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Seminole Rock Deference: Court Treatment of Agency Interpretation of Ambiguous Regulations

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Summary

Agencies promulgate rules to implement statutorily authorized regulatory programs. These rules, although established by an administrative agency, maintain the force and effect of law. To be able to promulgate rules, an agency must be granted by Congress the power to do so, either explicitly or implicitly, through statute. To control the process by which agencies create these rules, Congress has enacted statutes, such as the Administrative Procedure Act (APA), that dictate what procedures an agency must follow to establish a final, legally binding rule.

Often, the organic statute that allows an agency to implement a program through rulemaking may be ambiguous. The agency must then interpret the ambiguous terms of the statute in order to establish the regulatory program. The Supreme Court, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, established the *Chevron* test, which requires courts to defer to an agency's interpretation of an ambiguous statute if the agency's interpretation is reasonable. However, what happens if an agency's *regulation* is ambiguous? The Supreme Court ruled in *Bowles v. Seminole Rock & Sand Co.*, back in 1945, that a court must accept an agency's interpretation of its own regulations unless it is "plainly erroneous."

Since the Court handed down the *Seminole Rock* decision, the Court has outlined certain exceptions to the rule. Courts will not defer to an agency's interpretation if the regulation itself is clear, if the agency suddenly changes its interpretation, or if the agency's regulation merely "parrots" the statutory language. Finally, courts generally prevent agencies from levying punitive fines against regulated entities if the regulated party could not have reasonably known how the agency planned to interpret the regulation.

Agency regulations provide the backbone of a large number of federal programs. It is important to understand how courts treat an agency's promulgated regulations in order to understand how a rule may be applied to the public and regulated entities. This report discusses how courts currently treat an agency's interpretation of its own ambiguous regulations and discusses the arguments raised in the recent Supreme Court opinion from *Decker v. Northwest Environmental Defense Center*, in which some members of the Court indicated a willingness to reconsider *Seminole Rock* deference. The report also discusses the justifications for and arguments against maintaining this judicial deference.

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Introduction

Agencies promulgate rules to implement statutorily authorized regulatory programs.[1] These rules, although established by an administrative agency, maintain the force and effect of law.[2] To be able to promulgate rules, an agency must be granted by Congress the power to do so, either explicitly or implicitly, through statute. To control the process by which agencies create these rules, Congress has enacted statutes, such as the Administrative Procedure Act (APA),[3] that dictate what procedures an agency must follow to establish a final, legally binding rule.

Often, the organic statute that allows an agency to implement a program through rulemaking may be ambiguous. The agency must then interpret the ambiguous terms of the statute in order to establish the regulatory program. The Supreme Court, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[4] established the *Chevron* test, which requires courts to defer to an agency's interpretation of an ambiguous statute if the agency's interpretation is reasonable.[5] The *Chevron* test has been a staple in the canon of administrative law since it was handed down from the Court in 1984. However, what happens if an agency's *regulation* is ambiguous? The Supreme Court's decision from *Bowles v. Seminole Rock & Sand Co.*[6] addresses when an agency's regulation, as opposed to its organic statute, is ambiguous. *Seminole Rock* deference—which provides an agency judicial deference when an agency interprets its own regulations—arguably has become an equally important, if slightly less recognizable, canon of administrative law as the *Chevron* test.

Just as statutes enacted by Congress occasionally lack clarity, sometimes regulations enacted by administrative agencies can be unclear. The Supreme Court ruled in *Seminole Rock* that a court must accept an agency's interpretation of its own regulations unless it is "plainly erroneous."[7] Legal scholars have noted that this deference has benefits and drawbacks.[8] By enabling agencies to interpret their own regulations, agencies are provided with flexibility to enact broad rules and refine them as specific circumstances arise. This process may help agencies administer complex regulatory schemes with greater efficiency. Furthermore, courts often note that the agency—as opposed to a reviewing court—has a better understanding of what the regulation is intended to accomplish.[9] On the other hand, it may be troubling that the author of these legally binding rules also possesses the power to interpret the meaning of those regulations when the text is not clear.[10]

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[1] For more information on the rulemaking process, *see* CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by (name redacted) and (name redacted); CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by (name redacted).

