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## Both Sides of the *Rock*: Justice Gorsuch and the *Seminole Rock* Deference Doctrine

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# BOTH SIDES OF THE ROCK: JUSTICE GORSUCH AND THE SEMINOLE ROCK DEFERENCE DOCTRINE

*Kevin O. Leske\**

*Despite being early in his tenure on the U.S. Supreme Court, Justice Neil Gorsuch has already made his presence known. His October 16, 2017 statement respecting the denial of certiorari in Scenic America, Inc. v. Department of Transportation garnered significant attention within the legal community. Joined by Chief Justice John Roberts and Justice Samuel Alito, Justice Gorsuch questioned whether the Court's bedrock 2-part test from Chevron, U.S.A. v. NRDC—whereby courts must defer to an agency's reasonable interpretation of an ambiguous statutory term—should apply in the case.*

*Justice Gorsuch's criticism of the Chevron doctrine was not a surprise. In the months leading up to his confirmation hearing, legal scholars pored over his opinions while he was a judge on the U.S. Court of Appeals for the Tenth Circuit, and they had already unearthed his discomfort with the Chevron doctrine. Similarly, through an analysis of his originalism ideology and textualist approach to judicial decision-making, they have attempted to predict how Justice Gorsuch will decide future cases in other important areas of the law.*

*To date, however, Justice Gorsuch's view on the Seminole Rock deference doctrine has gone unexamined by scholars. Known as Chevron's "doctrinal cousin," the Seminole Rock 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." Especially given the profound practical importance of the doctrine in our administrative state and the Court's recent interest in it, an assessment of Justice Gorsuch's view is not merely academic.*

*This essay provides that assessment. First, the essay examines the Seminole Rock deference doctrine and explores the Court's recent interest in the doctrine. Part II analyzes Justice Gorsuch's likely view on the Seminole Rock doctrine by examining key Tenth Circuit opinions that will influence his view on Seminole Rock while on the Supreme Court. The essay concludes that although Justice Gorsuch would likely be very skeptical of Seminole Rock, he should ultimately choose to retain the doctrine provided that the Court continues to provide safeguards that would mitigate or even mute any perceived over-reach that the application of Seminole Rock allows in our administrative state.*

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\* Associate Professor of Law, Barry University School of Law. I dedicate this essay to my late father, Gary S. Leske, who provided life-long guidance, support, and inspiration. I am grateful to the editors and staff of the *Michigan Journal of Environmental & Administrative Law* for their excellent work.

INTRODUCTION . . . . . 282

I. THE *SEMINOLE ROCK* DEFERENCE DOCTRINE . . . . . 288

    A. *Introduction* . . . . . 288

    B. *Bowles v. Seminole Rock & Sand Co.* . . . . . 288

    C. *The Court’s Recent Interest in the Seminole Rock Doctrine* . . . . . 291

II. BOTH SIDES OF THE *ROCK* . . . . . 297

    A. *Introduction* . . . . . 297

    B. *Keep the Rock?* . . . . . 298

    C. *Flip the Rock?* . . . . . 304

CONCLUSION . . . . . 310

INTRODUCTION

Despite being early in his tenure on the U.S. Supreme Court, Justice Neil Gorsuch has already made his presence known. His October 16, 2017 statement respecting the denial of certiorari in *Scenic America, Inc. v. Department of Transportation* garnered significant attention within the legal community.<sup>1</sup> Joined by Chief Justice John Roberts and Justice Samuel Alito, Justice Gorsuch questioned whether the Court’s bedrock test from *Chevron, U.S.A. v. NRDC*<sup>2</sup>—whereby courts must defer to an agency’s reasonable interpretation of an ambiguous statutory term—should apply in the case.<sup>3</sup>

Justice Gorsuch’s criticism of the *Chevron* doctrine was not a surprise. In the months leading up to his confirmation hearing, legal scholars pored over his opinions while he was a judge on the U.S. Court of Appeals for the Tenth Circuit, and they had already unearthed his past discomfort with the *Chevron* doctrine. Similarly, through an analysis of his constitutional originalism ideology and textualist approach to statutory construction, they have attempted to predict how Justice Gorsuch will decide future cases in important areas of the law.<sup>4</sup>

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1. *Scenic Am., Inc. v. Dep’t of Transp.*, 583 U.S. \_\_\_\_ (2017) (No. 16–739) (Gorsuch, J., denying cert.).

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

3. *Scenic Am.*, 583 U. S. \_\_\_\_ (No. 16–739); *Chevron*, 467 U.S. at 842-43.

4. See, e.g., Philip J. McAndrews III, *What SCOTUS Nominee Neil Gorsuch’s Interpretation of Chevron Could Mean for Environmental Administrative Law*, GEO. ENVIL. L. REV. ONLINE (Mar. 5, 2017), <https://gelr.org/2017/03/05/what-scotus-nominee-neil-gorsuchs-interpretation-of-chevron-could-mean-for-environmental-administrative-law/> (predicting that “[a] lack of *Chevron* deference to agency interpretations would greatly impact environmental agencies’ abilities to apply statutory directives in a way that ensures their enforcement powers span the wide range of potential environmental issues with which they are tasked to administer.”); David J. Reiss, *Gorsuch, CFPB and Future of the Administrative State* (Brooklyn Law Sch. Legal Studies, Paper No. 483, 2017), <https://ssrn.com/abstract=2915266> (predicting Justice Gorsuch’s impact on the Consumer Financial Protection Bureau); David Feder,

To date, however, Justice Gorsuch's view on the *Seminole Rock* deference doctrine has gone unexamined by scholars. Known as *Chevron's* "doctrinal cousin," the *Seminole Rock* 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."<sup>5</sup> This is unsurprising, since the *Seminole Rock* deference regime has not received anywhere near the scrutiny applied to the *Chevron* doctrine.<sup>6</sup>

So why should we be concerned with the *Seminole Rock* standard and Justice Gorsuch's view on the doctrine? Given the paramount importance of regulations in our massive administrative state, the application of *Seminole Rock* doctrine has profound consequences to private parties.<sup>7</sup> As Chief Justice John Roberts recently observed, *Seminole Rock* questions go "to the heart of administrative law" and "arise as a matter of course on a regular basis" during judicial review.<sup>8</sup> Thus, whether the Court continues to apply the standard to agency interpretations in these cases is extremely significant.

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*The Administrative Law Originalism of Neil Gorsuch*, YALE J. ON REG. (Nov. 21, 2016), <http://yalejreg.com/nc/the-administrative-law-originalism-of-neil-gorsuch/> (analyzing "three of Judge Gorsuch's recent and noteworthy administrative law opinions, with an eye toward the rigorous originalism that motivated them").

5. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Recently, *Seminole Rock* deference has been called "*Auer* deference" because of the case of *Auer v. Robbins*, 519 U.S. 452, 461 (1997), where the Court applied and affirmed the *Seminole Rock* doctrine. It remains unknown why the courts and the legal community refer now to *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, 1089 n.26 (2008). Justice Scalia, who wrote the majority opinion in *Auer* invoking the doctrine, would later question the doctrine. See Kevin O. Leske, *A Rock Unturned: Justice Scalia's (Unfinished) Crusade against the Seminole Rock Deference Doctrine*, 69 ADMIN. L. REV. 1 (2017) [hereinafter Leske, *A Rock Unturned*].

6. 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*] (asserting that 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."); 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.").

7. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614-15 (1996) (highlighting that *Seminole Rock* deference mandates close attention because agency rules affect the public's legal rights more directly than statutes).

8. *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring).

In addition, there are constitutional and practical problems with the existing standard. Because the *Seminole Rock* standard is highly deferential to agencies, scholars have referred to it as “controlling” deference because the standard essentially mandates that a court accept the agency’s interpretation of an ambiguous regulatory provision.<sup>9</sup> Seen in this light, some scholars argue that the doctrine raises separation of powers concerns.

For example, in his groundbreaking law review article on the *Seminole Rock* doctrine, Professor John F. Manning asserts that granting an administrative agency deference under *Seminole Rock* effectively empowers the agency to make the law and then interpret that “law.”<sup>10</sup> In other words, an agency can first promulgate regulations, which have the force of law, and then in essence decide what the regulation means because the agency receives controlling deference for its subsequent interpretation.<sup>11</sup> This power of “self-interpretation,”<sup>12</sup> as seen by Manning, “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.”<sup>13</sup> Indeed, standing alone, law-exposition by an agency runs counter to the bedrock principle that “[i]t is emphatically the province and duty of the Judicial Department to say what the law is.”<sup>14</sup>

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9. As in my past scholarship on the *Seminole Rock* doctrine, see Leske, *Between*, *supra* note 6, 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, 789 (2014) [hereinafter Leske, *Splits in the Rock*], I will refer to *Seminole Rock* deference as “controlling” deference because it echoes 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 6, at 591 (calling certain deference rules, including *Seminole Rock*’s, “controlling” because they are outcome determinative).

Other scholars have called it “binding deference,” which is a phrase interchangeable with “controlling deference.” See Manning, *supra* note 7, at 617 (discussing the concept of “binding deference” whereby a reviewing court must “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”).

10. See Manning, *supra* note 7, 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).

11. See *id.* at 638-39, 654, 696.

12. See *id.* 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.”).

13. *Id.* at 617.

14. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“Those who apply the rule to particular cases must, of necessity, expound and interpret that rule.”). This concern is also reflected in related criticism that the *Seminole Rock* deference doctrine conflicts with the APA

Scholars have also identified related practical concerns. According to many, 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.”<sup>15</sup> In other words, an agency might intentionally leave key regulatory definitions ambiguous, knowing that it will be given deference when it subsequently interprets its regulation during an adjudication or during judicial review.<sup>16</sup>

These concerns have not gone unnoticed by the members of the Court.<sup>17</sup> For instance, Justice Antonin Scalia pushed for re-evaluation of the doctrine from 2011 until his death in 2016.<sup>18</sup> In 2011, in *Talk America, Inc. v. Michigan Bell Telephone Co.*,<sup>19</sup> he conceded that he “in the past [had] uncritically accepted that [deference] rule,” but now had “become increasingly

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because controlling deference is incompatible with the APA direction that courts determine “the meaning or applicability of the terms of an agency action.” Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 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”).

