CONTEXT-SPECIFIC *SEMINOLE ROCK* REFORM

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ABSTRACT

Under Bowles v. Seminole Rock*, courts will defer to an administrative agency's interpretation of rules that the agency produced. For decades,* Seminole Rock *deference was an uncontroversial part of the administrative law landscape. But recently, the doctrine has come under siege. Drawing on concerns about the flexible structure of the administrative state, critics of the doctrine have won an increasingly sympathetic ear in the Supreme Court and in Congress. This Essay suggests that any reform of* Seminole Rock *should be driven by three principles: Fidelity to congressional intent, avoidance of undesirable side effects, and careful targeting of a clear problem. It goes on to argue that these goals can best be satisfied by tailoring deference to the context created by each regulatory regime. For courts, this would mean looking to guideposts in the underlying statutes that authorize agency action. For Congress, this would mean specifying the level of deference on a statute-by-statute basis. The resulting context-specific* Seminole Rock *regime would avoid many of the pitfalls that have plagued past reform efforts while placing the doctrine on a proper footing.*

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I. INTRODUCTION

Applying *Seminole Rock* deference,[1] courts have deferred to agency interpretations of agency rules for decades.[2] For most of its existence, the doctrine was uncontroversial. Although various justices had registered concerns in particular cases,[3] the basic concept of deference to agency interpretations appeared to be on solid footing.

A law review article, of all things, undermined the stability of this framework. Drawing on broader concerns about the flexible structure of the administrative state, Professor John Manning argued that *Seminole Rock* was uniquely problematic because it allowed agencies to combine the powers of lawmaking and law interpretation: Agencies were interpreting rules that the agencies themselves had written.[4] This idea eventually captured the imagination of conservative reformers, and several justices and members of Congress have declared that they are ready to revisit the doctrine.[5] As this Essay goes to press, the Supreme Court is poised to decide whether to overrule *Seminole Rock* altogether.[6]

But any *Seminole Rock* reform must be pursued cautiously. Administrative deference doctrines are generally described as being grounded in presumptions about congressional intent, and any reform by the courts should be rooted in the text or structure of relevant statutes.[7] Reforms, whether by Congress or the courts, must also be carefully designed to avoid unintended consequences given the close relationships between administrative law doctrines.[8] And to be effective, reform must be targeted at a clearly-identified problem.[9] A sweeping

1. As discussed below, the deference doctrine is named for *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The term "*Seminole Rock* deference" is used interchangeably with the term "*Auer* deference," so named for *Auer v. Robbins*, 519 U.S. 452 (1997).

2. *See infra* Part II.A.

3. *See, e.g.*, Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 102 (1995) (O'Connor, J., dissenting); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 518 (1994) (Thomas, J., dissenting).

4. *See generally* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) [hereinafter Manning, *Constitutional Structure and Judicial Deference*].

5. *See infra* Part II.B.

6. *See* Kisor v. Wilkie, 139 S. Ct. 657 (2018).

7. *See infra* Part III.A.

8. *See infra* Part III.B.

9. *See infra* Part III.C.

action overturning *Seminole Rock* would be difficult to square with these principles.

This Essay proposes a more tailored approach. Instead of adopting a one-size-fits-all rule compelling one particular deference regime (or lack thereof) for all agencies and rules, any reform by Congress should grant or deny deference to particular agencies in particular contexts, based on the unique considerations that apply in each context.

Similarly, courts determined to reform the doctrine without congressional action should evaluate each organic statute giving rise to each regulatory scheme.[10] For example, courts could look to the text and structure of Section 10(b) of the Securities Exchange Act of 1934[11] and hold that the Securities and Exchange Commission is not entitled to *Seminole Rock* deference in its interpretation of any rules it issues under that statute. At the same time, courts could look to the text and structure of the National Labor Relations Act[12] and hold that the National Labor Relations Board is entitled to deference in its interpretation of rules issued under that statute. The resulting decisions would be limited to particular regulatory regimes and would avoid sweeping pronouncements about core doctrines, as well as attendant unintended consequences that are difficult to cabin. This approach would also allow for judicial decisions that draw on guideposts in the organic statutes, and thus would have a plausible grounding in congressional intent. While the general Administrative Procedure Act (APA) is open-textured and does not clearly support a particular level of judicial scrutiny,[13] certain regulatory statutes, such as the Securities Exchange Act of 1934, are a rich source of statutory clues.[14] And the statutory approach would limit opportunities for gamesmanship by reducing each agency's certainty that it will receive deference and creating the potential for remedies targeted at particularly recalcitrant agencies.

This context-specific approach draws its inspiration from *United States v. Mead Corp.*,[15] a case in which the Supreme Court limited the related doctrine of *Chevron* deference[16] by holding that it only applies when features of the statutory scheme support its application. While many draw inspiration from *Mead* in proposing reforms for *Seminole*

10. *See infra* Part IV.

11. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2012).

12. *See* National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012).

13. Manning, *Constitutional Structure and Judicial Deference*, *supra* note 4, at 636; *see also* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 303 (2017).

14. *See infra* Part IV.B.

15. 533 U.S. 218 (2001).

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

Rock,[17] the typical approach is to draw a direct parallel between the deference regimes. *Chevron* involves deference to agency interpretations of statutes, and *Mead* refined the limitations on *Chevron* by looking primarily to features of the statutory scheme. *Seminole Rock* involves deference to agency interpretations of regulations, and many reformers seek to impose limitations on *Seminole Rock* by looking either to features of the regulation being interpreted or to the interpretation itself.

Two examples highlight the focus on regulations or interpretations. Professor Kevin O. Leske suggests limiting *Seminole Rock* deference by imposing a structure modeled on *Chevron* in which a court would decide whether to defer to an agency's interpretation of a regulation by looking to features of the regulation and interpretation: "As in *Chevron*, when faced with an agency's interpretation of its regulation, the first step would be to determine whether the regulation is ambiguous. If ambiguous, the second step would be to apply four objective factors to the deference questions."[18] These four questions are based on the agency's interpretation: "(1) the administrative agency's stated intent at the time of the regulation's promulgation; (2) whether the interpretation currently advanced has been consistently held; (3) in what format the interpretation appears; and (4) whether the regulation merely restates or 'parrots' the statutory language."[19] Similarly, Professor Matthew C. Stephenson and Miri Pogoriler consider three possible limits on *Seminole Rock* that turn on the nature of the regulation and the agency interpretation[20]: 1) whether the rule is a mere placeholder;[21] 2) whether deferring would create a retroactivity problem;[22] and 3) the form in which the agency issues the interpretation.[23]

But there are problems with basing the level of deference on characteristics of the *regulation or interpretation*. Unlike inferences from

17. *See, e.g.*, Matthew Mezger, Essay, *Using Interpretive Methodology to Get Out from* Seminole Rock *and a Hard Place*, 84 GEO. WASH. L. REV. 1335, 1341-42 (2016); Michael P. Healy, *The Past, Present and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations and Regulations*, 62 U. KAN. L. REV. 633, 634-35, 678 (2014); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1452 (2011).

18. Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 275 (2013).

19. *Id.*

20. Stephenson & Pogoriler, *supra* note 17, at 1466. Stephenson and Pogoriler also discuss a fourth factor—the division of rulemaking and adjudicative authority—but use this factor to assign deference to one agency rather than another instead of denying deference altogether. *Id.* at 1502-03.

21. *Id.* at 1470-71.

22. *Id.* at 1481.

23. *Id.* at 1496.

statutory text and structure, they cannot claim to be grounded in congressional intent, except in the most attenuated and fictive sense. And they do not lend themselves to modesty—they would change *Seminole Rock* across the board along with the incentives created for all rulemaking administrative agencies instead of calibrating *Seminole Rock*'s application to particular regulatory regimes. Drawing inferences from the text and structure of the organic statutes would avoid these pitfalls.

Other reformers have sought to ground changes to the doctrine in congressional enactments but have unfortunately focused on the wrong statute. Justice Scalia originally framed an attack on *Seminole Rock* in terms of vague rhetoric about "fundamental principles,"[24] then moved to a generalized view about Congress's likely intent,[25] and finally arrived at a theory based on the text and structure of the APA.[26] Unfortunately, the "open-ended" provisions of the APA do not send a clear signal about the propriety of deference, at least not without imposing a judge's "own sensibilities" regarding separation of powers on the APA's general language.[27] Only Justice Thomas appears to believe that *Seminole Rock* deference—along with much of the administrative state—is actually unconstitutional,[28] but without constitutional rhetoric, it is hard to justify reading a general position on the propriety of deference into the APA.

Instead of resorting to constitutional rhetoric to impose content on the APA and rule on the propriety of *Seminole Rock* deference across all regulatory schemes, courts should look to the particular statutes that create and structure individual regulatory regimes. Under such an approach, decisions are likely to be less interesting—there will be fewer plaintive citations to long-dead political philosophers—but they will be better grounded in actual legal materials.

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24. Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

25. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part) ("The theory of *Chevron* (take it or leave it) is that when Congress gives an agency authority to administer a statute, including authority to issue interpretive regulations, it implicitly accords the agency a degree of discretion, which the courts must respect, regarding the meaning of statute. . . . While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations."). Justice Scalia's approach in *Decker*—invoking principles grounded in the Constitution to justify a presumption about congressional intent—mirrors the approach of Professor Manning. *See* Manning, *supra* note 4, at 618 ("[T]he Supreme Court should reject *Seminole Rock*'s presumption that the delegation of rulemaking power to an agency implicitly gives the agency a concomitant right to construe its own rules authoritatively.").

26. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring).

27. Manning, *Constitutional Structure and Judicial Deference*, *supra* note 4, at 636; *see also* Sunstein & Vermeule, *supra* note 13, at 303.

28. *See Perez*, 135 S. Ct. at 1225 (Thomas, J., concurring).