[2] Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979).

[3] 5 U.S.C. §§551 *et seq*.

[4] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[5] *Id.* at 842-43.

[6] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

[7] *Id.* at 413-14.

[8] *See, e.g.*, Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449 (2011); Scott H. Angstreich, *Shoring Up* Chevron: *A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretation*, 34 U.C. Davis L. Rev. 49 (2000); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L.J. 65 (1983); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996).

[9] *See, e.g.*, Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144, 150-53 (1991).

[10] *See* Decker v. Northwest Environmental Defense Center, No. 11-338, slip op. (U.S. March 20, 2013) (Scalia, J., (continued...)

Furthermore, imprecise regulations can lead regulated industries to lack the necessary knowledge of how a regulation will be interpreted or enforced.[11] Without concrete knowledge of the meaning of a regulation, a regulated entity will not easily be able to ensure that its behavior and practices conform to the required standards.

Indeed, although *Seminole Rock* deference has been a long-standing tenet of administrative law—the case was decided in 1945—at least three Justices of the Supreme Court have recently questioned whether this deference is still appropriate.[12] In the recent Supreme Court opinion from *Decker v. Northwest Environmental Defense Center*, Justice Scalia attacked the concept of *Seminole Rock* deference directly, noting "[f]or decades, and for no good reason, we have been giving agencies the authority to say what their rules mean ..."[13] Justices Roberts and Alito, in a one-page concurrence, simply noted that "it may be appropriate to reconsider the principle" of *Seminole Rock* deference.[14] Justice Thomas also appears to have previously questioned whether continued reliance on *Seminole Rock* is appropriate.[15] Although the holding in *Seminole Rock* remains in place, these opinions reflect the possibility that the Court may be willing to consider whether this judicial deference should remain in effect in a future case.

The Administrative Procedure Act (APA) and *Seminole Rock* Deference

Although the APA prescribes the procedures that agencies must undertake in order to promulgate agency rules,[16] there is no provision within the APA that requires agency regulations to meet any standard of clarity or precision. During the rulemaking process, persons and organizations that are affected by proposed rules may submit comments to the agency (if the agency is using "notice and comment" rulemaking procedures)[17] or present evidence (if the agency must use the "formal" rulemaking procedures).[18] During this process, those submitting comments or presenting evidence could raise issues relating to the clarity of the proposed rule, but there are no set standards that ensure an agency will enact clear regulations.

The Supreme Court has noted that "[t]he APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication."[19] This principle allows an agency to adopt broad guidelines, established by a rulemaking, that can then be further

(...continued)

concurring in part and dissenting in part).

[11] *See* Manning, *supra* note 8.

[12] *See Decker*, No. 11-338, slip op.

[13] *Id.* slip op. at 1 (Scalia, J., concurring in part and dissenting in part).

[14] *Id.* (Roberts, J., concurring) (noting that this particular case was not an appropriate time to review *Seminole Rock* deference because the Court had not been briefed on it by the parties to the case).

[15] *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 524 (1994) (Thomas, J., dissenting).

[16] 5 U.S.C. §§551 et seq. For a comprehensive review of agency rulemaking, *see* CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by (name redacted).

[17] 5 U.S.C. §553.

[18] 5 U.S.C. §556-557. For an overview of formal rulemaking, *see* CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by (name redacted) and (name redacted).

[19] Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 96 (1995).

clarified through individualized adjudication proceedings. The reasoning behind this is that courts do not believe that agencies should have to engage rulemaking procedures that may be lengthy and demanding to be able to capture every instance in which a rule will be applied.[20] However, what happens when a regulated entity believes that it has complied with a regulation, but the agency interprets the rule in a different manner?