15. 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 that if an agency knows that a court will defer to its regulatory interpretation, it creates “a powerful incentive for agencies to issue vague regulations, with the thought of creating the operative regulatory substance later through informal interpretations”).

16. 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”).

17. With that said, various members of the Court sporadically have voiced their concern with the doctrine. See, e.g., *Mullins Coal Co. of Va. v. 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 v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *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*, *supra* note 6 (reviewing the development of the doctrine).

18. See generally Leske, *A Rock Unturned*, *supra* note 5, at 1.

19. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50 (2011).

doubtful of its validity.”<sup>20</sup> In no uncertain terms, he stated that he would welcome an opportunity to reconsider the doctrine.<sup>21</sup>

One year later, in *Decker v. Northwest Environmental Defense Center*,<sup>22</sup> he was clear that upon re-evaluation he would dispense with the doctrine, echoing Professor Manning’s concerns that the doctrine 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.”<sup>23</sup> Writing separately, Chief Justice Roberts and Justice Alito, who were likely swayed by Justice Scalia, opined that it “may be appropriate to reconsider that principle in an appropriate case” where “the issue is properly raised and argued.”<sup>24</sup>

In 2015, the *Seminole Rock* doctrine appeared—although not directly—in *Perez v. Mortgage Bankers Ass’n*.<sup>25</sup> In *Perez*, the Court reviewed a doctrine created by the United States Court of Appeals for the District of Columbia Circuit involving the notice-and-comment procedures under the Administrative Procedure Act (APA).<sup>26</sup> The D.C. Circuit in *Paralyzed Veterans of America v. D.C. Arena L.P.* had determined that “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”<sup>27</sup>

Although the *Perez* Court unanimously struck down the *Paralyzed Veterans* doctrine in a narrow opinion,<sup>28</sup> the more noteworthy opinions were the three concurring opinions by Justices Alito, Scalia, and Thomas that were dedicated to agency deference issues, especially *Seminole Rock*.<sup>29</sup> In each opinion, the Justices shared the view that the D.C. Circuit’s creation of the *Paralyzed Veterans* doctrine could have been, in Justice Scalia’s words, a “courageous (indeed, brazen) attempt” to cure issues that result in part from the application of the *Seminole Rock* doctrine.<sup>30</sup> Likewise, they identified, in

20. *Id.* at 68 (Scalia, J., concurring).

21. *Id.*

22. *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597 (2013).

23. *Id.* at 621, 617 (Scalia, J., concurring in part and dissenting in part) (stating that “I believe that it is time to [reconsider *Auer* deference].”).

24. *Id.* at 615-16 (Roberts, C.J., concurring).

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

26. *Id.* at 1203.

27. *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 Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034-36 (D.C. Cir. 1999), but the doctrine is most often cited as the *Paralyzed Veterans* doctrine.

28. *Perez*, 135 S. Ct. at 1202.

29. *Id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment), 1211-13 (Scalia, J., concurring in the judgment), 1213-25 (Thomas, J., concurring in the judgment).

30. *Id.* at 1212 (Scalia, J., concurring in the judgment); *see also id.* at 1210 (Alito, J., concurring in part and concurring in the judgment) (The D.C. Circuit’s creation of the

Justice Alito's words, the necessity that the "aggrandizement of the power of administrative agencies" be controlled.<sup>31</sup> And each Justice believed that re-considering or overruling the doctrine was a means to rectify the situation.<sup>32</sup>

But with the death of Justice Scalia and the ascension of Justice Gorsuch to the Court, *Seminole Rock's* future is again uncertain. Given Justice Gorsuch's willingness to jettison the *Chevron* doctrine, what about *Chevron's* doctrinal cousin, the *Seminole Rock* doctrine? Will he take up Justice Scalia's crusade in a broader attempt to reform the Court's deference regimes?

On one hand, given the relatedness, he might similarly question *Seminole Rock's* validity. His legal philosophy, including his adherence to judicial nondelegation, would suggest that he would be skeptical of the *Seminole Rock* doctrine. After all, *Seminole Rock*, like *Chevron*, is a controlling deference standard that in some scholars' views violates the separation of powers clause and grants an agency the power of law exposition, which is committed to the judicial branch. And the legal community has likened Justice Gorsuch to Justice Scalia with respect to judicial philosophy.<sup>33</sup>

On the other hand, Justice Gorsuch raised no objection to *Seminole Rock* while on the U.S. Court of Appeals for the Tenth Circuit.<sup>34</sup> While on the Tenth Circuit, then-Judge Gorsuch either endorsed or declined to object to the deployment of *Seminole Rock*.<sup>35</sup> What might account for this? Might he be convinced by his new colleagues on the Court, such as Justices Thomas, Alito, and Chief Justice Roberts, who have recently questioned the doctrine? To attempt to ascertain Justice Gorsuch's view, this essay delves into these issues.

Part I briefly introduces the *Seminole Rock* doctrine and explores the Court's recent interest in the doctrine. Part II analyzes Justice Gorsuch's

doctrine could have been due in response to the "aggrandizement of the power of administrative agencies" which stems in part from the *Seminole Rock* doctrine.).

31. *Id.*

32. *See e.g., id.* at 1210 (Alito, J., concurring in part and concurring in the judgment) (noting that there are "substantial reasons why the *Seminole Rock* doctrine may be incorrect"); *id.* at 1225 (Thomas, J., concurring in the judgment) (stating that he would abandon *Seminole Rock* in the appropriate case); *id.* at 1213 (Scalia, J., concurring in the judgment) (suggesting that the Court overrule *Seminole Rock*).

33. Megan McDermott, *A Few Predictions for Justice Gorsuch's Bankruptcy Jurisprudence*, 8 CALIF. L. REV. 40, 41 (2017) ("It's no secret that Judge Gorsuch admires Justice Scalia and has adopted several aspects of his judicial philosophy into his own jurisprudence."); *see also* Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html>.

34. *See* *Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1142 (10th Cir. 2011); *see also* *Garrett v. ReconTrust Co.*, 546 F. App'x. 736, 737 (10th Cir. 2013).

35. *Miami Tribe*, 656 F.3d 1129.



likely views on *Seminole Rock* by analyzing the key cases that Justice Gorsuch heard while on the Tenth Circuit that may have influenced his view on the doctrine.

This analysis shows that Justice Gorsuch has expressed views on “both sides of the *Rock*.” On one hand, he has endorsed and applied the *Seminole Rock* standard in several cases. He has done so without examining the doctrine or, as Justice Scalia did, criticizing the standard. On the other hand, Justice Gorsuch has in other cases attempted to protect parties from perceived unfairness, as through lack of notice, equal protection, or due process, which are the same outcomes that critics have alleged can result from the application of *Seminole Rock* deference. And most recently, he has raised concerns with the Court’s related agency deference regime under *Chevron*.

The essay concludes that although Justice Gorsuch will likely show a newfound skepticism for the doctrine, he would likely vote to “keep the *Rock*.” As explained in more detail below, Justice Gorsuch—like Justice Scalia had for most of his tenure on the Court—has “uncritically accepted” the *Seminole Rock* doctrine. Based on Justice Gorsuch’s recent opinions, however, it appears likely that he would now be receptive to evaluating the doctrine. But his past opinions also suggest that even if he is given the opportunity to assess the doctrine, he will not go as far as Justice Scalia and advocate abandonment of *Seminole Rock*.<sup>36</sup>

## I. THE *SEMINOLE ROCK* DEFERENCE DOCTRINE

### A. Introduction

Review of the *Seminole Rock* deference doctrine’s continuing viability requires understanding its origin and recent treatment before the Supreme Court. This part begins by summarizing the facts and the Court’s ruling in *Bowles v. Seminole Rock & Sand Co.*<sup>37</sup> Next, it briefly explains the *Seminole Rock* standard’s legal foundation, which was not identified by the Court until nearly fifty years later. Last, it introduces the Court’s recent interest in the doctrine to help place the importance of Justice Gorsuch’s view of the doctrine in context.

### B. *Bowles v. Seminole Rock & Sand Co.*

The *Seminole Rock* standard had its genesis in a Supreme Court case decided in 1945 during World War II.<sup>38</sup> The Court held that when courts

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36. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67-69 (2011) (Scalia, J., concurring in part and dissenting in part).

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

38. *Id.*

review an agency's interpretation of its own regulation, a court must defer to the agency's interpretation unless it "is plainly erroneous or inconsistent with the regulation."<sup>39</sup>

The regulation in question in *Seminole Rock* was promulgated under the Emergency Price Control Act of 1942 to control prices of various commodities and curb wartime inflation.<sup>40</sup> The Court analyzed "Maximum Price Regulation No. 188," which required that "each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942."<sup>41</sup>

At issue in the case was whether *Seminole Rock & Sand* had made a contract to sell crushed stone for more than the price established during the base period, as this would contravene the regulation.<sup>42</sup> The Administrator of the Office of Price Administration, Chester Bowles, filed a suit to prohibit *Seminole Rock & Sand* from executing the contract in March 1942 because there had been an actual delivery for a lower price.<sup>43</sup> *Seminole Rock & Sand* did not contest that it had sold crushed stone for a lower price, but maintained that the ceiling price was only set where there was both a charge and a delivery at such price.<sup>44</sup> According to *Seminole Rock & Sand*, its delivery contract had been fulfilled in October 1941, and therefore no ceiling limit had been set or exceeded.<sup>45</sup>

Both the district court and the Fifth Circuit determined that *Seminole Rock & Sand* was not in violation of the Maximum Price Regulation.<sup>46</sup> On appeal, the Court needed to assess whether *Seminole Rock & Sand* had indeed charged a price that was greater than the maximum established during the base period set forth in regulation.<sup>47</sup> In undertaking the regulatory construction analysis, the Court noted that the Administrator's interpretation of the maximum price regulation would come into play only if the regulation was ambiguous.<sup>48</sup> If there was ambiguity, the Court held that it "must necessarily look to the administrative construction of the regulation."<sup>49</sup> Most importantly, the Court found that "the ultimate criterion" in the analysis is the administrative interpretation, "which becomes of control-

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39. *Id.* at 414.