In addition to developing a new approach to *Seminole Rock*, the resulting discussion highlights an important theme in this area of the law. Critics of *Seminole Rock* often deploy constitutional *rhetoric* to justify their preferred outcome even when they are unwilling to claim as a matter of constitutional *law* that their preferred outcome is required.[29] Constitutional rhetoric is fun—opinions about Locke, Montesquieu, and Blackstone are enjoyable to write and to read—but such rhetoric is ultimately empty unless backed by a real constitutional provision.[30]

This Essay proceeds as follows: First, it provides background on *Seminole Rock* deference and the rise of its opposition.[31] Second, it identifies principles that should guide any attempt at reform: Obedience to Congress's signals, attention to unintended consequences, and careful identification of a well-identified problem.[32] Finally, it suggests that these principles would be best implemented by tailoring deference to the features of the particular regulatory regime at issue,[33] and it identifies certain features to guide the analysis.[34]

II. BACKGROUND

A. Seminole Rock *and the Growth of Deference*

Even before the Supreme Court fully accepted the administrative state,[35] it expressed a measure of deference to agency interpretations of agency rules. For example, in 1933, the Court explained that an agency "was without competence by any decision it might make to fix the meaning of [a] phrase as used by Congress or the courts. It had

29. *See, e.g.*, Manning, *Constitutional Structure and Judicial* Deference, *supra* note 4, at 632-33 (acknowledging that courts have accepted the combination of "legislative, executive, and judicial functions" in administrative agencies but suggesting that the concept of separation should be enforced); Gillian E. Metzger, *The Supreme Court 2016 Term – Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 44 (2017) (noting that judicial critics of doctrines like deference often invoke "constitutional concerns," "[y]et this express invocation is rarely accompanied by sustained constitutional analysis—perhaps because . . . few Justices seem willing to embrace the rollback in national administrative government that the posited antimony of separation of powers and contemporary national administrative government would seem to entail.").

30. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2039-40 (2011) [hereinafter Manning, *Separation of Powers*] (suggesting that the Framers adopted specific provisions regarding allocation of authority, and that Congress is free to structure the government as long as it does not violate these provisions).

31. *See infra* Part II.

32. *See infra* Part III.

33. *See infra* Part IV.A.

34. *See infra* Part IV.B.

35. *See generally* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935). Following the lead of other commentators, this Essay assumes that the basic outlines of the modern administrative state are constitutionally valid. *See* Manning, *supra* note 4, at 632.

power, however, to interpret its own rules and any phrase contained in them."[36]

This concept received its canonical formulation in the 1945 case of *Bowles v. Seminole Rock*.[37] In that case, the Court confronted a dispute about the interpretation of a regulation issued by the Office of Price Administration, an agency charged with administering a scheme of wartime price controls.[38] The Court accepted the interpretation offered by the Administrator, explaining:

> The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But *the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation*. The legality of the result reached by this process, of course, is quite a different matter.[39]

In other words, under *Seminole Rock*, the administrative agency had the power to determine the meaning of the regulation as long as that meaning could be fairly supported by the text of the regulation. But once the regulation's meaning was settled, it would remain subject to judicial review to ensure that it was consistent with the authorizing statutes and the Constitution.

Soon after, Congress enacted the APA, the critical statute at the center of modern administrative law.[40] The APA provided for judicial review of agency activities and stated that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[41]

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36. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 325 (1933). Although *Norwegian Nitrogen* is largely a case about the Tariff Commission's construction of a statute, the quoted language came in the Court's discussion of the proper interpretation of "[a] rule of the Commission." *Id.* at 324. Interestingly, the Court expressly compared deference to agencies' constructions of statutes with deference to agencies' constructions of their regulations and concluded that the latter was less problematic. *Id.* at 325; *cf. infra* Part IV.

37. 325 U.S. 410, 413-14 (1945).

38. *Id.*

39. *Id.* at 414 (emphasis added).

40. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

41. 5 U.S.C. § 706 (2012). The APA also structured agency actions. The core distinction in the APA is between rules and orders. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1988) (Scalia, J., concurring) (describing the distinction between rules and orders as the "dichotomy upon which the most significant portions of the APA are based"). Rules are typically general statements of prospective effect and are created through a quasi-legislative process; orders are statements based on pre-existing law and are created through adjudications. *See id.*

In the years following the APA, the courts continued to apply *Seminole Rock* deference to agency interpretations of agency rules. For example, in the 1948 case of *L. Gillarde Co. v. Joseph Martinelli & Co.*, the First Circuit Court of Appeals deferred to the Department of Agriculture's interpretation of its regulation:

> Upon consideration of the petition for rehearing and the briefs submitted, we think that since the Department has interpreted its regulation in a manner which it thinks necessary to carry out the purposes of the [Perishable Agricultural Commodities Act of 1930], and since the interpretation has been adhered to for over ten years, it should not be disregarded. Under these circumstances we hold that we should not substitute our interpretation merely because our original thought was that such a drastic interpretation is not needed to carry out the intent of the Act. The Department's interpretation is not plainly erroneous; it is a possible and reasonable interpretation of the regulation, even if not the only possible one.[42]

Although the bulk of such statements were offered in the context of price regulations adopted in wartime, judicial acceptance of the doctrine was not limited to the wartime context.[43] *L. Gillarde* was a 1948 case; the face of the opinion did not reference the war; the relevant statute, regulations, and interpretations all predated America's entry into World War II;[44] and the dispute was about one private party's rejection of rotten cantaloupes delivered by another private party.[45]

It is possible to read such cases as uncritically expanding *Seminole Rock* beyond the narrow context that justified it, thus rendering the development of the doctrine suspect.[46] But a more neutral description may be that courts did not take the opportunities they had to cabin *Seminole Rock* or limit it to its particular facts. The most obvious explanation is that courts saw no reason to do so.

Seminole Rock was eventually joined by other deference doctrines. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*,[47] the

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42. L. Gillarde Co. v. Joseph Martinelli & Co., 169 F.2d 60, 61 (1st Cir. 1948).

43. For an opposing view, see Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 65, 66, 66 n.108 (2015) (arguing that *Seminole Rock* deference was essentially confined to the wartime context until the 1960s and 1970s). Other cases also applied *Seminole Rock* deference without obvious reference to wartime considerations. *See, e.g.*, Armstrong Co. v. Walling, 161 F.2d 515, 517 (1st Cir. 1947) (invoking *Seminole Rock* deference with respect to an interpretation by the Administrator of the Wage and Hour Division, United States Department of Labor, in a case regarding "the making, wrapping and delivery of sandwiches").

44. *L. Gillarde Co.*, 169 F.2d at 61.

45. L. Gillarde Co. v. Joseph Martinelli & Co., 168 F.2d 276, 277-78 (1st Cir. 1948), *amended by* 169 F.2d 60 (1st Cir. 1948).

46. Knudsen & Wildermuth, *supra* note 43, at 47.

47. 467 U.S. 837 (1984).

Supreme Court announced that courts should defer to an agency's interpretation of a *statute* that the agency is charged with administering. Under *Chevron*, if a "court determines . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[48] As the Court later explained in *Brand X*, "statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts."[49] *Chevron* deference applies "even if the agency's reading differs from what the court believes is the best statutory interpretation,"[50] and even if the court had previously announced its preferred interpretation in a judicial precedent.[51]

In *Seminole Rock* itself, the Court indicated that it would defer to an agency's interpretation of its own rules and suggested that agencies would remain constrained by an independent analysis of congressionally-imposed limits in statutes.[52] With the *Chevron* doctrine, the Court appeared to go further, allowing agencies to shape the interpretation of the very statutes that empower them.[53]

The Supreme Court continued its embrace of *Seminole Rock* in the post-*Chevron* era. In an opinion for a unanimous Court in *Auer v. Robbins*,[54] Justice Scalia applied *Seminole Rock* deference: "Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.' "[55] The Court's embrace of deference was so uncritical and enthusiastic—the Court deferred even though the agency's interpretation was announced in a legal brief[56]—that the phrase "*Auer* deference" became synonymous with *Seminole Rock* deference.[57]

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48. *Id.* at 842-43.

49. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

50. *Id.*

51. *Id.* at 982-83.

52. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

53. *See* City of Arlington v. FCC, 569 U.S. 290, 297 (2013) (under *Chevron*, courts must defer to agency interpretations even on questions of the agency's statutory "jurisdiction").

54. 519 U.S. 452 (1997).

55. *Id.* at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

56. *Id.* at 462.

57. Professor Jeffrey A. Pojanowski has urged that this conflation of standards is a mistake. In his view, *Seminole Rock* was far less deferential and was based on an intellectual framework in which the intent of the agency that authored the regulation merely had significant persuasive weight; by contrast, *Auer* was based on a *Chevron*-style concept in which the agency has policy-making discretion where regulations are ambiguous. *See* Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 GEO. J.L. & PUB. POL'Y 87 (2018).

B. New Concerns and a Drive Toward Reform

While *Seminole Rock* deference had been strengthened in some respects, it was also coming under increasing scrutiny. In *Thomas Jefferson University v. Shalala*,[58] Justice Thomas authored a four-justice dissent criticizing a "hopelessly vague" regulation, which he saw as an unfortunate byproduct of incentives in administrative law.[59] He found the agency's proposed interpretation of the regulation "unworthy of deference" under *Seminole Rock*.[60] In *Shalala v. Guernsey Memorial Hospital*,[61] Justice O'Connor authored a four-justice dissent urging that the agency's interpretation was inconsistent with the underlying statutory regime and so could not be saved by deference.[62] In Justice O'Connor's view, the statute required the agency to set requirements for reimbursements *by regulation*; under the agency's proffered interpretation, there would be no regulation addressing the issue.[63]

These concerns were treated as one-off issues. But in an unusually influential law review article,[64] Professor John F. Manning diagnosed them as symptoms of a broader problem—a diagnosis which he packaged in constitutional rhetoric.[65] In a *Chevron* case, an agency would interpret a law written by Congress.[66] By contrast, in a *Seminole Rock* case, an agency would interpret a rule that the agency itself had written.[67] To Manning, this made *Seminole Rock* deference uniquely problematic: Agencies were allowed to unite the two powers of lawmaking and law-exposition with minimal judicial oversight.[68] This perceived violation of separation of powers norms had pernicious effects, including encouraging agencies to promulgate vague rules to enhance their discretion and power in future interpretations.[69]

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58. 512 U.S. 504 (1994).

59. *Id.* at 525 (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. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.").

60. *Id.* at 528.

61. 514 U.S. 87 (1995).

62. *Id.* at 109 (O'Connor, J., dissenting).

63. *Id.*

64. *See* Sunstein & Vermeule, *supra* note 13, at 297 n.4 (describing Manning's article, *infra* note 4, as the "seminal article, with a host of original and ingenious arguments that appear to have inspired the attack on *Auer*").

65. Manning, *Constitutional Structure and Judicial Deference*, *supra* note 4, at 614-17.

66. *Id.* at 639.

67. *Id.*

68. *Id.* at 654.

69. *Id.* at 655.