In *Bowles v. Seminole Rock & Sand Co.*,[21] the Court declared that agencies are entitled to significant deference when they are interpreting their own regulations. The Court applied a "plainly erroneous" standard—if the agency's interpretation is plausible, it will be given effect. When determining the meaning of an administrative regulation, the Court announced that

> [A] court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.... [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation ... [a court's] only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.[22]

The decision in *Seminole Rock* arose from a dispute concerning the interpretation of the Maximum Price Regulation No. 188, which was promulgated by the Office of Price Administration pursuant to the Emergency Price Control Act of 1942.[23] The rule—which established price ceilings—commanded that a seller could not charge a higher price for delivery of any article than the seller's highest price charged during the month of March 1942.[24] In order to determine what qualified as the "highest price charged during March, 1942," the regulation established that it should equal "the highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942."[25] Seminole Rock & Sand Company had delivered crushed rock to a purchaser in March 1942 for a price of 60 cents per ton; however, Seminole Rock had *charged* the purchaser on this sale several months earlier.[26] Seminole Rock argued that because there was no charge in March 1942, but only a delivery, its price ceiling should not be set at 60 cents per ton.[27] The Administrator argued that the rule is satisfied whenever there has been a delivery of the specified articles during that month, regardless of when the sale actually occurred.[28] The Court looked to the agency's previous interpretations of the rule, and determined that the agency's interpretation of its own rule should be controlling "unless it is plainly erroneous or inconsistent with the regulation."[29] Thus, although there could be two possible readings of the regulation, the agency's interpretation was not plainly erroneous and, therefore, was determined to be controlling. With the Court's decision, the precedent for giving judicial deference to an agency's interpretation of its own rules was set.

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[20] *See id.*

[21] 325 U.S. 410 (1945).

[22] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14.

[23] *Id.* at 411. The price controls were put in place to control prices during the war effort.

[24] *Id.* at 413.

[25] *Id.* at 414.

[26] *See id.* at 415.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 413-14.

Since *Seminole Rock*, the Court has continued to follow this "plainly erroneous" standard. In *Thomas Jefferson Univ. v. Shalala*,[30] the Court stated, "[w]e must give substantial deference to an agency's interpretations of its own regulations. Our task is not to decide which among several competing interpretations best serves the regulatory purpose."[31] The Court reiterated that the agency's interpretation should be followed unless it is plainly erroneous or clearly inconsistent with the agency's "intent at the time of the regulation's promulgation."[32] The Court has clearly stated that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[33] Even more recently, in 2008, the Court again stated, "[j]ust as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance, the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force."[34] This statement may suggest that *Seminole Rock* deference is even more deferential than what is provided to an agency during the application of the *Chevron* test.

Limitations on the Applicability of *Seminole Rock* Deference

Although this judicial deference is substantial, it is not without limit. In some circumstances a court must refuse to defer to an agency's interpretation. Courts will not defer to an agency's interpretation if the regulation itself is clear,[35] if the agency suddenly changes its interpretation,[36] or if the agency's regulation merely "parrots" the statutory language.[37] Finally, courts generally prevent agencies from levying punitive fines against regulated entities if the regulated party could not have reasonably known how the agency planned to interpret the regulation.[38] These exceptions are discussed in further detail below.

No *Seminole Rock* Deference if the Regulation is Unambiguous

In order for an agency's interpretation to be granted *Seminole Rock* deference, the agency's regulation must first be ambiguous. As the Court noted in *Seminole Rock*, the agency's interpretation should only be controlling if it is not "plainly erroneous or inconsistent with the regulations."[39] Therefore, if the regulations are clear, then the agency is not permitted to interpret them in any manner that suits its immediate needs. The Court ruled in *Christensen v. Harris County*[40] that *Seminole Rock* deference is "warranted only when the language of the regulation is ambiguous.... To defer to the agency's position [in this circumstance] would be to permit the agency under the guise of interpreting the regulation, to create *de facto* a new regulation."[41] In

[30] 512 U.S. 504 (1994).

[31] *Id.* at 512.

[32] *Id.* (quoting Gardebring v. Jenkins, 485 U.S. 415, 430 (1988)).

[33] Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144, 151 (1986).

[34] Fed. Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008) (internal citations omitted).

[35] *See* Christensen v. Harris County, 529 U.S. 576 (2000).

[36] *See Thomas Jefferson Univeristy*, 512 U.S. at 515.

[37] *See* Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

[38] *See, e.g.*, General Electric Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995).

[39] *Seminole Rock*, 325 U.S. at 413–14.