40. *Id.* at 413.

41. *Id.*

42. *Id.* at 412, 415.

43. *Id.* at 412.

44. *Id.* at 415.

45. *See id.* at 412, 415.

46. *Id.* at 412-13.

47. *Id.* at 413.

48. *Id.* at 413-14.

49. *Id.* at 414.

ling weight unless it is plainly erroneous or inconsistent with the regulation.”<sup>50</sup>

With respect to the language in the regulation, the Court determined that the phrase “highest price charged during March, 1942” was ambiguous.<sup>51</sup> It thus turned to the administrative construction of the regulation, set forth in a bulletin issued at the time the Maximum Price Regulation was issued.<sup>52</sup> In the bulletin, the Administrator had stated that the price ceiling was set by looking to the highest price of an *actual* delivery during March 1942.<sup>53</sup> The Court deferred to the Administrator’s interpretation, reversed the decision of the Fifth Circuit, and created what we now refer to as the *Seminole Rock* deference doctrine.<sup>54</sup> With that said, it is not entirely clear that the Court knew that its statement that deference was required unless “plainly erroneous or inconsistent with the regulation” would become the definitive standard governing agency regulatory deference.<sup>55</sup>

In establishing the *Seminole Rock* standard that courts must give an agency’s interpretation “controlling weight unless it is plainly erroneous or inconsistent with the regulation,” the Court did not explain its rationale or its legal basis for such a standard.<sup>56</sup> Close to five decades later, however, the Court supplied the basis for the standard. In the 1991 case *Martin v. Occupational Safety & Health Review Commission*,<sup>57</sup> the Court explained that the *Seminole Rock* deference standard was justified as a part of the agency’s delegated lawmaking powers. Then, in *Pauley v. BethEnergy Mines, Inc.*,<sup>58</sup> decided the same year, the Court elaborated that an agency’s power to authoritatively interpret its own regulations under *Seminole Rock* was rooted in Congress’s delegation of power to an agency.<sup>59</sup>

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50. *Id.*

51. *Id.* at 415.

52. *Id.* at 417.

53. *Id.* at 415, 417-18. The Court also appears to have been likely swayed that the Administrator had placed the public on notice of this interpretation and it had been consistent. *See id.* at 417-18.

54. *See id.* at 418.

55. *Id.* at 414.

56. *Id.*; *see generally* Leske, *Between*, *supra* note 6 (tracing development of the doctrine).

57. *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151 (1991) (citation omitted) (“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.”). For additional background on *Martin* and *Pauley*, *see generally* Leske, *Between*, *supra* note 6, at 227-30.

58. *Pauley v. BethEnergy Mines*, 501 U.S. 680 (1991).

59. *Id.* 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 Court's holdings in *Pauley* and *Martin* gave rise to additional questions. For example, given that the Court has identified congressional delegation to an agency as a founding principle of the *Chevron* doctrine, would any subsequent assault on *Chevron* have a ripple effect on the *Seminole Rock* doctrine? Given that Justice Gorsuch and other members of the Court have recently expressed skepticism of *Chevron* and deference to agencies, exploring this question is even more important.

### C. *The Court's Recent Interest in the Seminole Rock Doctrine*

In the seven decades since the *Seminole Rock* decision, the doctrine has "gone largely unexamined."<sup>60</sup> During this time, the Supreme Court and lower courts adopted factors to determine whether *Seminole Rock* deference was appropriate.<sup>61</sup> There have been instances, however, where members of the Court have expressed concern about granting an agency controlling deference for its interpretation of its regulation.

For example, in a 1987 case, Justice Thurgood Marshall cautioned that *Seminole Rock* deference must not be "a license for an agency effectively to rewrite a regulation through interpretation."<sup>62</sup> In 1994, Justice Clarence Thomas (joined by three colleagues) echoed the concern that *Seminole Rock* deference provided an incentive for agencies to promulgate vague regulations (since the agency can receive controlling deference later when it "clarifies" the interpretation). In his view, "agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law."<sup>63</sup> These observations, however, were raised to voice concern over specific instances where the application of the doctrine was perceived to have resulted in unfairness to a party.

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the discretion to promulgate interim regulations based on a reasonable interpretation thereof. From this congressional delegation derives the Secretary's entitlement to judicial deference."). For further background on *Pauley*, see generally Leske, *Between*, *supra* note 6.

60. Leske, *Between*, *supra* note 6, at 229 (asserting that unlike *Chevron*, the *Seminole Rock* deference doctrine has "gone largely unexamined").

61. See Leske, *Between*, *supra* note 6, at 248 (noting that the most prominent of the Supreme Court factors include "whether the agency's interpretation has been consistent over time, whether the agency stated a contrary intent when it originally promulgated the regulation, and the format in which the agency has expressed its interpretation"). For a detailed analysis of the interpretation offered by the United States Courts of Appeals, see Kevin O. Leske, *Splits in the Rock*, *supra* note 9.

62. *Mullins Coal Co. of Va. v. U.S. Dep't of Labor*, 484 U.S. 135, 170 (1987) (Marshall, J., dissenting). See generally Leske, *Between*, *supra* note 6 (reviewing development of the doctrine).

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

It has only been very recently that justices have raised the possibility that the *Seminole Rock* standard should be reconsidered altogether. The momentum toward re-evaluating the doctrine is largely attributed to former Justice Scalia. In his 2011 concurring opinion in *Talk America*,<sup>64</sup> he began what would become an impassioned crusade to overturn the doctrine.<sup>65</sup> The Court in *Talk America* determined whether local telephone service providers were required to allow competitors the use of their transmission facilities at cost-based regulated rates.<sup>66</sup> Because it determined that the applicable Telecommunications Act provision and the Federal Communications Commission's (FCC) regulations were ambiguous, the Court considered the FCC's interpretation of its regulations.<sup>67</sup> The Court found that under *Seminole Rock*, the FCC's interpretation was controlling.<sup>68</sup>

Justice Scalia disagreed with the Court's reliance on *Seminole Rock*. He wrote separately to inform his colleagues that he was no longer convinced that the *Seminole Rock* doctrine was sound: "For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity."<sup>69</sup> He concluded his short concurrence by warning that "[w]e have not been asked to reconsider *Auer* in the present cases [but when] we are, I will be receptive to doing so."<sup>70</sup>

The following year, in *Christopher v. SmithKline Beecham Corp.*,<sup>71</sup> the Court again heard a case that raised the doctrine. This time, however, it refused to defer to an agency interpretation under *Seminole Rock*.<sup>72</sup> The Court in *SmithKline Beecham* assessed whether a Department of Labor

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64. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring).

65. *See Leske, A Rock Unturned*, *supra* note 5 at 23.

66. *Talk Am.*, 564 U.S. at 53.

67. *Id.* at 57-59. 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 53.

68. *Id.* at 67 ("The FCC as *amicus curiae* has advanced a reasonable interpretation of its regulations, and we defer to its views."). The Court's ability to rely on the *amicus brief* was established in *Auer v. Robbins* but "first appeared in [the Court's] jurisprudence . . . [in *Bowles v. Seminole Rock & Sand Co.*]" *Id.* (Scalia, J., concurring).

69. *Id.* at 68 (Scalia, J., concurring). Justice Scalia referred to the *Seminole Rock* doctrine as "*Auer* deference" and criticized the doctrine as encouraging agencies to enact vague regulations, potentially violating the separation of powers doctrine, and "frustrate[ing] the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Id.* at 69.

70. *Id.* (referring to the *Seminole Rock* standard, which had more recently been called *Auer* deference); *see Leske, A Rock Unturned*, *supra* note 5.

71. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

72. *Id.* at 2166-67.

(DOL) regulation defining “outside salesman” included pharmaceutical sales representatives.<sup>73</sup>

First, the Court acknowledged that deference under *Seminole Rock* “does not apply in all cases.”<sup>74</sup> The Court reviewed circumstances where *Seminole Rock* deference was not appropriate, 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.’”<sup>75</sup> The Court concluded that the DOL’s interpretation was not worthy of *Seminole Rock* deference, especially because acceptance of the DOL’s interpretation would deprive the public of fair warning and constitute “unfair surprise.”<sup>76</sup> Thus, although the Court did not find the *Seminole Rock* doctrine problematic as a whole, it did recognize that it should not always be applied.<sup>77</sup>

During the Court’s 2012-13 term, the *Seminole Rock* doctrine took center stage in two of the opinions written in *Decker*.<sup>78</sup> The *Seminole Rock* issue involved the interpretation of a regulation promulgated under the federal Clean Water Act defining discharges into navigable waters.<sup>79</sup> The U.S. Environmental Protection Agency (EPA) interpreted its regulation to exclude the storm water runoff channeled from logging roads.<sup>80</sup> The Court deferred under *Seminole Rock*, finding it to be a “reasonable interpretation of its own regulation.”<sup>81</sup> It added that it found the “EPA’s interpretation . . . a permissible one,” because “there is no indication that the [EPA’s] current

73. *Id.* at 2161.

74. *Id.* at 2166.