Though it took some time for them to attract the attention of the Supreme Court, Professor Manning's ideas eventually gripped the Court's conservative wing. Justice Scalia had been one of the most fervent proponents of administrative deference, but in 2011 he issued an opinion citing Manning's article and stated that he was "increasingly doubtful" of the validity of *Seminole Rock*.[70] In 2013, Justice Scalia moved past doubts, declared "[e]nough is enough," and urged rejection of the doctrine.[71] Chief Justice Roberts and Justice Alito stated that they would welcome a case squarely presenting the question of *Seminole Rock*'s validity.[72]

In *Perez v. Mortgage Bankers Association*,[73] a trio of opinions pressed the point. Justice Alito again expressed doubts about *Seminole Rock*, stating that he looked forward to a case that would allow the Court to revisit it.[74] Justice Scalia again urged that the Court should, by abandoning *Auer*, overturn *Seminole Rock*.[75] And Justice Thomas entered the fray, issuing a remarkable opinion arguing, on originalist grounds, that *Seminole Rock* was unconstitutional.[76]

Newly-appointed justices similarly expressed deep skepticism of deference doctrines.[77] Various members of Congress have also expressed interest in abolishing *Seminole Rock*. The House passed a bill that would have watered down *Seminole Rock* deference across all regimes, and Senators have proposed comparable pieces of legislation.[78] In the midst of this ferment, the Supreme Court has granted a certiorari petition squarely presenting the question of whether *Seminole Rock* and *Auer* should be overturned.[79]

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70. Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

71. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part).

72. *Id.* (Roberts, C.J., concurring).

73. 135 S. Ct. 1199 (2015).

74. *Id.* at 1210-11 (Alito, J., concurring).

75. *Id.* at 1211-13 (Scalia, J., concurring).

76. *Id.* at 1213 (Thomas, J., concurring). Justice Thomas's opinion in *Perez* was one of a broader set of opinions in the October 2014 Term, in which Justice Thomas sought to articulate an originalist view of administrative law. For an insightful analysis of these opinions, see Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J. F. 94 (2015), http://www.yalelawjournal.org/forum/justice-thomas-and-the-originalist-turn-in-administrative-law [https://perma.cc/5UQ5-B2V8].

77. *See infra* Part III.B.2 (discussing opinions by then-Judge Gorsuch); Kevin O. Leske, *Wishful Thinking? Justice Gorsuch and the Future of the* Seminole Rock/Auer *Deference Doctrine*, 36 YALE J. ON REG.: NOTICE & COMMENT (July 30, 2018), http://yalejreg.com/nc/wishful-thinking-justice-gorsuch-and-the-future-of-the-seminole-rockauer-deference-doctrine-by-kevin-o-leske/ [https://perma.cc/5J5J-54DD] (discussing Justice Gorsuch and then-Judge Kavanaugh's views).

78. *See* Christopher J. Walker, Essay, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 (2017).

79. Petition for a Writ of Certiorari, Kisor v. O' Rourke, 869 F.3d 1360 (No. 18-15), *cert. granted sub nom.* Kisor v. Wilkie, 139 S. Ct. 657 (2018).

III. PRINCIPLES FOR ADMINISTRATIVE LAW REFORM

There is clearly an appetite for reform, but unless reform is handled carefully, it could prove counterproductive. This Part identifies three principles that should guide any reform effort: 1) any reform by the courts should be rooted in the underlying statutes instead of a free-wheeling common-law approach; 2) reforms, whether by the courts or by Congress, should also take account of potential consequences in other areas of administrative law; and 3) reforms should be addressed to specific, clearly identified targets.

A. Reforms Should be Rooted in Statutes

Arguments about administrative law doctrine often have a common-law flavor. Positions are grounded in loose estimations of practical concerns or in philosophy purportedly grounded in constitutional theory (though not the Constitution itself). At a minimum, reformers should seek to move toward statutory text and structure. In so doing, they are likely to discover unanticipated benefits.

1. Problems with the Common Law Approach

Although sometimes cast in the language of statutory interpretation, the critics of *Seminole Rock* are not doing statutory interpretation in any traditional sense. Instead of emphasizing statutory text, structure, or history, they adopt a common law approach—frankly attempting to weigh competing practical considerations, such as agency incentives[80] and philosophical ideas framed at a high level of generality.[81]

This is not an uncommon approach,[82] but it is a problematic one. To begin, there is an obvious empirical issue—while it is possible to make

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80. *See, e.g.*, *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring) (urging that *Seminole Rock* is misguided in part because it gives agencies an incentive to "write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment").

81. For example, Professor Manning urges that *Chevron* abandoned the calibrated approach to deference that prevailed at the time the APA was enacted and thus cannot be justified on an originalist understanding of the APA. *See* Manning, *Constitutional Structure and Judicial Deference*, *supra* note 4, at 624-26. As a result, he urges that deference doctrines must be grounded in particular constitutional values, such as a desire for substantive policies to be set by (relatively) politically-accountable agencies instead of unelected, life-tenured judges. *Id.* He then urges that this value is outweighed in the *Seminole Rock* context by other constitutional values, such as the separation of powers. *Id.* at 631. This philosophical weighing of high-level values is not based on the text or structure of the relevant statutes.

Professor Manning's premise is also arguably out of date, given the Supreme Court's move toward a more calibrated approach to *Chevron* deference in *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001). With *Mead*, the Court has moved to the type of approach that prevailed at the time of the APA.

82. *See* Gillian Metzger, Auer *as Administrative Common Law*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 21, 2016), http://yalejreg.com/nc/auer-as-administrative-common-law-by-gillian-metzger/ [https://perma.cc/XN2H-3Y5B]; *see also Mead Corp.*, 533 U.S. at 241

vague conjectures about practical effects, it is difficult to get a real sense of how these issues play out in the real world.[83] Indeed, a recent analysis of over 1,200 rules has suggested that deference to agency interpretations did not cause agencies to adopt vague regulations—contradicting the empirical claim at the heart of the case against *Seminole Rock*.[84]

More fundamentally, administrative deference doctrines are generally defended as being based on presumptions about congressional intent[85]—a justification that ought to call for greater concern about Congress's handiwork. It is also strange to complain that *Seminole Rock* deference allows agencies to wield both legislative and judicial power[86] and then call on courts to behave like a legislature in inventing a new doctrinal approach.[87]

The abandonment of typical tools of statutory interpretation is particularly striking in the case of judges with originalist commitments. For example, the late Justice Scalia defended *Chevron* on the ground that it was consistent with the practices that prevailed when the APA was enacted.[88] In other words, Justice Scalia supported *Chevron* because the original public meaning of the text of the APA incorporated

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(Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite."); Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1301-04 (2012) (urging that deference doctrines have always had a judicially-created, common law character).

83. Professors Sunstein and Vermeule emphasize a particular strand of this problem, which they call "the sign fallacy." Sunstein & Vermeule, *supra* note 13, at 300. Critics of *Seminole Rock* tend to "identify the likely *sign* of an effect and then . . . declare victory, without examining its *magnitude*—without asking whether it is realistic to think that the effect will be significant." *Id.*

84. *See* Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 COLUM. L. REV. 85, 142 (2019).

85. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989); John F. Manning, Tribute, Essays in Honor of Justice Stephen G. Breyer: Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457, 458 (2014) [hereinafter Manning, *Tribute*] ("Every framework used by the Court for determining the availability of deference has rested on a legal fiction about presumed legislative intent."). *But see Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring) (urging that deference cannot be justified on congressional intent grounds, "because Congress lacks authority to delegate the power").

86. Manning, *supra* note 4, at 654.

87. Strikingly, some of the harshest critics of *Seminole Rock* are also the strongest proponents of rigid textualism. *See* Manning, *Separation of Powers*, *supra* note 30 (arguing that courts should permit Congress to structure the government except where expressly prohibited by the constitutional text); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003) (criticizing doctrine that judges can depart from statutory text where it leads to absurd results).

88. *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring) ("[T]he rule of *Chevron*, if it did not comport with the APA, at least was in conformity with the long history of judicial review of executive action, where '[s]tatutory ambiguities . . . were left to reasonable resolution by the

the *Chevron*-style deference recognized at the time of the APA's adoption. Though there are real questions as to when *Seminole Rock* deference as it is currently practiced was devised,[89] *Seminole Rock* itself similarly predated the APA. Yet Justice Scalia was prepared to set aside this understanding of the statute's meaning based on arguments first advanced in a law review article published fifty years after the APA was enacted.[90] This seems to be the realization of the precise threat Justice Scalia once warned about: "[U]nder the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."[91]

Justice Scalia tried to address these concerns but was not terribly persuasive. First, Justice Scalia sought to root his approach in the text of the APA. Quoting the APA language providing that a "*reviewing court* shall . . . interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action,"[92] Justice Scalia urged that the "Act thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations."[93] But this argument begs the essential question. As Professors Sunstein and Vermeule have noted, "the statement that the court shall 'interpret' questions of law is not decisive in favor of independent judicial review, if it is also the case *that under organic statutes, the correct interpretation of law depends on the agency's interpretation of law*."[94] The essential question is whether courts should apply the rule of *Seminole Rock* when they interpret regulations. APA text ordering courts to interpret regulations cannot resolve that question.

Second, Justice Scalia urged that *Chevron* deference was justified by a long history of courts deferring to agency interpretations of statutes

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Executive.' " (alteration in original) (quoting *Mead Corp.*, 533 U.S. at. 243)); *Mead Corp.*, 533 U.S. at 241-42. This is not a uniquely originalist approach. The legal process school, championed by Hart and Sacks, similarly urged the merits of "reading general language as subject to assumed but unexpressed qualifications in terms of customary defenses or other limiting policies of the law." Manning, *Tribute*, *supra* note 85, at 467 (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1124, 1192 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958)).

89. *See* Knudsen & Wildermuth, *supra* note 43, at 65-66.

90. *See* Sunstein & Vermeule, *supra* note 13, at 297 n.4 (describing Manning's article, *supra* note 4, as containing "original and ingenious arguments that appear to have inspired the attack on" *Seminole Rock*).

91. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17-18 (1997).

92. *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring) (quoting 5 U.S.C. § 706).

93. *Id.*

94. Sunstein & Vermeule, *supra* note 13, at 303-04.

and claimed that the long history was not present with respect to *Seminole Rock* deference.[95] However, it is not clear how much history Justice Scalia would have required. *Seminole Rock* was part of the *corpus juris* at the time of the APA's enactment.[96] In addition, Congress has amended the APA sixteen times since its enactment[97] and has routinely enacted and amended organic regulatory statutes in the decades since. The background understanding of *Seminole Rock* deference has been in place for each of these enactments.[98]

The open-textured nature of the APA and the variety of novel problems presented by the administrative state may make it impossible to plausibly ground deference doctrine in the precise wording of that statute.[99] But that is hardly an excuse for abandoning normal principles of statutory interpretation in favor of a common law approach driven by newly invented concerns.

2. Statutory Interpretation and its Benefits

Courts have also disclaimed the authority to go beyond the relevant statutes in setting requirements for agency policymaking. In the watershed case of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[100] the Supreme Court held that a reviewing court cannot "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good."[101] Instead, courts can only enforce the procedural requirements imposed *by Congress* in statutes like the APA.[102] This approach has paid dividends in the *Seminole Rock* context.