[40] Christensen v. Harris County, 529 U.S. 576 (2000).

[41] *Id.* at 588.

Christensen, the regulation in question stated that an agreement between an employer and employee "*may* include other provisions governing the preservation, use, or cashing out of compensatory time ..."[42] The agency purported to "interpret" this regulation as *requiring* an agreement to address these issues. The Court noted that deference to the agency's interpretation was not warranted because the use of the word "may" clearly and unambiguously illustrates that the regulation "is permissive, not mandatory."[43]

No *Seminole Rock* Deference if Interpretation Is Inconsistent with Previous Construction

The Supreme Court has found that "an agency's interpretation of a ... regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view."[44] The Court has thus suggested that agency "flip-flopping" on interpretations would be unacceptable. Lower courts have applied this restriction on *Seminole Rock* deference. For example, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) declined to provide the Mine Safety and Health Administration (MSHA) with *Seminole Rock* deference because the agency changed its position on its regulations regarding requirements for having two "escapeways" from mines.[45] The MSHA had previously stated that the second escapeway did not have to be continually functioning if it could be made ready for use within one hour.[46] Later, during litigation, the MSHA contended that its new interpretation of the regulation required that both escapeways be continuously functioning.[47] The D.C. Circuit held that "the flip-flops here mark the Secretary's position as the sort ... to which courts will not defer."[48] Similarly, the United States Court of Appeals for the Ninth Circuit has also declined to defer to an agency's interpretation because the agency's position differed from case to case.[49]

No *Seminole Rock* Deference if Regulation Merely "Parrots" the Statutory Language

The Supreme Court has ruled that *Seminole Rock* deference is not appropriate when an agency's regulation merely restates or paraphrases the statutory language enacted by Congress. In *Gonzales v. Oregon*, the Court noted that "[a]n agency does not acquire special authority to interpret its own words when, instead of using its own expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."[50] This decision attempts to prevent agencies from circumventing the requirements of the APA. If the agency could simply restate the ambiguous statutory language in its rules and then rely on broad deference to interpret its own rules, the agency would have an easy way to avoid potentially difficult rulemaking procedures. The holding in *Gonzales* establishes that agencies must use rules, and the rulemaking

[42] *Id.* at 577-88.

[43] *Id.* at 588.

[44] *Thomas Jefferson Univeristy*, 512 U.S. at 515.

[45] Akzo Nobel Salt, Inc. v. Federal Mine Safety and Health Review Commission, 212 F.3d 1301 (D.C. Cir. 2000).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1304-05.

[49] *See* Western States Petroleum Association v. EPA, 87 F.3d 280 (9th Cir. 1996).

[50] Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

process, to clarify the ambiguous terms of the statute, and cannot merely parrot the statutory language and rely on *Seminole Rock* deference to avoid complex rulemaking procedures.[51]

Requirement of Notice to Punish—Lower Courts' Implementation of *Seminole Rock* Deference in Enforcement Proceedings

Some regulations may impose civil fines or criminal penalties if a regulated entity violates a properly issued rule. This could potentially lead to problems where a regulated entity believes it is in compliance with agency regulations, but the agency interprets the rule differently. However, lower courts have acknowledged the potential to subject regulated entities to surprise fines, and have prohibited agencies from taking punitive action if the regulated entity has not received sufficient notice of the agency's interpretation.

In *General Electric Co. v. EPA*,[52] the D.C. Circuit afforded the Environmental Protection Agency (EPA) *Seminole Rock* deference and declared that it would defer to the EPA's reasonable interpretation of its own regulation relating to proper disposal of transmission fluids.[53] However, despite the controlling weight given to the agency's interpretation, the court determined that the EPA could not "punish" General Electric (GE) with fines because GE did not have sufficient notice regarding the agency's interpretation of the regulation.[54] The court held that GE's interpretation of the regulation was also reasonable, and, because GE was not aware of how the EPA intended to apply the regulation, GE could not be punished for its reasonable attempt to comply with the regulation. The court stated, "Where, as here, the regulations and other policy statements are unclear, where the [regulated entity's] interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished."[55]

