inclusion of "safe harbor" provisions in statutes to shield regulated entities from liability when they rely on previous agency interpretation.³²⁴

318. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring).

319. *Id.*

320. *See Perez*, 135 S. Ct. at 1210 (Alito, J., concurring in part and concurring in the judgment).

321. *Id.*

322. *Id.* (declining to join Part III-B).

323. *Id.* at 1209–10.

324. *Id.*

It naturally follows that Justice Alito was therefore not in complete agreement that regulated entities have sufficient recourse to protect themselves from agency power and consequently he would likely be amenable to providing a better “check” to agency power.³²⁵ His recognition that the Court can address excess agency power through a re-evaluation of “the validity” of the doctrine similarly shows that he might vote in favor of scaling back on the doctrine or even dispensing with the doctrine altogether.³²⁶ The question remains, however, whether Justice Alito’s allegiance to stare decisis will prove to be an insurmountable impediment him from overturning the doctrine.

Third, Justice Alito’s opinion is notable for the glaring absence of Chief Justice Roberts as a signatory. As explained, the chief justice penned a very similar opinion in 2012, which Justice Alito joined. It is indeed curious why the chief justice did not join Justice Alito’s opinion. Possible rationale include his disagreement with Justice Alito’s language suggesting he agreed with Justice Thomas and Justice Scalia’s view that *Seminole Rock* may be incorrect. Or, given his allegiance to stare decisis, Chief Justice Roberts might have questioned whether the Court should or could rectify the issue by overruling *Seminole Rock*, as Justice Alito seemed to suggest.³²⁷ In any event, while it seems likely that based on his concurrence in *Decker*, Chief Justice Roberts will also vote to hear a case raising *Seminole Rock* in the future, his view on whether *Seminole Rock* should be abandoned remains unclear.³²⁸

Justice Scalia’s opinion is also significant in several respects. First, like Justice Alito, it is clear that Justice Scalia would vote to hear a case raising the *Seminole Rock* doctrine. His opinion in *Mortgage Bankers*, as well as his past opinions highlighting the doctrine, makes this proposition virtually indisputable.³²⁹

Second, unlike determining Justice Alito’s view on the validity and vitality of the *Seminole Rock* doctrine, there is no question as to Justice Scalia’s positions on these issues. His opinion expressly calls

325. *See id.* at 1210.

326. *See id.*

327. *See id.*

328. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring).

329. *See Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment); *Talk America, Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265 (2011) (Scalia, J. concurring); *Decker*, 133 S. Ct. at 1326 (Scalia, J., concurring in part and dissenting in part).

for the abandonment of the controlling deference standard established in *Seminole Rock*.³³⁰

Third, however, a more nuanced question remains. Although Justice Scalia concluded his opinion indicating that he would give “no deference to the agency . . . whether [its] interpretation is correct,” it remains to be seen whether he would still endorse any of the Court’s other deference doctrines that might otherwise apply, such as the lesser standard established in *Skidmore v. Swift & Co.*³³¹

Of course, Justice Thomas’s opinion with respect to his view of the *Seminole Rock* doctrine speaks for itself. His assessment and subsequent rejections of the various foundations proposed for *Seminole Rock* should help inform the future evaluation of the doctrine in a future case. But Justice Thomas has often set forth a “minority” view of the division of constitutional powers and the judicial role. It is naturally unclear whether he can convince enough justices to adopt his view—especially since none of the other concurring justices joined in any part of his opinion. With that said, with Justice Scalia firmly of a similar view, and Justice Alito and Chief Justice Roberts on the record as wanting to re-evaluate the doctrine, it is too early to tell.

Nonetheless, it seems clear that Justice Thomas would likely endorse any significant change in the doctrine, even if it does not go so far as an outright rejection of it. This, however, could take on many forms. Any such modification would have to ensure that the courts have the ultimate role in determining the meaning of the regulation thereby preserving the courts’ duty to give their independent judgment. Whether it would be acceptable to re-formulate the current *Seminole Rock* standard to yield a lesser deferential standard or whether resorting to the non-controlling *Skidmore* standard would be permissible to him is also unclear.

Last, and of special importance, is Justice Thomas’s clear statement that he is not bound by stare decisis in circumstances when he believes proper adherence to the Constitution requires deviating from it. It will be interesting to see, however, whether there will be enough justices who are willing to go as far as overturning a doctrine that has been an integral part of our administrative state for the past seventy years.

330. *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

331. 323 U.S. 134, 140 (1944).

V. CONCLUSION

Although the *Mortgage Bankers* decision did not radically alter the *Seminole Rock* doctrine as some scholars predicted, it is clear the various opinions demonstrate a “chipping away” at the *Seminole Rock* doctrine. And it is equally clear the Court will reconsider the doctrine in an appropriate case. It remains to be seen, however, whether this will lead to a complete fracture, such as an outright rejection of the doctrine, or simply flakes and fragments, such as a more structured test or further limits on the doctrine’s application to address the justices’ concerns.

In sum, the various opinions addressing the *Seminole Rock* doctrine demonstrate there are legitimate constitutional concerns with the doctrine, as well as practical issues. These concerns combined with the current confusion and inconsistency by the courts when applying the doctrine strongly militates in favor of re-evaluating the doctrine as soon as possible. Because our administrative state relies on consistency and uniformity in order to promote fairness, the current questions revolving around the *Seminole Rock* doctrine considerably hamper these principles. Therefore, a meaningful reconsideration of the doctrine would be an important step to bringing clarity in this important area of administrative law.