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95. *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring).

96. *Cf.* Scalia, *supra* note 85, at 16-17 ("We simply assume, for purposes of our search for 'intent,' that the enacting legislature was aware of all those other laws. . . . We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.").

97. *See* Walker, *supra* note 78, at 633-34.

98. This point is separate from, but complementary to, the observation that *Seminole Rock*'s progeny are statutory precedents entitled to heightened *stare decisis* effect. *See* Halliburton Co. v. Erica P. John Fund, 134 S. Ct. 2398, 2411 (2014) ("The principle of *stare decisis* has special force in respect to statutory interpretation because Congress remains free to alter what we have done." (internal quotation marks omitted)). It is not clear how much force the conservative wing of the Court would give to *stare decisis* in this context. For example, in one opinion joined by Justices Scalia and Alito, Justice Thomas urged that although Congress could overrule a precedent by statute, the precedent was merely "judge-made law" that the Court had a responsibility to correct itself. *Id.* at 2426 (Thomas, J., dissenting). To the extent that *Seminole Rock* can be dismissed as a judicially-created doctrine, *stare decisis* may not be persuasive.

99. *See* Manning, *Constitutional Structure and Judicial Deference*, *supra* note 4, at 636.

100. 435 U.S. 519 (1978).

101. *Id.* at 549.

102. *Id.* at 524.

In *Perez v. Mortgage Bankers Association*,[103] the Supreme Court considered the Department of Labor's interpretation of a rule defining the set of employees exempt from federal overtime compensation provisions. In 2006, the agency interpreted the rule as providing that mortgage loan officers fell within the exemption and thus were not covered by overtime compensation requirements; and in 2010, the agency reinterpreted the rule to provide that mortgage loan officers did not fall within the exemption and accordingly were covered by overtime compensation requirements.[104] These interpretations were issued in opinion letters and were not subjected to the notice and comment process.[105]

Applying its precedent from *Paralyzed Veterans of America v. D.C. Arena*,[106] the United States Court of Appeals for the District of Columbia Circuit held in *Mortgage Bankers Association v. Perez* that the 2010 reinterpretation was invalid.[107] In the view of the D.C. Circuit, the agency could not meaningfully change its interpretation of a rule without undergoing notice and comment.[108] This approach had the effect of freezing the agency's initial interpretation of its rule in place.

The Supreme Court reversed, rejecting the *Paralyzed Veterans* doctrine on the ground that it imposed requirements not called for by the APA.[109] Justice Scalia concurred in the judgment in an opinion tinged with reluctance; he described the D.C. Circuit's *Paralyzed Veterans* doctrine as a "courageous (indeed, brazen)" attempt to restore a balance upset by *Seminole Rock*.[110] Some of his reluctance seems to have been shared by the other Justices: Justices Alito and Thomas filed concurrences that similarly urged reconsideration of *Seminole Rock*, or of deference more generally,[111] and the majority found it necessary to assure readers that *Seminole Rock* "deference is not an inexorable command in all cases."[112]

The overall tenor of the *Perez* opinions seems to reflect a view that Congress's commands in the APA were sadly unequal to the problems with *Seminole Rock* that judges had uncovered by reasoning in the common law mode. But a closer look suggests that the statutory approach is stronger than the justices recognized. If the problem with

103. 135 S. Ct. 1199 (2015).
104. *Id.* at 1204-05.
105. *Id.* at 1205.
106. 117 F.3d 579 (D.C. Cir. 1997).
107. Mortg. Bankers Ass'n v. Perez, 720 F.3d 966 (D.C. Cir. 2013).
108. *Id.* at 967-68.
109. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206-07 (2015).
110. *Id.* at 1212 (Scalia, J., concurring).
111. *Id.* at 1210-11 (Alito, J., concurring in part); *id.* at 1213 (Thomas, J., concurring).
112. *Id.* at 1208 n.4 (majority opinion).

Seminole Rock was a lack of notice to regulated parties, then *Paralyzed Veterans* would be a sound doctrine, because no agency could suddenly reinterpret a rule. But if the real problem is self-delegation, as many of the justices who were critical seem to believe, *Paralyzed Veterans* was perverse. It allowed the very people at the agency who decided to issue an unclear rule to lock in an interpretation, binding any future agency decision-makers.[113] Now that *Paralyzed Veterans* has been struck down, agency officials who issue unclear rules must live with the risk that a future administration will interpret the rule in a way they find distasteful.[114]

In other words, the statutory scheme created an incentive to issue clear rules and avoid the self-delegation problems that trouble the critics of *Seminole Rock*. By contrast, the judge-made, common law approach of *Paralyzed Veterans* actually exacerbated those problems. Perhaps Congress could have weighed the issues differently in the APA, emphasizing notice over self-delegation and adopting a rule like that of *Paralyzed Veterans*. But the APA "enacts a formula upon which opposing social and political forces have come to rest,"[115] and it is both perilous and inappropriate for judges to second-guess that balance.

B. Reforms Should Take Account of Undesirable Consequences

A second principle to guide reform is attention to undesirable consequences. Administrative law doctrines exist in a dense tangle of interconnected rules; changing one doctrine can lead to destructive results elsewhere. As Justice Jackson once observed in a different context: "To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice."[116]

Congress should consider these issues when altering administrative law regimes. To the extent that the governing statutes permit judges to consider practical concerns,[117] judges should also be attentive to the potential for broader consequences. This point can be illustrated by studying three recent examples in which reforms led to issues elsewhere.

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113. Stephenson & Pogoriler, *supra* note 17, at 1478.

114. This effect may create a major incentive for agencies to be clear in their rules. *See* Sunstein & Vermeule, *supra* note 13, at 309 ("One administration might well want to ensure that its successor will not be allowed, with the aid of *Auer*, to shift from a prior position."); *cf.* Aaron Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85 (2018) (asserting that agencies' goals are often best served by taking a position that cannot be changed quickly).

115. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 520, 523 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)).

116. Michelson v. United States, 335 U.S. 469, 486 (1948).

117. *See supra* Part III.A. The text of the APA actually appears to require judges to go slow in rendering rulings on administrative actions. *See* Aneil Kovvali, *The APA's Call for Judicial Minimalism*, 36 YALE J. ON REG.: NOTICE & COMMENT (Oct. 15, 2017), http://yalejreg.com/nc/the-apas-call-for-judicial-minimalism-by-aneil-kovvali/ [https://perma.cc/R974-8KLZ].

1. Limits on Chevron *Created an Incentive to Use* Seminole Rock

As discussed above,[118] in *Chevron USA, Inc. v. Natural Resources Defense Council*, the Supreme Court declared that courts should defer to an agency's reasonable resolution of an ambiguity in a statute that the agency administers. This represented a significant transfer of interpretive authority from the courts to administrative agencies.[119] In *United States v. Mead Corp.*,[120] the Supreme Court took some of that authority back, limiting the circumstances where *Chevron* deference is available. This created an incentive to obtain deference through the alternative route of issuing empty rules and claiming the benefit of *Seminole Rock*.

In *Mead*, the Court considered whether to extend *Chevron* deference to the U.S. Customs Service's resolution of an issue regarding the proper classification of day planners. The majority explained that the essential question for the courts was whether "Congress would expect the agency to be able to speak with the force of law" on the issue; if so, deference was appropriate.[121] To decide this question, courts were to examine "the agency's generally conferred authority and other statutory circumstances."[122] The majority explained that Congress had enacted a "great variety" of statutes administered by agencies, and that the proper approach was to show respect for Congress's handiwork by trying "to tailor deference to variety."[123] Applying this approach, the Court decided that the full measure of *Chevron* deference was not appropriate in that case by looking to the structure of the relevant organic regulatory statute.[124]

Justice Scalia penned a vigorous dissent.[125] The majority had noted that Justice Scalia's "first priority over the years has been to limit and simplify,"[126] and Justice Scalia's dissent reflected that priority. He urged that courts should accord *Chevron* deference to *all* authoritative agency interpretations, and he protested that the *Mead* majority had "largely replaced" the clear rule of *Chevron* "with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who

118. *Supra* Part II.

119. Chevron USA, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 837-38 (1984).

120. 533 U.S. 218 (2001).

121. *Id.* at 229.

122. *Id.*

123. *Id.* at 236-37.

124. *Id.* at 231-32. The Court decided that the interpretation should be evaluated under a less deferential standard—evaluating the agency's position based on its persuasiveness—in light of its expertise. *Id.* at 221.

125. *Id.* at 239 (Scalia, J., dissenting).

126. *Id.* at 236 (majority opinion).

want to know what to expect): th'ol' 'totality of the circumstances' test."[127]

Justice Scalia also cannily observed that the combination of *Mead* and *Seminole Rock* could lead to unhelpful outcomes by changing strategic incentives. *Mead* would make agencies uncertain of their ability to command deference when they sought to resolve statutory ambiguities.[128] But under *Seminole Rock* and its progeny, judges would still "defer to reasonable agency interpretations of their own regulations."[129] Justice Scalia observed that the combination of *Mead* and *Seminole Rock* would create a "high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect."[130]

The Court would soon confront this precise agency tactic in *Gonzales v. Oregon*.[131] In *Gonzales*, the Court was presented with the question of whether the Controlled Substances Act forbade the prescription of drugs for purposes of assisted suicide. Under the statute, this inquiry turned on whether the drugs had a "currently accepted medical use" and a prescription was "issued for a legitimate medical purpose . . . in the course of professional practice."[132] In urging that it was not legitimate to use controlled substances to assist suicide, the Attorney General pointed to his interpretation of a regulation, which requires that prescriptions only be issued "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."[133]

The Court refused to defer to the Attorney General's interpretation of this regulatory language:

> Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.[134]

Justice Scalia again dissented, this time in an opinion joined by Chief Justice Roberts and Justice Thomas.[135] In Justice Scalia's view, there

127. *Id.* at 241 (Scalia, J., dissenting).
128. *Id.* at 246.
129. *Id.*
130. *Id.*
131. 546 U.S. 243, 244 (2006).
132. *Id.* at 257 (quoting 21 U.S.C. §§ 812(b), 830(b)(3)(A), 802(21)).
133. *Id.* at 256 (quoting 21 C.F.R. § 1306.04 (2005)).
134. *Id.* at 257.
135. *Id.* at 275 (Scalia, J., dissenting).

was no exception to *Seminole Rock* for regulations that parroted statutory language; certainly the Court had cited no precedent suggesting there was one.[136] And even if the Court's innovation were accepted, "the Regulation does not run afowl (so to speak) of the Court's newly invented prohibition of 'parroting,' " since it actually clarified certain statutory ambiguities.[137]

In sum, the Court in *Mead* sought to limit *Chevron* deference. Because of the relationship between *Chevron* and *Seminole Rock*, this limitation created an incentive for agencies to engage in empty rulemakings that would do nothing to resolve statutory uncertainty but would give the agencies options under *Seminole Rock*. Controlling this undesirable consequence required a further alteration of doctrine: An exception to *Seminole Rock* that some have criticized as unworkable.[138] The problem should not be overstated—the consequence was anticipated, and both *Mead* and *Seminole Rock* were flexible enough to control it. But the episode illustrates the need for reformers to attend to broader consequences.