Essentially, the court stated that the agency's permissible interpretation could be enforced in the future, but could not be used to punish a party who did not have adequate notice of the agency's interpretation. Such lack of notice violated constitutional due process requirements.[56] As a result, GE would have to comply with the EPA's interpretation of the regulation in the future, but the EPA could "not hold GE responsible in any way ... for the actions charged in this case."[57]

Similarly, in *Satellite Broadcasting Co. v. FCC*,[58] the D.C. Circuit ruled that although agency interpretations are entitled to deference, they may not cut off a party's right or punish a party

[51] *See* Richard J. Pierce, Jr., Admnistrative Law Treatise §6.11 (5th ed. 2010).

[52] 53 F.3d 1324 (D.C. Cir. 1995).

[53] *Id.* at 1327 ("We accord an agency's interpretation of its own regulations a high level of deference, accepting it unless it is plainly wrong.") (quotations omitted).

[54] *Id.* at 1328–29 ("Had EPA merely required GE to comply with its interpretation, this case would be over. But EPA also found a violation and imposed a fine ... In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.").

[55] *Id.* at 1333–34.

[56] *Id.* at 1328.

[57] *Id.* at 1334.

[58] 824 F.2d 1 (D.C. Cir. 1987).

without giving full notice of its interpretation.[59] Other circuits have similarly applied this notice requirement in order for an agency to punish a regulated party either criminally or civilly.[60]

Justifications for and Potential Benefits of *Seminole Rock* Deference

The Supreme Court's treatment of ambiguous agency rules illustrates the challenges that arise when agencies promulgate regulations lacking clarity. Many authors note that the Court is less explicit with its reasoning for granting *Seminole Rock* deference than it is with its justifications for *Chevron* deference.[61] Indeed, Justice Scalia, in his recent dissent from *Decker v. Northwest Environmental Defense Center*, notes that the Court in *Seminole Rock* "offered no justification whatever" for providing the agency such deference.[62] However, the most common justifications[63] for giving agencies this power closely mirror the justifications for granting *Chevron* deference[64]—that is, agencies have greater expertise in their policy field and they are more politically accountable than Article III courts.

Agency regulatory schemes are often intricate and complex, and the expert agency is expected to understand how its rules fit into the larger regulatory system. Therefore, the expert agency presumably should be most able to interpret its regulations in a manner consistent with its policy goals. The Supreme Court put emphasis on this justification in *Thomas Jefferson University* when it stated that "broad deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns."[65]

Furthermore, the reasoning in *Chevron* regarding political accountability can easily be transferred to the *Seminole Rock* context—agencies are in a better position to interpret their own regulations because they are more politically accountable than independent courts.[66] If an agency's

[59] *Id.* at 4 ("The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation.").

[60] *See, e.g.*, Diamond Roofing Co. v. Occupational Safety & Health Review Com., 528 F.2d 645, 650 (5th Cir. 1976) ("If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express."); Kropp Forge Co. v. Secretary of Labor, 657 F.2d 119, 122 (7th Cir. 1981) (noting that there must be adequate notice in order to punish a regulated entity for violating an agency regulation); Dravo Corp. v. Occupational Safety & Health Review Com., 613 F.2d 1227, 1234 (3rd Cir. 1980) ("[A]n employer should not be subject to penal sanctions for nonadherence to safety standards without adequate notice in the regulations of the exact contours of his responsibility.").

[61] *See, e.g.*, Stephenson & Pogoriler, *supra* note 8, at 1454 ("The *Seminole Rock* Court offered no explanation whatsoever ... for its conclusion."); Angstreich, *supra* note 8, at 93 (noting that the *Seminole Rock* "Court stated the deference principle without explanation, as though it were axiomatic.").

[62] *Decker*, No. 11-338, slip op. at 2 (Scalia, J., concurring in part and dissenting in part).

[63] *See* Stephenson & Pogoriler, *supra* note 8, at 1454-56.

[64] *See* Stephenson & Pogoriler, *supra* note 8, at 1457 (noting that the pragmatic justifications associated with *Chevron* reasoning are "ascendant"); Angstreich, *supra* note 8, at 99 (noting "that the Court is moving in the direction of transposing its justification for *Chevron* into the *Seminole Rock* context").