75. *Id.* (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). As examples, the Court identified that an agency’s interpretation might not reflect its fair and considered judgment. The first example is “when the agency’s interpretation conflicts with a prior interpretation.” *Id.* (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)). Second, the Court identified that an agency’s interpretation might not reflect its fair and considered judgment when an agency’s interpretation appears to be “nothing more than a ‘convenient litigating position.’” *Id.* at 2166-67 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)). Third, an agency’s interpretation might not reflect its fair and considered judgment when the interpretation is a “post hoc rationalizatio[n] advanced by an agency seeking to defend past agency action against attack.” *Id.* (alteration in original) (citation omitted) (quoting *Auer*, 519 U.S. at 462).

76. *Id.* at 2167, 2167-68 (citation omitted).

77. *See id.* at 2167.

78. *See Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 601-03 (2013).

79. *Id.* at 601. Under the CWA, a permit is required if the discharge is “deemed to be ‘associated with industrial activity.’” By regulation, EPA 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).

80. *Id.* The United States appeared as amicus curiae on behalf of the EPA. *Id.*

81. *Id.*

view [was] a change from prior practice or a *post hoc* justification adopted in response to litigation.”<sup>82</sup>

Justice Scalia again penned a separate opinion to convey his frustration with the *Seminole Rock* doctrine.<sup>83</sup> He lamented that “[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*.<sup>84</sup> He decried that the doctrine had “no principled basis” and “contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.”<sup>85</sup>

To be sure, Justice Scalia’s opinion is significant by itself with respect to casting light on the problems arguably inherent in the *Seminole Rock* doctrine, but the concurring opinion of Chief Justice Roberts, which was joined by Justice Alito, thrust *Seminole Rock* doctrine into the spotlight. In his opinion, the Chief Justice expressly made the legal bar “aware that there is some interest in reconsidering” *Seminole Rock* and its progeny.<sup>86</sup> In addition, Chief Justice Roberts and Justice Alito tacitly suggested that they agreed that Justice Scalia’s opinion had posed “serious questions about the principle set forth” in these cases.<sup>87</sup>

Taken together, the justices’ opinions in *Talk America*, *SmithKline Beecham*, and *Decker* suggested that momentum among the justices was building toward the Court taking a *Seminole Rock* case. But after the Court’s various opinions in *Perez*, the review seemed a virtual certainty.<sup>88</sup> Interestingly, *Perez* was not ostensibly a *Seminole Rock* doctrine case. But the three separate concurring opinions of Justices Scalia, Thomas, and Alito showed that *Seminole Rock* was on most of the justices’ minds.<sup>89</sup>

Before the Court in *Perez* was the validity of the *Paralyzed Veterans* doctrine as applied to Section 551 of the APA.<sup>90</sup> Created by the U.S. Court of

82. *Id.* at 613-14 (citing *SmithKline Beecham*, 132 S. Ct. at 2166-67).

83. *Id.* at 616 (citing *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67 (Scalia, J., concurring in part and dissenting in part)).

84. *Id.*

85. *Id.* at 621.

86. *Id.* at 616 (Robert, C.J., concurring) (making the legal bar “aware that there is some interest in reconsidering” *Seminole Rock* and *Auer*).

87. *Id.* at 615-16 (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)) (noting that 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”).

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

89. *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211-12 (Scalia, J., concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment).

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

Appeals for the District of Columbia Circuit in 1997, the *Paralyzed Veterans* doctrine directed that “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”<sup>91</sup> Because an agency’s informal interpretations of its own regulations were purportedly also subject to the *Paralyzed Veterans* doctrine, the *Seminole Rock* doctrine seemed to be implicated in the Court’s review.<sup>92</sup>

At issue in *Perez* were regulations promulgated by the DOL implementing the Fair Labor Standards Act (FLSA).<sup>93</sup> The FLSA generally requires that employers subject to the Act pay overtime wages to employees who work more than forty hours per week, but provides limited exemptions.<sup>94</sup> The Mortgage Bankers Association alleged, and the D.C. Circuit agreed, that the DOL had changed its interpretation of the scope of the exemption but had not gone through notice and comment rulemaking, thereby violating the *Paralyzed Veterans* doctrine.<sup>95</sup>

Justice Sotomayor wrote the decision on behalf of a unanimous court, holding that the *Paralyzed Veterans* doctrine “improperly impose[d] on agencies an obligation beyond the ‘maximum procedural requirements’ specified in the APA.”<sup>96</sup> The APA’s categorical exemption of interpretive rules from the notice and comment provisions showed the Court that the *Paralyzed Veterans* doctrine could not stand.<sup>97</sup>

91. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). Although the doctrine is most often cited as the *Paralyzed Veterans* doctrine, the court revisited, and re-affirmed, this holding later in *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999).

92. *See Perez*, 135 S. Ct. at 1204–05.

93. *See id.*; *see generally* 29 U.S.C. §§ 201–19 (2012).

94. *Perez*, 135 S. Ct. at 1204–05; *see* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–62; *see also* *Mortg. Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193, 195–96 (D.D.C. 2012); 29 U.S.C. § 207(a)(1). The court reviewed a FLSA exemption that 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 exempt from the “[m]inimum wage and maximum hour requirements” otherwise required by the Act. *See Solis*, 864 F. Supp. 2d at 196 (quoting 29 U.S.C. § 213(a)(1)).

95. *Solis*, 864 F. Supp. 2d at 196–201. The change in interpretation involved whether certain employees, such as mortgage loan officers, should be subject to the FLSA exemption, thereby precluding them from over-time pay.

96. *Perez*, 135 S. Ct. at 1203, 1206 (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)). The Court reasoned that the APA plain language stated that unless “notice or hearing is required by statute,” the notice-and-comment requirement “does not apply . . . to interpretative rules.” *Id.* at 1206 (quoting 5 U.S.C. § 553(b)(A)).

97. *Id.*



As indicated above, the case was notable for the separate opinions of Justices Alito, Thomas, and Scalia devoted to the *Seminole Rock* doctrine. For example, in Justice Alito's short opinion that concurred in part and concurred in the judgment, he agreed that the *Paralyzed Veterans* doctrine was "incompatible" with the APA.<sup>98</sup> He next lamented that the D.C. Circuit's creation of the doctrine could have been a response to the "aggrandizement of the power of administrative agencies."<sup>99</sup> And he identified the *Seminole Rock* deference doctrine as a contributor to such power and suggested that the Court could check this power by reigning in the *Seminole Rock* doctrine.<sup>100</sup> He concluded by pointing to the separate opinions of both Justice Scalia and Justice Thomas to support the "substantial reasons why the *Seminole Rock* doctrine may be incorrect."<sup>101</sup>

Justice Thomas's lengthy opinion detailed his view that *Seminole Rock* deference "effects a transfer of the judicial power to an executive agency," which created serious constitutional concerns.<sup>102</sup> In particular, he comprehensively laid out his view that *Seminole Rock* eviscerates the courts' constitutional mandate to be a check on the other branches and thereby "subjects regulated parties to precisely the abuses that the Framers sought to prevent."<sup>103</sup> Although he conceded the importance of stare decisis, his allegiance to the principle that he should "decide by our best lights what the Constitution means" led him to conclude that he would abandon the *Seminole Rock* doctrine in an appropriate case.<sup>104</sup>

For his part, Justice Scalia's concurrence represents his most thorough argument on why *Seminole Rock* should be overruled. In his view, the Court's current deference doctrines, such as the *Seminole Rock* doctrine, upset the balance that Congress envisioned in passing the APA.<sup>105</sup> He believed

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98. *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment (declining to join Part III-B)).

99. *Id.*

100. *Id.* (noting that such power also resulted from Congress's delegation of broad law-making authority to agencies and the potential for agencies to take advantage of the difficulty for courts to discern between legislative and interpretive rules).

101. *Id.* at 1210-11 ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.").

102. *Id.* at 1213, 1225.

103. *Id.*

104. *Id.* at 1225 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 812 (2010) (Thomas, J., concurring)).

105. *Id.* at 1211 (Scalia, J., concurring) (noting that the "elaborate law of deference to agencies' interpretation of statutes and regulations" now gives agencies the ability to "authoritatively resolve ambiguities" in both statutes and regulations).

that deference to agency interpretations allowed agencies to bind the public, because such interpretive rules effectively have the force of law.<sup>106</sup>

Justice Scalia identified *Seminole Rock* deference doctrine as being particularly problematic because it can incentivize an agency to promulgate a broad and vague substantive regulation which the agency can subsequently “interpret” according to its needs and then receive controlling deference.<sup>107</sup> Not only would this ability, Justice Scalia maintained, run counter to Congress’s intent when it enacted the APA, but it would raise separation of powers concerns that he had expressed in earlier cases.<sup>108</sup>

To “restore the balance originally struck by the APA with respect to an agency’s interpretation of its own regulations,” Justice Scalia proposed that the Court overrule *Seminole Rock*.<sup>109</sup> This push for the reversal of the *Seminole Rock* deference doctrine would be Justice Scalia’s final words with respect to the doctrine. After his death, those in the legal community following the Court’s recent interest in *Seminole Rock* wondered whether this would be the end of Justice Scalia’s crusade.

## II. BOTH SIDES OF THE ROCK

### A. Introduction

Shortly after Justice Scalia’s death, the Court was presented with an attractive opportunity to reconsider the *Seminole Rock* doctrine. In *Bible v. United Student Aid Funds, Inc.*,<sup>110</sup> the application of the *Seminole Rock* doctrine was the outcome-determinative issue.<sup>111</sup> But over a stinging dissent by Justice Thomas, the Court denied certiorari in May 2016.<sup>112</sup> More telling, there was a resounding silence from the justices who had in the past appeared sympathetic to Justices Scalia and Thomas’s pleas to reconsider the

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106. See *id.* at 1212 (“Interpretive rules that command deference *do* have the force of law.”) (emphasis in original).