2. Limits on Retroactive Rules Created an Incentive to Use Adjudication

In *Bowen v. Georgetown University Hospital*,[139] the Supreme Court announced another doctrine that created the potential for unintended consequences—a prohibition on retroactive rules. This created an incentive for agencies to use adjudications, which could reduce notice to regulated parties and destroy valid reliance interests. According to some, controlling this consequence has required further reform.[140]

In *Bowen*, the Court considered the validity of a retroactive rule issued by the Secretary of Health and Human Services.[141] Although the statute authorized certain retroactive *adjudications*,[142] the Court held that it did not authorize retroactive *rulemaking* and struck down the rule.[143] Justice Scalia authored a concurring opinion centered on the distinction:

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136. *Id.* at 277.

137. *Id.* at 278-80.

138. Commentators have questioned the courts' ability to apply the *Gonzales* anti-parroting principle. *See* Stephenson & Pogoriler, *supra* note 17, at 1469-71. I have argued elsewhere that this concern is misguided, and that the *Gonzales* anti-parroting rule is a practical and sensible limitation on the reach of *Seminole Rock*. *See* Aneil Kovvali, Seminole Rock *and the Separation of Powers*, 36 HARV. J.L. & PUB. POL'Y 849, 863-64 (2013).

139. 488 U.S. 204 (1988).

140. *See infra* notes 149-68 and accompanying text.

141. *Id.* at 206.

142. *Id.* at 209.

143. *Id.* at 213.

> Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities.[144]

Justice Scalia acknowledged that an adjudication could have "future as well as past legal *consequences*, since the principles announced in an adjudication cannot be departed from in future adjudications without reason."[145] But he insisted that "[a]djudication *deals* with what the law was; rulemaking deals with what the law will be."[146] As a result, Justice Scalia urged that although retroactivity was "not only permissible but standard" in adjudication,[147] it was presumptively improper in rulemaking.[148]

Bowen thus leaned heavily on a strict distinction between rulemaking (which is presumptively prospective) and adjudication (which is presumptively retroactive).[149] This distinction could create an incentive for agencies to use adjudications to announce policy choices, because that approach would give those choices immediate effect.

In a series of opinions, then-Judge Neil Gorsuch stated his belief that this precise scenario had come to pass and announced yet another sweeping reform meant to control the consequences. Under 8 U.S.C. § 1255(i)(2)(A), as of 2012, the Attorney General has discretion to grant lawful residency status to an individual who entered the country illegally. A separate section—8 U.S.C. § 1182(a)(9)(C)(i)(I)—prevents certain persons who have entered the country illegally more than once from obtaining lawful residency unless they remain outside the United States for "more than 10 years." In *Padilla-Caldera I*, the Tenth Circuit concluded that the best reading of these sections was that the Attorney General's discretion under the first provision *was not* limited by the second provision.[150]

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144. *Id.* at 218-19 (Scalia, J., concurring) (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 13-14 (1947)).

145. *Id.* at 216-17 (emphasis added).

146. *Id.* at 221.

147. *Id.* Indeed, Justice Scalia suggested that "adjudication could *not* be purely prospective, since otherwise it would constitute rulemaking." *Id.* While this position has some support in judicial opinions, it is not obvious from the face of the APA. *See* 5 U.S.C. § 554(e) (2012) (authorizing declaratory adjudications).

148. *Bowen*, 488 U.S. at 224.

149. *Id.* at 209, 213-14.

150. Padilla-Caldera v. Gonzales, 426 F.3d 1294, 1298 (10th Cir. 2005), *amended and superseded on reh'g by* 453 F.3d 1237 (10th Cir. 2006).

In a different matter, the Board of Immigration Appeals, in *In re Briones*,[151] issued an order concluding that the Attorney General's discretion under the first provision *was* limited by the second. In *Padilla-Caldera II*, the Tenth Circuit acknowledged that the agency's interpretation was reasonable (despite the conflict with *Padilla-Caldera I*) and deferred to the agency under *Chevron* and *Brand X*.[152]

In *De Niz Robles v. Lynch*,[153] the Tenth Circuit confronted the question of what interpretation applied between the decision in *Padilla-Caldera I* and the decision in *Briones*. In an opinion by then-Judge Gorsuch, the Tenth Circuit held that *Briones* should not apply to such applicants.[154] Such an application would mean giving the adjudication in *Briones* retroactive effect, because individuals made decisions based on *Padilla-Caldera I* but would be judged in accordance with the harsher rule of *Briones*.[155]

Judge Gorsuch found such retroactivity unacceptable.[156] While *Briones* was an adjudication, Judge Gorsuch concluded that

> [f]orm . . . can't obscure the fact that an agency exercising its *Chevron* step two/ *Brand X* powers acts in substance a lot less like a judicial actor interpreting existing law and a good deal more like a legislative actor making new policy—certainly as much like a legislator as the rulemaking agency in *Bowen*—and thus fairly subject to the same presumption of prospectivity that attaches there.[157]

It would often be difficult to determine whether adjudications were covert exercises of legislative power,[158] but the exercise was necessary. Applying *Bowen*'s strict distinction between rulemaking and adjudication "would create a strange incentive for [agencies] to eschew the Court's stated preference for rulemaking—and render *Bowen* easily evaded."[159]

In a later decision, Judge Gorsuch extended the reasoning. In *Gutierrez-Brizuela v. Lynch*,[160] the Tenth Circuit held that "*Briones* went into effect in this circuit only when this court handed down *Padilla-Caldera II*," the decision holding that *Briones* was valid.[161]

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151. 24 I. & N. Dec. 355 (BIA 2007).

152. Padilla-Caldera v. Holder (*Padilla-Caldera II*), 637 F.3d 1140, 1402 (10th Cir. 2011).

153. 803 F.3d 1165 (10th Cir. 2015).

154. *Id.* at 1172.

155. *Id.* at 1168-69.

156. *Id.* at 1172.

157. *Id.* at 1173.

158. *Id.* at 1174.

159. *Id.* at 1173.

160. 834 F.3d 1142 (10th Cir. 2016).

161. *Id.* at 1145.

A full evaluation of Judge Gorsuch's opinions is unnecessary,[162] but two points stand out. To begin, the approach blurs the distinction between rulemakings and adjudications. His opinions were surely right to observe that the distinction between the procedures of rulemaking and adjudication does not align precisely to the distinction between the powers of lawmaking and law interpretation.[163] But the result of an adjudication must be justified by pre-existing rules and statutes, while a rulemaking can (of course) make new rules. If the Tenth Circuit did not believe that *Briones* was justified by the legal materials already in place, it could and should have rejected it in *Padilla-Caldera II*. Judge Gorsuch muddled this distinction by creating a new category—adjudications equivalent to rulemakings—which could not be identified through any straightforward formula. The lack of a clear formula could have unfortunate consequences, such as encouraging agencies to craft orders in a manner that avoids general statements and fails to provide guidance to other parties.[164]

The approach also raises uncomfortable separation of powers issues, as it requires courts to step outside of their traditional role of resolving concrete cases and controversies. If a new agency interpretation could not be applied unless a court had previously approved it, courts would have to approve an agency interpretation while declining to apply the interpretation to the case at hand.[165] Such advisory opinions do not fit comfortably into the role of federal courts,[166] and they

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162. For some thoughtful analyses, see Aaron Nielson, *Judge Gorsuch and* Chevron *Doctrine: A Defense*, 36 YALE J. ON REG.: NOTICE & COMMENT (Mar. 29, 2017), http://yalejreg.com/nc/judge-gorsuch-and-chevron-doctrine-a-defense/ [https://perma.cc/L8GU-3KXW]; Asher Steinberg, *Judge Gorsuch and* Chevron *Doctrine Part II: The Misuse of Precedent*, 36 YALE J. ON REG.: NOTICE & COMMENT (Mar. 28, 2017), http://yalejreg.com/nc/judge-gorsuch-and-chevron-doctrine-part-ii-the-misuse-of-precedent-by-asher-steinberg/ [https://perma.cc/FXW5-JR8V]; David Feder, *The Administrative Law Originalism of Neil Gorsuch*, 36 YALE J. ON REG.: NOTICE & COMMENT (Nov. 21, 2016), http://yalejreg.com/nc/the-administrative-law-originalism-of-neil-gorsuch/ [https://perma.cc/572A-L8H3].

163. *Cf.* Kovvali, *supra* note 138, at 851 ("[D]espite their beguiling forms, the mechanism that the agency uses to make decisions is imperfect evidence of the true nature of the power that the agency is exercising.").

164. For example, agencies may attempt to write adjudicative orders narrowly to try to avoid offending judicial sensibilities; however, this would reduce notice to other parties. Agencies might also try to rely more heavily on factual findings in adjudications which would similarly reduce notice and would insulate decisions from review. *See* Kovvali, *supra* note 138, at 852 n.18 ("[A]n agency with control over fact-finding can find whatever facts are needed to justify the outcomes it wishes to reach.").

165. *Gutierrez-Brizuela*, 834 F.3d at 1148.

166. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3529.1 (3d ed. 2017) ("The oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions."). As Judge Gorsuch observed, there are contexts in which prospective decisions are rendered. Faced with the task of regulating officials, courts have evolved a system of prospective decisionmaking through the qualified immunity doctrine. *Gutierrez-Brizuela*, 834 F.3d at 1148. The point fits within a critique of his approach: Prospective statements are not necessarily an exercise of

are arguably inconsistent with the text of the Administrative Procedure Act.[167]

In sum, the Supreme Court sought to limit agency power in *Bowen* by limiting retroactive rulemakings. To ensure the integrity of this prohibition and eliminate any incentive for agencies to proceed through adjudications, Judge Gorsuch found it necessary to make significant changes to other areas of administrative law.[168] These changes could in turn have unfortunate consequences.

3. Limits on Seminole Rock *Could Create an Incentive to Use Adjudication*

Reforming *Seminole Rock* could also have unintended consequences. For example, Professor Aaron Nielson has observed that *Seminole Rock* does not exist in a vacuum.[169] *Seminole Rock* has the effect of further empowering agencies that choose to undertake rulemaking.[170] Weakening *Seminole Rock* would reduce the incentive to use rulemaking instead of adjudications.