[65] *Thomas Jefferson University*, 512 U.S. at 512.

[66] *See Chevron*, 467 U.S. at 865–66.

interpretations are truly undesirable, the incumbent Administration—unlike the insulated courts—can be held accountable by political processes.[67]

Some scholars note further justifications based on efficiency and flexibility.[68] It is potentially easier and more efficient for agencies to enact broad rules and then clarify or refine them as the scheme is put into place.[69] This flexibility allows an agency to implement a comprehensive regulatory scheme without having to constantly revise its regulations through the daunting rulemaking process.[70] Arguably, perfect clarity in the rulemaking process is essentially impossible, and issues concerning these regulations will necessarily have to be resolved through agency interpretation.[71]

Finally, some authors note that attempting to achieve perfect clarity in agency regulations comes with a cost and is not necessarily desirable.[72] For example, the more precise a regulation must be, the longer it will take to issue and the more it will cost for an agency to gather all of the needed data to promulgate the regulation.[73] Agencies, if they were unable to rely on clarifying interpretations, would have to undertake an effort to promulgate rules that could be applied perfectly in all situations—this could take a considerable amount of time and resources.

In some circumstances, being too precise can have a negative effect on the overall regulatory scheme.[74] Professor Colin Diver gives an example of this phenomenon, hypothesizing about a regulation aimed to prevent unsafe pilots from flying.[75] An agency could promulgate a clear rule that prevents any pilot over 60 years of age from flying—but this would still allow some unsafe pilots to fly while prohibiting other perfectly capable pilots from flying.[76] A less clear regulation that prohibits pilots that create an "unreasonable risk" from flying may be more difficult for regulated entities to interpret, but could provide the groundwork for a more effective regulatory scheme to be implemented.[77]

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[67] *See id.*

[68] Stephenson & Pogoriler, *supra* note 8, at 1459–60.

[69] Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 96–97 (1995) ("As to particular reimbursement details not addressed by her regulations, the Secretary relies upon an elaborate adjudicative structure ... The Secretary's mode of determining benefits by both rulemaking and adjudication is, in our view, a proper exercise of her statutory mandate.").

[70] Hoctor v. United States Dep't of Agric., 82 F.3d 165, 170 (7th Cir. 1996) ("[U]nless a statute or regulation is of crystalline transparency, the agency enforcing it cannot avoid interpreting it, and the agency would be stymied in its enforcement duties if every time it brought a case on a new theory it had to pause for a bout, possibly lasting several years, of notice and comment rulemaking.").

[71] *See id.*; Stephenson & Pogoriler, *supra* note 8, at 1459.

[72] Diver, *supra* note 8, at 67–71 (Diver notes that clarity, or "transparency," is not the only important quality that a regulation needs to have. Diver argues that rules must also be "accessible" and "congruent"—that is, rules should be easily applicable to concrete situations and should produce the desired behavior from regulated entities. Diver argues that making a rule clearer can lead rules to be less accessible or congruent, and vice versa.).

[73] Angstreich, *supra* note 8, at 114 (noting, among other tradeoffs, that increased clarity can make it easier to comply with the rules, but it also "adds to the costs of promulgating the rule," as the agency will have to "acquire the information needed to develop precise rules").

[74] Diver, *supra* note 8, at 67–71 (1983).

[75] *Id.*

[76] *See id.*

[77] *See id.*

Criticisms and Potential Problems with *Seminole Rock* Deference

There are also possible concerns connected with granting an agency *Seminole Rock* deference. A commonly cited concern is the potential for *Seminole Rock* deference to incentivize the promulgation of vague agency rules.[78] If an agency knows that its own interpretation will become controlling, there is little need for the agency to promulgate a clear rule from the start—the agency can instead promulgate a broad rule and then attach more precise interpretations of the rule at a later time. This behavior could have a negative effect on regulated entities that are left without knowledge of how to comply with the regulations. Justice Thomas illustrates this concern in his dissenting opinion in *Thomas Jefferson University*:

> It is perfectly understandable ... 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. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.[79]