107. *Id.*

108. See *id.* at 1212-13.

109. *Id.* In his concurrence, Justice Thomas wrote at length about his disdain for the *Seminole Rock* doctrine. *Id.* at 1213 (Thomas, J., concurring in part, dissenting in part). For an in-depth look at Justice Thomas’s views, see Kevin O. Leske, *Chipping Away at the Rock; Perez v. Mortgage Bankers Association and the Seminole Rock Deference Doctrine*, 49 LOY. L.A. L. REV. 375 (2016).

110. *Bible v. U.S. Aid Funds, Inc.*, 807 F.3d 839 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1607 (2016).

111. *Bible*, 807 F.3d at 841 (Easterbrook, J., concurring in the denial of rehearing en banc) (stating “this is one of those situations in which the precise nature of deference (if any) to an agency’s views may well control the outcome”).

112. *Bible*, 136 S. Ct. at 1608 (Thomas, J., dissenting from the denial of certiorari).

doctrine.<sup>113</sup> Thus, it appeared that the fight against the *Seminole Rock* doctrine that Justice Scalia began in 2011 was at its end.<sup>114</sup>

But with the ascension of Justice Gorsuch to the Court, *Seminole Rock*'s future is once again questionable. Given the profound practical importance of the doctrine in our administrative state and the Court's recent interest in the doctrine, an assessment of Justice Gorsuch's view is far from academic.

Accordingly, with the genesis of *Seminole Rock* deference and an explanation of the Court's recent interest in the doctrine in mind, this part explores the pivotal issue of how Justice Gorsuch might vote if the Court reconsiders the *Seminole Rock* doctrine. The part assesses Justice Gorsuch's likely views on the *Seminole Rock* doctrine by analyzing key cases that Justice Gorsuch heard while on the Tenth Circuit.

### B. *Keep the Rock?*

In several cases while on the Tenth Circuit, then-Judge Gorsuch applied the *Seminole Rock* doctrine in a rote fashion. Although, naturally, he was bound to follow the doctrine under Tenth Circuit precedent, at no time did he write separately to voice his concern over the doctrine, as he did with respect to the *Chevron* doctrine. Nor did he write separately as Justice Scalia had done repeatedly with respect to the *Seminole Rock* doctrine.

In 2011, Justice Gorsuch was a member of the panel in *Miami Tribe of Oklahoma v. United States*, where the court relied on the *Seminole Rock* doctrine.<sup>115</sup> The appeal raised the issue of whether "the Bureau of Indian Affairs (BIA) properly exercised its discretion to reject a gift of property by a member of the Miami Tribe of Oklahoma to the tribe."<sup>116</sup>

Although the case involved jurisdictional issues and had a "complicated history," the crux of the dispute involved the proposed transfer by Miami Tribe member James Smith of a portion of his property interest in a parcel located in Miami County, Kansas, which required BIA approval.<sup>117</sup> More specifically, Smith "owned a 3/38 undivided restricted interest in the Re-

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113. Neither Chief Justice Roberts nor Justice Alito joined Justice Thomas's dissent from the denial of certiorari in *Bible*, 136 S. Ct. at 1608 (Thomas, J., dissenting from the denial of certiorari).

114. See Leske, *A Rock Unturned*, *supra* note 5.

115. *Miami Tribe of Okla. v. United States*, 656 F.3d 1129 (10th Cir. 2011).

116. *Id.* at 1131.

117. *Id.* at 1131-32. The parcel at issue was the Maria Christiana Reserve No. 35, which was a 35-acre parcel of land located "approximately 180 miles from Miami Tribe's current land-base in Ottawa County, Oklahoma." *Id.* at 1132.

serve and applied [to BIA] to give 1/3 of his interest (i.e. 1/38 interest) to Miami Tribe.”<sup>118</sup>

The BIA had denied the application, “[c]iting concerns regarding fractionation of the land interests in the Reserve as well as the long-range best interests of Reserve landowners.”<sup>119</sup> It found that “(1) the gift transfer was not in Smith’s or other Reserve landowners’ long-range best interests, and (2) the transfer would conflict with the government’s policy regarding fractionated interests in Indian land.”<sup>120</sup> After the district court reversed the BIA’s decision, the Tenth Circuit panel disagreed and found that “the BIA properly applied the applicable statutes and regulations when it denied Smith’s application.”<sup>121</sup>

In reaching its decision, the Tenth Circuit held that “[w]hen considering agency action made pursuant to its own regulations, we do not ‘decide which among several competing interpretations best serves the regulatory purpose,’ but rather ‘give substantial deference to an agency’s interpretation of its own regulations.’”<sup>122</sup> Citing the *Seminole Rock* standard, it held that the “agency’s interpretation will control ‘unless “plainly erroneous or inconsistent with the regulation.””<sup>123</sup>

The Tenth Circuit next turned to the applicable regulations promulgated by the BIA, which cover “the sale, exchange, and conveyance of Indian trust or restricted lands.”<sup>124</sup> After applying the deference doctrines, the court ruled that “the BIA properly interpreted and applied its own regulations, . . . which afford discretion to approve a land transfer.”<sup>125</sup> It found that gifts are not required to be accepted by the regulation and that a land conveyance “may be approved” if after a “careful examination” the BIA concludes the gift transfer is “clearly justified” in the “long-range best interest of the landowners.”<sup>126</sup>

Although it conceded that “[t]here are no explicit factors the BIA must consider when making its determination,” the BIA had supplied detailed

118. *Id.* at 1141. The court noted that Smith wanted to give the land because of his “desire to do something for the benefit of the Miami Tribe and its members.” *Id.* at 1141-42.

119. *Id.* at 1131.

120. *Id.* at 1142.

121. *Id.*

122. *Id.* (quoting *Morris v. U.S. Nuclear Regulatory Comm’n*, 598 F.3d 677, 684 (10th Cir. 2010)).

123. *Id.* (quoting *Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm’n*, 519 F.3d 1176, 1192 (10th Cir. 2008) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997))).

124. *Id.* at 1143, 1147 (citing 25 C.F.R. §§ 152.23, 152.25(d)).

125. *Id.* at 1147.

126. *Id.* 1146-47 (citing 25 C.F.R. § 152.25(d) (“Indian owners may convey . . . restricted land . . . when some other special relationship exists. . . .”)).

reasoning for its denial of Smith's application.<sup>127</sup> And in light of the plausible reasoning, the panel found that it "cannot substitute [its] judgment for the BIA's considered judgment."<sup>128</sup> Although the tribe preferred a different interpretation of the BIA regulations at issue, the court rejected it by applying the *Seminole Rock* standard and finding that the BIA interpretation was "neither plainly erroneous nor inconsistent with the regulation because it is a reasonable framework to guide the BIA's otherwise unfettered discretion."<sup>129</sup> The court, therefore, deferred "to the BIA's interpretation of its own regulation," again citing a Tenth Circuit case setting forth the *Seminole Rock* standard.<sup>130</sup>

Thus, in joining the decision, then-Judge Gorsuch endorsed the doctrine. He raised no concern with its application even though Justice Scalia had already started his criticism of the doctrine in his concurring opinion in *Talk America* several months earlier.<sup>131</sup>

Two years later, Justice Gorsuch sat on the panel in *Garrett v. ReconTrust Co.*,<sup>132</sup> where appellant Gary Garrett had appealed the dismissal of claims related to the foreclosure sale of his residence in Utah by ReconTrust, Co. (ReconTrust).<sup>133</sup> Garrett maintained that Utah state law forbade ReconTrust, which had no offices in Utah, from instituting a nonjudicial foreclosure sale because certain designated state entities were permitted to do so pursuant to the statute.<sup>134</sup> ReconTrust contended—and the district court agreed—that the permissibility of the sale of the residence was governed by a federal banking statute, which stated that the state law of where ReconTrust was "located" would be applied.<sup>135</sup> Therefore, under Texas law, which was where ReconTrust asserted it was "located" for the purpose of the federal statute, the nonjudicial sale was legal.<sup>136</sup>

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127. *Id.* at 1147.

128. *Id.*

129. *Id.* The tribe asserted that BIA was required "to approve a gift when a special relationship exists under § 152.25(d) without performing a long-range best interests analysis." *Id.* (emphasis omitted). On the other hand, the BIA interpreted the regulations to mean that "the BIA must review a gift for the long-range best interests, even when the gift falls within § 152.25(d)." *Id.* (emphasis omitted).

130. *Id.* (citing *Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm'n*, 519 F.3d 1176, 1192 (10th Cir. 2008)).

131. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67-68 (2011). The Court decided *Talk America* on June 9, 2011, and the Tenth Circuit issued its opinion for *Miami Tribe* on August 30, 2011. *Id.*; *Miami Tribe*, 656 F.3d 1129.

132. *Garrett v. ReconTrust Co.*, 546 F. App'x. 736 (10th Cir. 2013).

133. *Id.* at 737.

134. *Id.* (citing UTAH CODE ANN. §§ 57-1-21, 57-1-23).

135. *Id.* (citing 12 U.S.C. § 92a(a)-(b)).

136. *Id.* (citing TEX. FIN. CODE §§ 32.001, 182.001).