Under a precedent generally dubbed *Chenery II*, agencies have discretion to make policy either through adjudication or through rulemaking.[171] If an agency chooses to set policy through adjudication, courts will generally defer to it.[172] Similarly, if an agency chooses to set policy by promulgating then interpreting rules, courts will still generally defer to it under *Seminole Rock*. Limiting *Seminole Rock* would shatter this symmetry and create an incentive for agencies to proceed by adjudication (which would allow them to obtain deference) instead of rulemaking.[173] If agencies acted on this changed incentive, the result would be a net loss for those who seek to increase notice to regulated parties given the inherently ex post nature of adjudication.[174]

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legislative power—courts are issuing prospective statements even though they are not entitled to wield legislative power—and they are invaluable when filling a regulatory function.

167. The judicial review provision of the APA only authorizes a "reviewing court" to decide a "*relevant* question[] of law" "[t]o the extent *necessary* to decision and *when presented*." 5 U.S.C. § 706 (2012) (emphasis added). Addressing issues unnecessary to resolution of the case at hand would arguably be inconsistent with this statutory command.

168. Of course, Judge Gorsuch might have taken a more modest approach, emphasizing issues of notice and reasonable reliance instead of highlighting a purported structural issue. *Cf. infra* Part III.C.1.

169. *See* Aaron L. Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943 (2017).

170. *Id.*

171. SEC v. Chenery Corp., 332 U.S. 194, 207 (1947).

172. *See id.*; United States v. Mead Corp., 533 U.S. 218, 230, 230 n.11 (2001).

173. Nielson, *supra* note 169, at 982-85.

174. *Id.* at 985-89. It is far from obvious that substitution toward adjudication would be undesirable. A formal adjudication entails "extensive hearing and participation rights as well as significant constraints on the agency's decisionmaking process." Stephenson & Pogoriler, *supra* note 17, at 1485-86; *see also* Knudsen & Wildermuth, *supra* note 43, at 85.

Professor Nielson thus suggests that reforms to *Seminole Rock* should be accompanied by broader reforms designed to "tame" *Chenery II*, such as limiting deference to agency interpretations announced in adjudications[175] and bolstering fair notice requirements.[176]

The general pattern is the same as for the other examples of limits on *Chevron* and limits on retroactive rules. Reform in one area of administrative law produces undesired consequences which may require reforms in other areas of administrative law. But it does differ from the other examples in the magnitude of the potential consequences. *Chenery II* is a core administrative law doctrine that was issued in the early days of the APA. It reflects recognition of Congress's policy judgment to allow agencies to choose whether to set precise requirements ex ante through rulemaking or to flesh out requirements ex post through adjudication.[177] Undermining the doctrine is likely to have further consequences.

C. Reforms Should Have a Clearly-Identified Target

The potential for unintended consequences shows the importance of identifying a clear target and crafting precise solution. But much of the analysis in the administrative law space has an impressionistic feel. Reformers deploy constitutional rhetoric without clearly making the argument that constitutional law requires their preferred results, they make practical arguments without providing data to justify their empirical claims, and they use separation of powers language to describe problems relating to notice. These issues affect much of the discourse around *Seminole Rock* reform.

1. Administrative Law Arguments Often Have an Unclear Basis, Leading to Untargeted Remedies

For all of its rhetorical brilliance, then-Judge Gorsuch's analysis for the Tenth Circuit in *De Niz Robles* is not entirely clear about the source of the principle that it applies.[178] After conceding that Supreme Court precedent dispensed with his separation of powers concerns,[179] Judge Gorsuch offered the following puzzling passage:

Agency decisions after formal adjudications may thus be especially deserving of deference. Adjudications are also more insulated from political interference than rulemakings, which is a particularly desirable feature if separation of powers is a concern. *See* Kovvali, *supra* note 138, at 869.

175. Nielson, *supra* note 169, at 992.

176. *Id.* at 993.

177. *See* Sunstein & Vermeule, *supra* note 13, at 313-14.

178. De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015) is discussed in greater detail above. *See supra* Part III.B.2.

179. *De Niz Robles*, 803 F.3d at 1171.

> Coming at it from another angle, if the separation of powers doesn't forbid this form of decision-making outright, might second-order constitutional protections sounding in due process and equal protection, as embodied in our longstanding traditions and precedents addressing retroactivity in the law, sometimes constrain the retroactive application of its results? We think the answer yes. . . . The presumption of prospectivity attaches to Congress's own work unless it plainly indicates an intention to act retroactively. That same presumption, we think, should attach when Congress's delegates seek to exercise delegated legislative policymaking authority: their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application.[180]

Read carefully, the passage seems to suggest that the result is driven by "constitutional protections," but then goes on to suggest that it is merely a "presumption" about congressional intent at work.[181]

The confusion makes it difficult to evaluate the reasoning. If it is merely a statement about congressional intent, can it be disputed using statutory signals? If so, can such a signal be found in Congress's decision to give the agency the ability to resolve issues in adjudications? After all, by "ancient tradition," adjudication has entailed retroactive application of decisions.[182]

The reasoning is also challenging in a different sense, as it hopscotches from admittedly invalid separation of powers complaints, to rights-based concerns sounding in due process and equal protection, to a separation of powers remedy. If the issue were due process and fairness to the affected litigants, the court could easily have devised a narrower doctrinal principle that focused on notice and litigants' reliance interests.[183] Instead, it announced a broad principle that attacked core administrative law doctrines, like *Chevron* and *Chenery II*, by blurring the line between legislative and adjudicative action.[184]

2. Seminole Rock *Critiques Often Have Unclear Targets*

Similar confusions abound in commentary about *Seminole Rock*. The latest drive toward reform has been couched in terms of separation of powers concerns, which are problematic at best; pushed forward

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180. *Id.* at 1171-72.

181. *Id.* at 1172. This is not a mere slip of the tongue. The court implies elsewhere that it is enforcing constitutional requirements elsewhere. *See id.* at 1174 (acknowledging the difficulty of applying the distinction drawn in the opinion but stating that "the difficulty of a task is not reason enough to abandon it, especially if it illuminates and aids in the enforcement of underlying constitutional demands").

182. *Id.* at 1170.

183. The opinion did evaluate reliance interests, which were exceptionally strong, but it was deliberately obscure about what impact the consideration had. *See id.* at 1175, 1178.

184. *See supra* Part III.B.2.

using commentary regarding due process or notice; and ultimately used to support a separation-of-powers style remedy.

The critics of *Seminole Rock* insist that the doctrine allows agencies to combine legislative and judicial power by issuing regulations and interpreting them.[185] But as Professors Sunstein and Vermeule have observed, "[t]hese activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.' "[186] Sunstein and Vermeule also observe that there is a profound mismatch between the arguments being deployed and their target.[187] If this type of combination of activities offends the Constitution, as Justice Thomas has suggested, much of the administrative state would violate the Constitution as well.[188] This claim about constitutional law is not terribly appealing—it certainly did not seem to appeal to Justice Scalia.[189] And any claim that the principle is incorporated into statutory law must be qualified at best.[190] Yet without such claims, it is hard to see what the reformers are trying to accomplish.[191]

One possible answer is that the *real* concern is a lack of notice to regulated parties. The separation of powers issues cited by critics are important only insofar as they create an incentive for agencies to promulgate vague rules that leave regulated parties unsure of what conduct will trigger liability, thus depriving them of proper notice.[192] In other words, this may be a rights problem disguised as a structural

185. *See supra* notes 175-188 and accompanying text. As discussed below, these concerns also do not apply to certain statutory schemes. *See infra* Part IV.B.1; Kovvali, *supra* note 138, at 849.

186. Sunstein & Vermeule, *supra* note 13, at 311 (quoting City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013)). Admittedly, this argument smacks of what Professor Paul M. Bator once derisively called "the theological approach" to separation of powers issues: It assumes that the powers assigned to an executive agency are executive in nature because an executive agency is incapable of receiving legislative or judicial power. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 240-41 (1990). But perhaps a formalist objection to *Seminole Rock* warrants a formalist response.

187. Sunstein & Vermeule, *supra* note 13, at 312.

188. *Id.*

189. *Id.*

190. *See infra* Part IV.B.1.

191. At times, Professor Manning suggests that the lack of an enforceable constitutional norm *strengthens* the case for imposing a less-deferential system of judicial review. He writes that such an approach can "serve as a constitutional doctrine of second best, indirectly preserving structural norms that the Court will not enforce directly by invalidating acts of Congress." Manning, *Constitutional Structure and Judicial Deference*, *supra* note 4, at 633. There is some value to this mode of analysis. *See* Kovvali, *supra* note 138, at 850. But it is strange to insist that although the Constitution permits the administrative state, judges should not go too far and allow the administrative state to function effectively. If a measure is effective, and if the courts are not prepared to find the measure unconstitutional, it is hard to see why courts should insist on a less effective approach.

192. *See* Nielson, *supra* note 169, at 995-96.

problem. This type of problem does not require a sweeping structural remedy, like overturning *Seminole Rock* across the board—courts can evaluate the amount of notice afforded to parties on a case-by-case basis and deny deference where appropriate.[193]

It is also unclear exactly how the problem should be defined. There are sometimes sound reasons for articulating a policy in a relatively vague rule and giving it content through ex post activities such as adjudications, instead of articulating it in a relatively precise rule, thus giving it content ex ante through rulemaking.[194] "Indeed, it might sometimes be desirable for agencies to build a bit of flexibility into their rules by writing them in somewhat open-ended terms and fleshing them out as the agency gains experience with implementing the regulatory program."[195] The question of how precisely to frame a regulation is itself a technical issue, which the Supreme Court has repeatedly left to the sound discretion of agencies as it did in *Chenery II*.[196]

As a result, the problem cannot be vagueness in the abstract. A relatively vague rule can be an appropriate choice and consistent with congressional intent. The issue must be gamesmanship; that is, an agency's decision to use a vague regulation *because* of its desire to abuse *Seminole Rock* as opposed to a desire to set an optimal policy based on legitimate criteria. Abolishing *Seminole Rock* across the board is not necessary to address this relatively narrow problem.[197] To do so could be the administrative law equivalent of breaking a butterfly upon a wheel.[198]

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193. *See, e.g.*, Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 157 (2012) (refusing to defer where regulated parties could not have inferred meaning); Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (refusing to defer where regulation did not reduce statutory ambiguity).

In weighing this consideration, it is also worth noting that once an agency has announced its interpretation of a rule, *Seminole Rock* deference actually increases the confidence of regulated entities by giving them confidence that the interpretation will be sustained in court. Denying deference would diminish their confidence.