Professor John F. Manning echoes this concern in his article:

> In a regime in which a regulation may be interpreted in several permissible ways, regulated parties may find it difficult, if not impossible, to plan their affairs with confidence until the regulation has been definitively interpreted by the agency. Conclusive adjudications do not occur overnight, and they are not costless. The agency, as opposed to its lower functionaries, may take years to address the meaning of unclear regulatory norms, leaving regulated parties to plan their conduct based on often-conflicting or unclear signals of the lesser agency functionaries who may make the important day-to-day enforcement and adjudication decisions. If an agency regulation, for example, requires an investment in pollution abatement equipment, and the regulation may be read to require process X or Process Y, the regulated parties compelled to act cannot know with confidence which process to install until the end of the often-lengthy gestation period of a definitive agency interpretation.[80]

This lack of notice for how a rule could be interpreted potentially raises serious concerns for regulated industries. Even though courts have declined to allow agencies to "punish" regulated entities for rule violations when how the promulgating agency would interpret the rule was not readily apparent,[81] a regulated entity must still bear the potentially large cost required to come into compliance with the agency's interpretation.

Justice Scalia recently attacked *Seminole Rock* deference for incentivizing the promulgation of ambiguous regulations. However, Justice Scalia framed his argument as a violation of the doctrine of separation of powers. He noted that an important aspect of the separation of powers

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[78] *See, e.g.*, Stephenson & Pogoriler, *supra* note 8, at 1461; Manning, *supra* note 8, at 655 (noting that *Seminole Rock* deference can reduce an agency's "incentive to speak precisely and transparently when it promulgates regulations" and that "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."); *but see id.* at 655–66 (noting that there are other factors that may incentivize the promulgation of clear rules such as reduced cost of enforcement, reduced cost of agency internal management, and reduced ability for subsequent Administrations to easily manipulate vague regulations for a quick reversal of policy).

[79] *Thomas Jefferson University*, 512 U.S. at 524 (Thomas, J., dissenting).

[80] Manning, *supra* note 8, at 671.

[81] See above discussion on limits of *Seminole Rock* deference.

principle is that "the power to write a law and the power to interpret it cannot rest in the same hands."[82] He distinguished *Seminole Rock* deference from *Chevron* deference by showing that when an agency is interpreting a statute passed by Congress, the author of the vague statute is not the entity tasked with interpreting the statute.[83] However, he stated, "when an agency interprets its *own* rules—that is something else. Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly."[84]

Justice Scalia also attacked the principal arguments for maintaining *Seminole Rock* deference. Agreeing that agencies possess special expertise in their policy areas, Justice Scalia noted that this expertise "leads to the conclusion that agencies and not courts should make regulations," but is not indicative of who should have power to interpret regulations.[85] He noted that it should be up to the courts to "say what the law is."[86] Furthermore, he noted that although agencies may have a better understanding and insight into the intent of a regulation, agencies should not get credit for what they intended to do, but, rather, should be bound by what the regulation actually says.[87]

Conclusion

Seminole Rock deference has been a mainstay in administrative law since the decision was handed down in 1945. It is important to understand the implication this deference has on the behavior and functioning of administrative agencies. *Seminole Rock* provides a significant amount of flexibility to agencies in the implementation of their regulatory programs. There are costs and benefits associated with permitting an agency to promulgate broad rules and then allowing the agency to refine them through interpretations accorded with judicial deference. While the Supreme Court has not acted to change the deferential standard provided to agencies in these circumstances, Justice Roberts recently announced that "the bar is now aware that there is some interest in reconsidering" *Seminole Rock* deference.[88] If the Court decides to take a case to reconsider this judicial deference, it would be considering a question that goes "to the heart of administrative law" because "[q]uestions of *Seminole Rock* ... deference arise as a matter of course on a regular basis."[89]

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[82] *Decker*, No. 11-338, slip op. at 4 (Scalia, J., concurring in part and dissenting in part).
[83] *Id.*
[84] *Id.* at 5.
[85] *Id.* at 3.
[86] *Id.* (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)).
[87] *Id.*
[88] *Id.* (Roberts, J., concurring).
[89] *Id.*