After noting “that the law in this area is unsettled,” and that there were “compelling arguments to be found on both sides,” the court first reviewed Garrett’s plain language argument that under the federal statute, “Utah law, not Texas law, governed the nonjudicial foreclosure sale of Garrett’s residence.”<sup>137</sup> The court found that the statute “provide[d] no direction” in situations where “activities related to the foreclosure sale occur in more than one state[ ].”<sup>138</sup> Therefore, it found that the statute was ambiguous as to the “state” in which Recon[Trust] was “located” under the circumstances presented.<sup>139</sup>

Next, the court analyzed “the interpretive regulations promulgated by the [Office of the Comptroller of the Currency (OCC)] for guidance.”<sup>140</sup> The panel recognized that the OCC’s Rule 9.7, which interprets the federal statute at issue, “arguably lends itself to more than one interpretation.”<sup>141</sup> But it determined that it “need not dwell on the parties’ speculation” concerning OCC’s interpretation of the regulation as it applied to the facts in the case because “OCC had expressly articulated its position on the subject in another case recently decided by [the Tenth Circuit.]”<sup>142</sup> The court concluded that the OCC’s views “resolve the parties’ disputes over the OCC’s interpretation” of the federal statute.<sup>143</sup>

Then, citing the *Seminole Rock* standard set forth in the 2013 Supreme Court case of *Decker*, the panel held that “OCC’s interpretations of its own regulations are authoritative unless they are ‘plainly erroneous or inconsistent with the regulation.’”<sup>144</sup> It also noted, citing *Auer*, that the fact that “the OCC’s interpretation of its own regulations ‘comes to us in the form of a legal brief’ does not detract from the deference owed where, as here, the OCC’s position is not a ‘post hoc rationalization advanced . . . to defend past agency action against attack.’”<sup>145</sup>

Under the OCC’s view, a national bank, such as ReconTrust, “is ‘located’ in (and hence, permitted to act as a foreclosure trustee to the same extent as allowed by the laws of) the ‘state’ where it ‘acts in a fiduciary capacity,’ which is determined using the ‘location where the bank: (1) ac-

137. *Id.* at 738.

138. *Id.* (citing *Citizens & S. Nat’l Bank v. Bougas*, 434 U.S. 35, 44 (1977) (that “[t]here is no enduring rigidity about the word ‘located.’”)).

139. *Id.* at 739.

140. *Id.*

141. *Id.* at 740.

142. *Id.* (citing Brief for the Office of the Comptroller of the Currency as Amicus Curiae, *Dutcher v. Matheson*, 733 F.3d 980 (10th Cir. 2013) (No. 12–4150)).

143. *Id.* at 741.

144. *Id.* at 740 (citing *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 613 (2013)).

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

cepted the fiduciary appointment; (2) executed the documents that create the fiduciary relationship; and (3) makes discretionary decisions regarding fiduciary assets.’”<sup>146</sup> Because Garrett had not disputed that “(1) Recon performed the three acts enumerated in Texas, such that Recon was ‘located’ there as that term has been construed by the OCC, and (2) Texas law permitted Recon to conduct a nonjudicial foreclosure sale of Garrett’s residence,” the court affirmed the district court’s decision that Texas law applied.<sup>147</sup>

As in *Miami Tribe*, then-Judge Gorsuch raised no objection to *Seminole Rock* and surely would have been aware of the Court’s recent interest in the doctrine. Earlier in the year, Justice Scalia had decried that “[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*,<sup>148</sup> and Chief Justice Roberts specifically made the legal bar “aware that there is some interest in reconsidering” *Seminole Rock* and its progeny.<sup>149</sup>

The final case that is probative of Justice Gorsuch’s future view of the validity of the *Seminole Rock* doctrine did not directly cite or rely on *Seminole Rock* or its progeny. In *Southern Utah Wilderness Alliance v. Office of Surface Mining Reclamation and Enforcement*, then-Judge Gorsuch participated on a panel in the 2010 case involving “decisions made by two federal agencies that would allow UtahAmerican Energy, Inc. (UEI) to proceed in the development of the Lila Canyon Mine” in Utah.<sup>150</sup>

The facts of the case are as follows: on September 22, 2000, UEI was assigned six coal leases in Lila Canyon, Utah, from the previous owner.<sup>151</sup> Before beginning mining operations for these federal coal reserves, UEI was required to secure state approval from Utah under the Surface Mining Control and Reclamation Act<sup>152</sup> and from the federal government under the Mineral Leasing Act of 1920, “which falls under the authority of the Assis-

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146. *Id.* at 741 (quoting Brief for the Office of the Comptroller of the Currency as Amicus Curiae at 8-9, *Dutcher v. Matheson*, 733 F.3d 980 (10th Cir. 2013) (No. 12–4150)).

147. *Id.* at 742.

148. *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (citing *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring in part and dissenting in part)).

149. *Id.* (Robert, C.J., concurring).

150. *S. Utah Wilderness All. v. Office of Surface Mining Reclamation & Enft*, 620 F.3d 1227, 1230 (10th Cir. 2010).

151. *Id.*

152. 30 U.S.C. §§ 1201-1328 (requiring state permit); 30 C.F.R. § 944.30 (delegating authority to Utah to issue mining permits on federal lands).

tant Secretary for Land and Minerals Management in the Department of the Interior.”<sup>153</sup>

After resolving a jurisdictional issue and prior to analyzing the merits, the court noted that it was “mindful of a number of basic principles of administrative law.”<sup>154</sup> The panel explained that “when an agency subsequently interprets its own order, we owe deference to this interpretation as well.”<sup>155</sup> Although it did not cite *Seminole Rock* or *Auer*, it essentially quoted the *Seminole Rock* standard set forth in a decision by the D.C. Circuit that “an agency’s interpretation of its own orders should be upheld ‘unless its interpretation is plainly erroneous or inconsistent with the order.’”<sup>156</sup> Similar to the rationale of *Seminole Rock*, the panel seemed to recognize that deference was appropriate because “the BLM orders here exemplify the types of decisions necessary to administer a complex regime of laws and regulations, and a delicate balancing of potentially conflicting policy considerations.”<sup>157</sup> With no objection from then-Judge Gorsuch, the panel found that it “thus owe[d] deference to BLM’s interpretation of its order” and affirmed the district court’s decision that “BLM acted properly in determining UEI’s lease is still valid, and that OSM was in conformity with its statutory duties when it declined to issue a new recommendation” regarding UEI’s mining plan.<sup>158</sup>

Taken together, *Miami Tribe*,<sup>159</sup> *Garrett*,<sup>160</sup> and *Southern Utah Wilderness Alliance*<sup>161</sup> demonstrate that Justice Gorsuch has uncritically accepted the *Seminole Rock* deference doctrine in the past. Unlike Justice Scalia when he

153. *S. Utah Wilderness All.*, 620 F.3d at 1230; 30 U.S.C. §§ 181-287 (approval of a mining plan).

154. *S. Utah Wilderness All.*, 620 F.3d at 1235. The court stated that “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.” *Id.* (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). It also noted that “[w]hile informal agency orders, like the ones at issue in this case, fall short of actions that “make rules carrying the force of law,” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)), “they deserve at least some deference.” *Id.* at 1236.

155. *Id.* at 1236 (citing *Colo. Interstate Gas Co. v. FERC*, 791 F.2d 803, 810 (10th Cir. 1986) (“An agency’s interpretation of its own order is entitled to great weight.”)); *see also Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1067-68 (D.C. Cir. 2005) (an agency’s interpretation of its own orders should be upheld “unless its interpretation is plainly erroneous or inconsistent with the order”).

156. *S. Utah Wilderness All.*, 620 F.3d at 1236 (quoting *Consumers Energy*, 428 F.3d at 1067-68).

157. *Id.*

158. *Id.* at 1230, 1242.

159. *Miami Tribe of Okla. v. United States*, 656 F.3d 1129 (2011).

160. *Garrett v. ReconTrust Co.*, 546 F. App’x. 736 (2013).

161. *S. Utah Wilderness All.*, 620 F.3d 1227.



began to question the doctrine, Justice Gorsuch made no attempt to cast doubt on the doctrine despite having had the opportunity. These appellate court cases suggest that if asked to reconsider the doctrine in a future Supreme Court case, he would likely vote to “keep the *Rock*.”

### C. *Flip the Rock?*

In contrast to the cases discussed above where then-Judge Gorsuch granted *Seminole Rock* deference to an agency’s interpretation, there are other indicators that he might be open to re-evaluate and then reconsider *Seminole Rock* in a future case. While these “tell-tale” cases do not involve *Seminole Rock* deference directly, then-Judge Gorsuch expressed views that could signal that he might change his view towards *Seminole Rock*.

For example, in a 2010 environmental case, he recognized in dicta that other doctrines such as lack of notice, equal protection, and due process would also need to be analyzed—irrespective of whether an agency action was otherwise in accordance with law.<sup>162</sup> In this respect, he might join opponents of *Seminole Rock* that have criticized the ad hoc approach to whether to apply the doctrine. Thus, Justice Gorsuch might later decide, as Justice Scalia did, that “[e]nough is enough” with respect to *Seminole Rock*.<sup>163</sup>

In *United States v. Magnesium Corp. of America*,<sup>164</sup> a panel of the Tenth Circuit that included then-Judge Gorsuch was called upon to review the grant of summary judgment to U.S. Magnesium<sup>165</sup> regarding the applicability of regulations promulgated under Subtitle C of the Resource Conservation and Recovery Act of 1976.<sup>166</sup> The lower court found that because the EPA could not change its prior interpretation of its regulation without first complying with the notice and comment procedures of the APA, its previous interpretation exempting five of U.S. Magnesium’s wastes from Subtitle C was unlawful.<sup>167</sup>

The court vacated the judgment, finding that even if it were to agree that EPA is not permitted to set forth a new interpretation without following the APA, EPA had not adopted a definitive regulatory interpretation that would be subject to such a prohibition.<sup>168</sup> In reaching its conclusion,

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162. See *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1142-44 (10th Cir. 2010).

163. *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 616 (Scalia, J., concurring in part and dissenting in part).

164. *Magnesium Corp.*, 616 F.3d 1129.

165. U.S. Magnesium, LLC was the Defendant-Intervenor-Appellee. *Id.*

166. *Id.* at 1130.

167. *Id.* at 1131.