194. Professor Louis Kaplow uses the terms "rules" and "standards" to distinguish between precise formulations of policy and relatively imprecise formulations that are given content ex post. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992). Kaplow demonstrates that there are situations in which a standard can be preferable, as when an issue will arise only "rarely, and in settings that vary substantially." *Id.* at 563.

195. Stephenson & Pogoriler, *supra* note 17, at 1459.

196. *See id.* at 1470; *see also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (plurality opinion); *id.* at 777-78 (Douglas, J., dissenting); SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

197. Indeed, a more selective approach could be more effective in eliminating incentives for this type of gamesmanship. *See infra* Part IV.A.4.

198. With apologies to Alexander Pope. ALEXANDER POPE, EPISTLE TO DR. ARBUTHNOT, 297 (1735).

IV. CONTEXT-SPECIFIC *SEMINOLE ROCK*

There is an obvious drive for reform of *Seminole Rock* doctrine. The principles identified above indicate that reform must be handled with a focus on statutory law, an attention to potential unintended consequences, and a precise targeting on the object of the reform. These principles support an approach grounded in the individual statutes that create and structure particular regulatory regimes and agencies.[199]

A close examination of regulatory statutes reveals a rich set of statutory guideposts that courts can use to determine whether *Seminole Rock* deference is appropriate on a scheme-by-scheme basis.[200] For example, courts could consult the structure of the Securities Exchange Act of 1934 in deciding whether the Securities and Exchange Commission is entitled to deference on its interpretation of rules promulgated under that statute; courts could consult the structure of the Fair Labor Standards Act in deciding whether the Department of Labor is entitled to deference on its interpretation of rules promulgated under that statute; and so on. This approach would diminish incentives for gamesmanship while bringing the deference regime into closer alignment with the governing statutes.

This analysis is also relevant to any congressional effort to reform *Seminole Rock*. Congress should also make decisions about deference on a scheme-by-scheme basis. While Congress is not obligated to draw inferences from existing statutes—it is free to write new ones—it would be wise to consider the judgments incorporated into the existing statutes when devising a new approach, as well as to consider the differing impact that deference has in different contexts.

A. Courts Should Look to Guideposts in the Organic Statutes

A context-specific regime would have several advantages. It would bring statutes to the forefront of the *Seminole Rock* analysis, it would allow courts to take a minimalist approach that controls unintended consequences, and it would allow for closer targeting at specific issues. To the extent it creates uncertainty, the uncertainty can be useful in altering agency incentives.

1. The Approach Would Bring Greater Focus on the Statutes

Most obviously, an approach to *Seminole Rock* reform that is based on statutory guideposts would bring the focus back to congressional intent as expressed in the text and structure of relevant enactments. Instead of using the open-textured nature of the APA as an excuse to

199. *See infra* Part IV.A.

200. *See infra* Part IV.B.

impose a particular political philosophy,[201] courts would be encouraged to consult the relevant materials enacted by Congress in each individual case.

2. Minimalism Can Help Control Unintended Consequences

Decisions under the regime would also be more tailored than a sweeping abolition of *Seminole Rock* and less likely to create undesirable consequences. For example, abolishing *Seminole Rock* would alter the strategic incentives for different agencies in different ways given particular features of the statutory schemes they administer.[202] Courts can weigh that concern in deciding whether those particular agencies should receive deference.

The approach would also allow courts to "go slow" and gain experience with the consequences of *Seminole Rock* reform for individual agencies. The courts can issue a ruling limited to a specific regulatory regime and observe the effects before issuing a broader ruling. Courts can use their experiences to calibrate their level of skepticism of deference. Going slowly and basing decisions on statutory features would also allow Congress to react to rulings.

Indeed, Congress has arguably already required the courts to move slowly. The judicial review provision of the APA authorizes courts to decide only "relevant questions of law" and only "[t]o the extent *necessary* to decision and when presented."[203] This language calls for a minimalist approach in which courts consider only the issues presented by the particular cases before them.[204] A tailored decision about deference within the particular regulatory regime at issue in a case is more consistent with this statutory command than a sweeping pronouncement about deference across the board.

3. The Statutory Approach Would Permit Decisions that Are More Precisely Targeted on the Problem

Different regulatory regimes present different problems. For example, the latest drive toward reform is based on separation of powers rhetoric.[205] But the separation of powers concern only applies to certain regulatory schemes.[206] A scheme-by-scheme approach allows for more careful targeting at the precise problem.

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201. *See* Manning, *Constitutional Structure and Judicial Deference*, *supra* note 4, at 682.

202. *See infra* Part IV.B.

203. 5 U.S.C. § 706 (2012) (emphasis added).

204. *See* Kovvali, *supra* note 117.

205. *See supra* Part II.B.

206. *See infra* Part IV.B.1; Kovvali, *supra* note 138, at 849.

4. Any Uncertainty Would Have Strategic Value

Regimes of this type are often criticized as creating uncertainty.[207] In this instance, uncertainty can be productive because agencies writing rules would be unsure of whether they would be able to obtain deference at a later date. This would reduce any *Seminole Rock*-related incentive to write rules in a vague way.[208]

Admittedly, there would be some undesirable uncertainty for regulated entities as to whether *Seminole Rock* applied to an agency interpretation, at least until a body of precedents had been built up.[209] But this effect should not be overstated. Few responsible lawyers would advise a client not to worry about a regulatory interpretation that is plausibly supported by the text of a rule, even if there is some chance that deference would not be accorded to the agency's choice amongst the plausible alternatives. As a practical matter, uncertainty about the availability of *Seminole Rock* will thus have limited consequences. There is also no relevant uncertainty for congressional drafters—if they are unable to determine what level of deference would apply, they always have the option of speaking directly to the deference issue.

A more abstract but related concern is that doctrines of this type would further a balkanization of administrative law. A context-specific approach driven by features of particular organic statutes would shift weight away from core administrative law doctrines toward the vast and diverse set of regulatory enactments. Taken to an extreme, the centrifugal forces exerted by such an approach would undermine the coherence of administrative law and reduce it to the status of a "Law of the Horse"[210]: Just as there is little value to a single law school course that covered cases on the theft of horses, betting on horses, contracts involving horses, transactions secured by property interests in horses, negligence by horse veterinarians, and the like, there would be little value to a law school course on administrative law.[211] While the

207. *See* United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) ("The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."); Aaron Nielson, *Cf.* Auer v. Robbins, 21 TEX. REV. L. & POL. 303, 306 (2017) (noting that although Justice Scalia was eager to overturn *Seminole Rock* deference, "[h]e was not going to jettison a bright-line test in favor of a mushy balancing test.").

208. Of course, agencies could still have legitimate policy-based reasons for writing a relatively vague rule. *See supra* notes 190-92 and accompanying text.

209. *See* Kaplow, *supra* note 194, at 605 ("[W]hen individuals are risk averse, their bearing of risk is socially undesirable. Because individuals tend to be less well informed concerning standards, they may bear more risk under standards, which would favor rules.").

210. *See* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 208-18 (1996).

211. *Id.*

cases covered would be linked by a common feature, an effort to stress that feature would do little to illuminate the relevant and dispositive principles.

But even in that extreme scenario, there would be few costs. If Congress finds the backdrop too confusing to legislate against, it can always specify the desired level of deference when it passes new organic statutes or updates existing regimes. Also, it would be easier for Congress to manage the process on a scheme-by-scheme basis than if reformers managed to abolish core doctrines like *Seminole Rock* across the board leaving Congress to pick up the pieces.

B. Statutory Guideposts

Of course, the statutory approach does require some cooperation from Congress. Unless Congress sends meaningful statutory signals about the appropriate approach, courts cannot draw inferences from them. There is room for pessimism on this score: "In the deference context, no one on the Court seems to think that the texts of the APA or the organic acts offer many answers."[212] And indeed, the APA does seem to be a barren source.[213]

But a closer look at the variety of organic statutes enacted by Congress shows that there are useful guideposts for reviewing courts to employ. Several statutory regimes can be understood as incorporating a congressional command that an agency must put content through a meaningful rulemaking process. Various statutes do not become operative until an agency has made rules;[214] some deny particular agencies the ability to conduct adjudications;[215] others impose special requirements on rulemaking;[216] and others still deny agencies enforcement discretion that could be used to avoid detailed rulemaking.[217] These statutory distinctions reflect congressional judgments that bear on the propriety of *Seminole Rock* deference.

1. Primary and Secondary Rules[218]

Congress has taken different approaches to empowering agencies. Some organic statutes adopt a "primary" rule and directly "impose duties" on regulated entities; such statutes provide that regulated entities

212. Manning, *Tribute*, *supra* note 85, at 466.

213. *See supra* notes 88-90; Sunstein & Vermeule, *supra* note 13, at 303.

214. *See infra* Part IV.B.1.

215. *See infra* Part IV.B.2-B.3.

216. *See infra* Part IV.B.4.

217. *See infra* Part IV.B.5

218. This discussion is drawn from Kovvali, *supra* note 138, at 855.

"are required to do or abstain from certain actions."[219] An agency does not need to adopt a legislative rule before enforcing such duties through civil actions and adjudications. For example, the National Labor Relations Act directly imposes a duty not to engage in various unfair labor practices,[220] and the National Labor Relations Board is free to enforce that duty through adjudications alone.[221]

Other organic statutes adopt a "secondary" rule that confers powers on an agency, allowing the agency to "introduce new rules of the primary type."[222] Until an agency exercises this power and adopts a legislative rule through the rulemaking process, there are no duties binding regulated entities, and there is nothing for the agency to enforce through civil actions or adjudications. For example, Section 14(b) of the Securities Exchange Act of 1934 is a secondary statute that makes it unlawful for certain persons "to give, or to refrain from giving a proxy" "in contravention of *such rules and regulations* as the [Securities and Exchange] Commission *may prescribe*."[223] Until the Securities and Exchange Commission (SEC) promulgates a rule through rulemaking, there are no legal duties for the agency to enforce under the secondary statute.

The distinction between primary and secondary statutes has important implications for the application of *Seminole Rock* deference. First, the separation of powers criticism of *Seminole Rock* is not applicable to agency action under a primary statute. Rulemaking under a primary statute is not an exercise of legislative power—the statute itself creates duties that the agency is empowered to enforce through actions and adjudications. Instead, rulemaking under a primary statute is merely interpretation of the statutory duties, which affords greater clarity to regulated entities. As a result, agency interpretations of agency rules under primary statutes do not combine legislative power with interpretive power; it is interpretation all the way down. By contrast, rulemaking under a secondary statute is an exercise of legislative power—it creates duties where no duties were present before. As a result, agency interpretations of agency rules under secondary statutes do combine different types of power. This suggests that *Seminole Rock* deference is more appropriate for agency interpretations of rules promulgated under primary statutes than for agency interpretations of rules promulgated under secondary statutes.