168. *Id.*

the court analyzed the *Paralyzed Veterans* doctrine,<sup>169</sup> which was subsequently struck down by the Supreme Court in *Perez*, discussed above.<sup>170</sup>

After rejecting U.S. Magnesium's contention that "an agency may not abandon a prior interpretation of its own ambiguous regulation without first going through notice and comment,"<sup>171</sup> then-Judge Gorsuch quipped that "one might worry that administrative law has simply abandoned regulated parties to the whims of an agency's arbitrary interpretive reversals."<sup>172</sup> But he then explained that "there [was] no reason for undue alarm" because "at least two other layers of protection exist" for "the reasonable and settled expectations of the regulated public."<sup>173</sup>

Then-Judge Gorsuch reasoned that courts can overturn agency action under the APA if such action is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>174</sup> This standard requires that an agency "must cogently explain why it has exercised its discretion in a given manner" which applies with equal force whether an agency is replacing a previous interpretation or setting forth its first interpretation of a regulation.<sup>175</sup>

Moreover, then-Judge Gorsuch reasoned that even if the APA did not protect parties, "the Due Process Clauses of the Fifth and Fourteenth Amendments would still prohibit the imposition of penalties without fair notice," which "requires at the least that 'laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'"<sup>176</sup> Applying this concept to agency regulations, he further explained that "it pertains when an agency advances a novel interpretation of its own regulation

169. *Id.* at 1138-40; *see also* *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 Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999), but the doctrine is most often cited as the *Paralyzed Veterans* doctrine.

170. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015). *See infra* pp. 116-19.

171. *Magnesium Corp.*, 616 F.3d at 1138 (citing *Alaska Prof'l Hunters Ass'n*, 177 F.3d 1030). *See generally* *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("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.").

172. *Magnesium Corp.*, 616 F.3d at 1143.

173. *Id.* at 1143-44.

174. *Id.* at 1144 (quoting 5 U.S.C. § 706(2)(A)).

175. *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983)).

176. *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)); *see also* U.S. CONST. amends. V, XIV, § 1. Justice Gorsuch noted that the "principle applies to civil as well as criminal penalties, albeit in slightly different form." *Magnesium Corp.*, 616 F.3d at 1144 (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982)).

in the course of a civil enforcement action” and that changes to regulatory interpretations must not create “unfair surprise.”<sup>177</sup> He concluded that “[i]f an agency could punish a regulated party for following the agency’s own interpretation of its own ambiguous regulations, . . . ‘the practice of administrative law would come to resemble “Russian Roulette.”’”<sup>178</sup>

Justice Gorsuch’s dicta in *Magnesium Corp.* suggests that he might take a more skeptical view of *Seminole Rock* than his other *Seminole Rock* cases would suggest. Thus, it remains to be seen whether he would go so far as to overturn *Seminole Rock* rather than apply an ad hoc approach incorporating other safeguards to see whether *Seminole Rock* deference is warranted.

Arguably the most notable opinion penned by then-Judge Gorsuch while on the Tenth Circuit outlined his concern for the *Chevron* deference doctrine. And it has significant relevance to Justice Gorsuch’s future view of *Seminole Rock*. In *Gutierrez-Brizuela v. Lynch*, the court reviewed “two provisions buried in our immigration laws.”<sup>179</sup> The first provision “grants the Attorney General discretion to ‘adjust the status’ of those who have entered the country illegally and afford them lawful residency.”<sup>180</sup> The second provision “provides that certain persons who have entered this country illegally more than once are categorically prohibited from winning lawful residency . . . unless they first serve a ten-year waiting period outside our borders.”<sup>181</sup> The interaction of these provisions during the subsequent litigation and appeals of cases involving these provisions.

Prior to *Lynch*, in a 2005 case, the Tenth Circuit had determined that “the Attorney General’s discretion to afford relief without insisting on a

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177. *Magnesium Corp.*, 616 F.3d at 1144 (citing *Walker Stone Co. v. Sec’y of Labor*, 156 F.3d 1076, 1083–84 (10th Cir. 1998) (“In order to satisfy constitutional due process requirements, regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit.”) and *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007) (“[I]nterpretive changes [to regulations must] create no unfair surprise.”)).

178. *Id.* (quoting *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987)). With respect to these protections, Justice Gorsuch explained that U.S. *Magnesium* had not “raised any argument or sought decision of any issue arising under either § 706(2)(A) of the APA or the Due Process Clause” and that these arguments were therefore waived. *Id.* (citing *Rollins Envtl. Servs. (NJ) Inc. v. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991) (finding waiver of due process notice argument in agency enforcement action involving novel interpretation of ambiguous regulation) and *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1172 n.17 (10th Cir. 2007)).

179. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1144 (10th Cir. 2016) (citing 8 U.S.C. §§ 1255(i)(2)(A), 1182(a)(9)(C)(i)(I)).

180. *Id.* (citing *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167 (10th Cir. 2015)).

181. *Id.*

decade-long waiting period remained intact.”<sup>182</sup> Then, in 2007, the Board of Immigration Appeals (BIA) set forth its contrary view that “as a matter of policy discretion—the statutory tension should be resolved against affording the Attorney General any discretion to consider applications for adjustment of status.”<sup>183</sup> This new viewpoint was again challenged and found permissible because “when a statute is ambiguous and an executive agency’s interpretation is reasonable, the agency may indeed exercise delegated legislative authority to overrule a judicial precedent in favor of the agency’s preferred interpretation.”<sup>184</sup>

In yet another case involving these provisions, the court had to determine whether BIA could apply its new interpretation retroactively to prohibit parties who “applied for discretionary relief in express reliance on [the court’s 2005 case allowing discretionary relief], before the BIA’s announcement of its contrary interpretation” in 2007.<sup>185</sup> The court rejected BIA’s attempt, holding that “because the agency’s promulgation of a new rule of general applicability under *Chevron* step two and *Brand X* is an exercise of delegated legislative policymaking authority, it is subject to the presumption of prospectivity [sic] that attends true exercises of legislative authority.”<sup>186</sup>

The final point at issue in *Lynch* involved petitioner Hugo Gutierrez-Brizuela, who applied for adjustment of status during the window in which BIA had announced its new interpretation but before the Tenth Circuit had reviewed and approved of BIA’s new interpretation.<sup>187</sup> Then-Judge Gorsuch, writing for the panel, found that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”<sup>188</sup> The court therefore rejected the BIA’s attempt to foist its new interpretation on the petitioner.<sup>189</sup>

182. *Id.* (citing *Padilla-Caldera v. Gonzales (Padilla-Caldera I)*, 426 F.3d 1294, 1299–1301 (10th Cir. 2005), amended and superseded on reh’g by 453 F.3d 1237, 1242–44 (10th Cir. 2006)).

183. *Id.* (quoting *In re Briones*, 24 I. & N. Dec. 355 (B.I.A. 2007)).

184. *Id.* at 1143 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).

185. *Id.* at 1144.

186. *Id.* (citing *De Niz Robles v. Lynch*, 803 F.3d 1165, 1172–74 (10th Cir. 2015)).

187. *Id.* at 1144–45.

188. *Id.* at 1145 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (internal quotation marks omitted)).

189. *Id.* at 1149.

Then-Judge Gorsuch then wrote a separate concurring opinion attacking the judiciary's deference regime under *Chevron*.<sup>190</sup> In his view, *Chevron* and its progeny "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."<sup>191</sup>

He concentrated on the Court's holding in *National Cable & Telecommunications Association v. Brand X Internet Services*.<sup>192</sup> (*Brand X*), under which "courts are required to overrule their own declarations about the meaning of existing law in favor of interpretations dictated by executive agencies."<sup>193</sup> In his view, the application of the *Brand X* rule "means a judicial declaration of the law's meaning in a case or controversy before it is not 'authoritative,' but is instead subject to revision by a politically accountable branch of government."<sup>194</sup>

Then-Judge Gorsuch then suggested that the underlying problem created by *Brand X* was a result of *Chevron* itself. He noted that although under *Marbury v. Madison*<sup>195</sup> legal questions "must be tried by the judicial authority" to fulfill the court's role to interpret "statutory provisions, declaring what the law is, and overturning inconsistent agency action," step two of the *Chevron* analysis "tells us we must allow an executive agency to resolve the meaning of any ambiguous statutory provision."<sup>196</sup> And in this respect, he viewed *Chevron* as "a judge-made doctrine for the abdication of the judicial duty" because a court does not "independently decide what the statute means."<sup>197</sup>

His concern that *Chevron* deference allowed agencies to "usurp the judicial function" applies with at least equal force to the *Seminole Rock* doctrine.<sup>198</sup> His view that this transfer of the constitutional role of "saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions" likewise implicates his view of the *Seminole Rock* doctrine.<sup>199</sup> If he were to

190. *Id.* (Gorsuch, J., concurring).

191. *Id.*

192. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-85 (2005).

193. *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J. concurring).

194. *Id.* (internal citations omitted).

195. *Marbury v. Madison*, 5 U.S. 137, 167 (1803).

196. *Gutierrez-Brizuela*, 834 F.3d at 1151-52 (Gorsuch, J. concurring) (internal quotation omitted).

197. *Id.* at 1152.

198. *Id.*

199. *Id.*

apply these judicial non-delegation principles in a *Seminole Rock* case, he very well may vote against it.

Another relevant concern then-Judge Gorsuch raised in his concurring opinion involves the ability for an agency to “reverse its current view 180 degrees anytime based merely on the shift of political winds and still prevail.”<sup>200</sup> Equally applicable to the regulatory context is the argument that “[n]either, too, will agencies always deign to announce their views in advance; often enough they seek to impose their ‘reasonable’ new interpretations only retroactively in administrative adjudications.”<sup>201</sup> This could lead to the same unfair surprise and due process issues he had already cautioned against.

He also raised a broader doctrinal concern, which was separate from any accusation of malfeasance on the part of the agency. He wondered whether Congress can “really delegate its legislative authority—its power to write new rules of general applicability—to executive agencies?”<sup>202</sup> Again, a comparison to *Seminole Rock* could be made whereby the ability to definitively interpret its own ambiguous regulations could raise a similar legislative non-delegation issue.<sup>203</sup> And he would likely view this delegation as even more problematic for regulations due to the recognition that “today many administrative agencies ‘wield[ ] vast power’ and are overseen by political appointees (but often receive little effective oversight from the chief executive to whom they nominally report).”<sup>204</sup>

Then, with direct relevance to *Seminole Rock*, he wondered that “[u]nder any conception of our separation of powers, I would have thought powerful and centralized authorities like today’s administrative agencies would have

200. *Id.* 1152, 1158 (emphasis omitted) (“But because even when clearly and properly implemented, *Chevron*’s very point is to permit agencies to upset the settled expectations of the people by changing policy direction depending on the agency’s mood at the moment. So if reliance interests count, they would seem to count against retaining *Chevron*.”).

201. *Id.* at 1152.

202. *Id.* at 1153. He continued: “The Supreme Court has long recognized that under the Constitution ‘congress cannot delegate legislative power to the president’ and that this ‘principle [is] universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.’” *Id.* (citing *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

203. *Id.* at 1153-54.

204. *Id.* at 1155 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010)). Justice Gorsuch also viewed it as “an arrangement, too, that seems pretty hard to square with the Constitution of the founders’ design and, as Justice Frankfurter once observed, ‘[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions’ imposed by the Constitution.” *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring)).

warranted less deference from other branches, not more.”<sup>205</sup> Whether this amounts to a new-found skepticism toward *Seminole Rock*’s future as well remains to be seen, but it certainly demonstrates that Justice Gorsuch will not be passive in accepting the doctrine.<sup>206</sup>

Then-Judge Gorsuch concluded his opinion by asking “what would happen in a world without *Chevron*?”<sup>207</sup> And he could ask the same of *Seminole Rock* with the same answer. In his view, “[t]he only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law is” and “courts could and would consult agency views and apply the agency’s interpretation when it accords with the best reading of a [regulation].”<sup>208</sup> Moreover, eliminating *Seminole Rock* “would avoid the due process and equal protection problems of the kind documented in our decisions [and] would promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election.”<sup>209</sup> Thus, if Justice Gorsuch expands his anti-*Chevron* view to *Seminole Rock*, the doctrine’s vitality is questionable.

#### CONCLUSION

There is little dispute that the *Seminole Rock* doctrine raises legitimate doctrinal, pragmatic, and constitutional concerns. Given the Court’s recent interest, it is also fair to say that the future of the *Seminole Rock* doctrine lies in the balance. And Justice Gorsuch may very well hold *Seminole Rock*’s future in his hands. But because Justice Gorsuch has sent mixed signals by presenting viewpoints that support “both sides of the *Rock*” his view of the doctrine, as well as the future of the doctrine, is uncertain. The question therefore remains whether Justice Gorsuch would vote to “keep” or “flip” the *Rock*.

This essay concludes that Justice Gorsuch would be very receptive to re-evaluating the doctrine in a future case. On balance, however, upon re-evaluation, he is more likely to vote to retain *Seminole Rock*, rather than abandon it altogether as Justice Scalia had advocated before his death. Several key points support this conclusion.

First, recent opinions by Justice Gorsuch suggest that he would be open to re-evaluate the doctrine with an eye to overrule it. Clearly, his concurring opinion in *Gutierrez-Brizuela* demonstrates a distrust of agency power and

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205. *Id.*

206. *Id.*

207. *Id.* at 1158.

208. *Id.* (emphasis omitted).

209. *Id.*

the Court's deference regimes, which includes *Seminole Rock*. As previously discussed, Justice Gorsuch's belief that "today many administrative agencies 'wield vast power'" that "[u]nder any conception of our separation of powers," should warrant "less deference from other branches, not more" signals that he would approach *Seminole Rock* with skepticism.<sup>210</sup> These points are strong indicators that he might be wary of allowing *Seminole Rock* to remain.

Second, in contrast, his past support of *Seminole Rock* tells a different story. In all the cases where then-Judge Gorsuch was presented with a *Seminole Rock* question, he endorsed the doctrine. To be sure, he was required to accept the doctrine as Tenth Circuit and Supreme Court precedent dictates, but he did so without objection. In fact, several of those cases where he uncritically accepted the *Seminole Rock* doctrine came after Justice Scalia and other members of the Court had expressed concern over the doctrine. For example, Justice Scalia began his crusade in 2011 in his concurring opinion in *Talk America*, which pre-dated Justice Gorsuch's key *Seminole Rock* cases.<sup>211</sup> Moreover, by 2013, Chief Justice Roberts, joined by Justice Alito, had announced in *Decker*<sup>212</sup> that members of the Court were interested in reconsidering the doctrine in the appropriate case. It seems unlikely that these opinions escaped the notice of Justice Gorsuch. Thus, it is fair to assume that despite Justice Scalia's mounting criticism detailing the separation of powers and practical problem with the doctrine, then-Judge Gorsuch either disagreed with Justice Scalia or was, at least, complacent with *Seminole Rock*'s existence.

Third, Justice Gorsuch's recent view that *Chevron* doctrine should be eliminated should not compel his future rejection of *Seminole Rock*. At first blush, Justice Gorsuch's attack of the *Chevron* doctrine in *Gutierrez-Brizuela* on separation of powers grounds (namely the granting of the power of both law-exposition and lawmaking to an agency) would apply with even more force to *Seminole Rock*.<sup>213</sup> But as Professors Cass R. Sunstein and Adrian Vermeule persuasively argue, "this critique of [*Seminole Rock*] is both unsound and too sweeping."<sup>214</sup> They reject "the traditional and mainstream understanding" that when agencies "make rules, interpret rules, and adjudicate violations, they exercise executive power, not legislative or judicial power."<sup>215</sup> To the contrary, they reason that because "[e]xecutive power itself includes the power to make and interpret rules, in the course of carry-

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210. *Id.* at 1155.

211. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50 (2011).

212. *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 614-17 (2013).

213. *Gutierrez-Brizuela*, 834 F.3d at 1144-45, 1151.

214. Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 310 (2017).

215. *Id.* (emphasis omitted).



ing out statutory responsibilities” there is no impermissible “commingling of functions within agencies.”<sup>216</sup>

Professor Sunstein and Professor Vermeule also assert that there is no separation of powers concern if Congress, the president, and the judiciary “devise and approve the scheme of agency authority that combines rulemaking and rule-interpreting power in the agency’s hands.”<sup>217</sup> In other words, if the constitutional branches agree that such power is “both valid and wise,” then the separation of powers doctrine is not violated.<sup>218</sup> To them, the non-delegation argument of *Seminole Rock* is better construed as simply a disagreement over the settled authority of an agency to choose “between more general rulemaking now and more specific interpretation or adjudication later.”<sup>219</sup> Thus, even if Justice Gorsuch carries his criticism of *Chevron* to *Seminole Rock*, there are both structural differences in the separation of power arguments and potential flaws in the argument against *Seminole Rock* such that Justice Gorsuch should not be bound to follow his reasoning in *Gutierrez-Brizuela*.<sup>220</sup>

Fourth, to the extent that Justice Gorsuch might feel that the *Seminole Rock* doctrine leads to unfair surprise or detrimental reliance to parties, as critics assert, he has already demonstrated that there are ways to mitigate such results without abandoning the doctrine. For example, in *Magnesium Corp.*, where then-Judge Gorsuch quipped that “one might worry that administrative law has simply abandoned regulated parties to the whims of an agency’s arbitrary interpretive reversals,” he identified “at least two other layers of protection” for such interests.<sup>221</sup> He detailed how the APA’s “arbitrary and capricious, an abuse of direction, or otherwise not in accordance with law” standard would apply when an agency sets forth a new administrative interpretation that creates surprise.<sup>222</sup> He also noted that “the Due Process Clauses of the Fifth and Fourteenth Amendments would still prohibit the imposition of penalties without fair notice,” which “requires at the least that ‘laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’”<sup>223</sup>

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216. *Id.* (citing *United States v. Grimaud*, 220 U.S. 506, 521 (1911), stating the proposition that “statutory authority to make administrative rules is a grant of executive power, not legislative power”).

217. *Id.* at 311.

218. *Id.*

219. *Id.* at 313 (discussing *SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947)).

220. *Id.* at 312.

221. *U.S. v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1143-44 (10th Cir. 2010).

222. *Id.* at 1144 (quoting 5 U.S.C. § 706(2)(A)).

223. *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)); *see also* U.S. CONST. amends. V, XIV, § 1.

He expressly applied these principles to agency interpretations, suggesting that allowing an agency to create “unfair surprise” in this fashion would not be permitted under his watch.<sup>224</sup> Thus, to the extent Justice Gorsuch remains concerned over such notice issues, he could continue to enforce due process protection to mitigate or even mute any perceived overreach that the application of *Seminole Rock* allows in our administrative state.

In sum, then-Judge Gorsuch, when discussing whether *Chevron* should be reconsidered, opined that “[m]aybe the time has come to face the behemoth.”<sup>225</sup> Although a case could be made that Justice Gorsuch is also ready to “face the behemoth” of *Seminole Rock*, on balance, it seems more likely that Justice Gorsuch would retain *Seminole Rock* and incorporate safeguards set forth in his past opinions to address the practical and constitutional concerns previously identified by scholars and his new colleagues.

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224. *Magnesium Corp.*, 616 F.3d at 1144 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (“[I]nterpretive changes [to regulations must] create no unfair surprise.”)).

225. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016).