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219. H.L.A. HART, THE CONCEPT OF LAW 81 (Paul Craig ed., Oxford Univ. Press 3d ed. 2012).

220. *See* 29 U.S.C. § 158 (2012).

221. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion.").

222. HART, *supra* note 219, at 81.

223. 15 U.S.C. § 78n(b)(1) (2012) (emphasis added).

Second, the vagueness arguably encouraged by *Seminole Rock* is more destructive with respect to secondary statutes. Although a vague rule promulgated under a primary statute *fails to resolve* statutory uncertainty, vague rules under a secondary statute *create* uncertainty. When an agency promulgates a vague rule under a primary statute, it is merely failing to relinquish a power given to it by Congress. By contrast, a vague rule under a secondary statute amounts to self-delegation, because it creates options for the agency that did not exist previously.

Third, the risk that reform will prompt strategic substitution of rulemaking for adjudication[224] is somewhat less acute with respect to secondary statutes. When an agency is acting under a secondary statute, adjudications are not a complete substitute for rulemaking: until the agency has promulgated a rule; there is no duty for the agency to apply or interpret in an adjudication.[225] The agency must use rulemaking to create duties for the agency to apply through adjudications. As a result, denying *Seminole Rock* deference to interpretations of rules promulgated under secondary statutes will be somewhat less likely to drive the agency toward adjudications.

Finally, enactment of a secondary statute should be understood as a congressional command to the agency to promulgate a precise rule, which would weigh against application of *Seminole Rock* deference.[226] A secondary statute obligates the agency to engage in rulemaking before it can proceed. There would be few legitimate reasons to insist on such rulemaking if it were not possible for the agency to formulate a relatively precise rule.[227] If no precise rule were possible, the agency would inevitably go through the empty ritual of promulgating a vague rule before engaging in the real work of giving meaning to the law through adjudications or enforcement actions. Assuming Congress would not insist on empty formalities, a congressional choice to use a

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224. *See supra* Part III.B.3.

225. *See* Nielson, *supra* note 169, at 977.

226. *See* Stephenson & Pogoriler, *supra* note 20, at 1481 ("Where Congress has established a system in which the agency lacks the power to act until it first promulgates a valid set of legislative rules, it is usually reasonable to suppose that Congress intends for those rules (and their interpretation) to be knowable in advance.").

227. Legislators might use a secondary statute to take credit for solving a problem while making agencies responsible for tough choices. This point can be framed in either pessimistic or optimistic terms. The approach allows legislators to play politics and shift blame. *See* Stephenson & Pogoriler, *supra* note 20, at 1461 n.52. But this is hardly a legitimate rationale. One stronger justification is that the approach also allows legislators to place decisions in the hands of expert technocrats who will not be swayed by the "sewer talk" that governs ordinary legislative deliberations. *See* CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 4-5 (2013); *see also* Stephenson & Pogoriler, *supra* note 20, at 1501 ("Indeed, sometimes the whole point of delegation to agencies is to insulate certain decisions from the vicissitudes of day-to-day politics; that is why we have (and the courts have upheld) independent agencies in the first place.").

secondary rule amounts to a judgment that precision in rulemaking is possible. Denying *Seminole Rock* deference to interpretations of rules promulgated under a secondary statute would help enforce the congressional command by forcing the agency to put content through the rulemaking process.

2. Division of Rulemaking and Adjudicative Authority

Some statutes divide rulemaking and adjudicative authority. For example, the Occupational Safety and Health Administration (OSHA) makes rules under the Occupational Safety and Health Act and can initiate enforcement actions.[228] However, an independent entity called the Occupational Safety and Health Review Commission (OSHRC) adjudicates contested actions.[229] Although this type of division of responsibility is rare, Congress has deployed this approach elsewhere.[230]

Separation of powers concerns may seem to be mitigated by the division of authority, suggesting that *Seminole Rock* deference is less problematic in the context of a divided regime. However, the Supreme Court has held that *Seminole Rock* deference should be accorded to the rulemaking agency in such regimes, not the adjudicative agency.[231] This rule undoes the separation of powers benefits of a divided regime by placing interpretive power in the hands of the lawmaking agency.[232]

Even if the Supreme Court reversed course, the existence of a split administrative regime should weigh against application of *Seminole Rock* deference in those situations. First, a divided regime is more than a signal from Congress that legislators like OSHA should not control adjudications rendered by adjudicators like OSHRC. It is also a signal from Congress that adjudicators like OSHRC should not be allowed to wield legislative authority like that granted to OSHA.[233] Deferring to an adjudicator's informal interpretations would allow it to rewrite the legislator's rules, albeit within defined limits.[234] Denying *Seminole Rock* deference altogether would help enforce Congress's allocation of responsibilities.

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228. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 147-48 (1991).

229. *See id.*

230. *See* Stephenson & Pogoriler, *supra* note 20, at 1497 (collecting examples).

231. *See Martin*, 499 U.S. at 152-53.

232. *See* Stephenson & Pogoriler, *supra* note 20, at 1502-03.

233. It is also far from obvious that the adjudicator is the weaker party in the relationship, and that the courts should work to tip the scales in its favor and achieve balance. An adjudicator's control over the fact-finding process gives it substantial power to engineer outcomes on a case-by-case basis. *See* Kovvali, *supra* note 138, at 852 n.18.

234. The adjudicator's interpretation would still be rejected if it was "plainly erroneous or inconsistent with the regulation," Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945), or if it ran afoul of other limitations on the deference doctrine.

Second, in a divided regime, the strategic substitution effect described by Professor Nielson[235] does not apply—denying *Seminole Rock* deference would not cause agencies to shift from rulemaking to making policy through adjudication, because adjudications are not controlled by the agency that makes rules.[236] As a result, the concern he identifies with limiting *Seminole Rock* would not apply in the context of a divided administrative regime.

Finally, a split enforcement regime may also be taken as a signal that Congress was especially concerned with separation of powers issues in the particular substantive context. At a minimum, it would mean that Congress chose not to give an agency a free choice of policymaking tools. As described above, a decision to give an agency rulemaking and adjudicative power is tantamount to a decision to give the agency a choice between promulgating precise rules (whose content is specified *ex ante*) and promulgating imprecise standards and giving them content at a later point.[237] When Congress divides authority in a particular substantive context, it denies any one agency this choice, suggesting congressional discomfort with imprecise standards in that context. This would suggest that *Seminole Rock* deference is inappropriate where rulemaking authority is separated from adjudicative authority.

3. Denial of Adjudicative Authority

Many statutory regimes require agencies to resolve particular questions through rulemaking rather than through adjudication. Much like a division of rulemaking and adjudicative authority,[238] such a factor would counsel against application of *Seminole Rock* deference.

This factor has already entered the discourse on *Seminole Rock*. For example, in *Shalala v. Guernsey Memorial Hospital*,[239] the dissenters urged that deference was not appropriate, flagging that the statute required the agency to set requirements for reimbursements *by regulation*.[240] Denying deference helps enforce such statutory commands by requiring agencies to put content through the rulemaking process.[241]

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235. *See* Nielson, *supra* note 169, at 977; *supra* Part III.B.3.

236. This does assume that there is no collaboration between rulemaking and adjudicative agencies, but the assumption is justified given the normal degree of insulation provided to protect the integrity of the adjudicative process. *See* 5 U.S.C. § 554(d) (2012) (APA provision providing general rule that adjudicators cannot report up to employees or agents engaged in investigative or prosecuting functions).

237. *See supra* notes 190-92 and accompanying text.

238. *See supra* Part IV.B.2.

239. 514 U.S. 87 (1995).

240. *Id.* at 109.

241. Professor Nielson has also noted that such statutory schemes do not create the possibility that an agency will substitute away from rulemaking to adjudication if *Seminole*

Of course, the factor must be deployed with some care. If Congress dictates that an agency is the only entity that can bring suit to enforce a regulation, the agency does have some measure of authority to decide on a case-by-case basis whether that regulation will be applied.[242] In some respects, that discretion allows the agency to achieve results comparable to those that could be achieved through adjudication.

4. Statutory Constraints on Rulemaking

Certain agencies are also subject to additional statutory constraints on rulemaking. For example, the SEC is under a special obligation to consider effects on "efficiency, competition, and capital formation" in making certain rules.[243] When Congress insists that agencies do additional work to put content through the rulemaking process, it is reasonable to infer that Congress does not want similar content put into force outside of the rulemaking process.

The inference is particularly clear where the statutory requirements are designed to foster deliberation or call on agency expertise. The SEC's obligation to consider financial effects has—somewhat controversially—been interpreted to require the agency to engage in a cost-benefit analysis and to defend the quality of that analysis in court.[244] By requiring the SEC to engage in that comprehensive analysis, Congress is making a statement that the analysis is valuable and cost-justified.[245] Further, the requirement of a comprehensive analysis can be understood as a statement that Congress only intended to delegate authority to the agency to the extent that the agency could demonstrate superior expertise or fact-based judgment. The congressional goals to be achieved by comprehensive analysis and demonstration of expertise are not well served by the type of informal proceedings that lead to statements that are candidates for *Seminole Rock* deference.

5. Denial of Enforcement Discretion

Some organic statutes only allow agencies to bring enforcement actions,[246] while other statutes allow private plaintiffs to bring suit in federal court.[247] If an agency has a monopoly on enforcement, it can

Rock deference is denied. *See* Nielson, *supra* note 169, at 977.

242. *See infra* Part IV.B.5.

243. Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c) (2006)).

244. *See* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015) (discussing and critiquing the requirement).

245. *Id.* at 887-88.

246. *E.g.*, 47 U.S.C. § 613(j) (2012) ("Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder.").

247. *E.g.*, 7 U.S.C. § 25 (2012) (authorizing private suits for violations).

decide that a rule will not be enforced in a particular circumstance. When the agency has this type of discretion, it suggests that deference is appropriate. But when Congress allows entities other than the agency to enforce agency regulations through private suits, it sends a strong signal that deference is not appropriate.

To see why, consider a situation in which an agency has a monopoly on enforcement authority. In such a situation, the agency would have essentially unreviewable authority to refuse to bring an enforcement action.[248] As a result, the agency would be free to insist upon a narrow interpretation of the regulation.[249] By contrast, authorizing private suits would mean that an agency's decision to not bring an enforcement action would not be the final word: Even if the agency does not sue, someone else might.[250]

Exclusive enforcement authority also allows an agency to pursue other strategies. For example, if an agency intends to achieve a particular result but wants flexibility regarding the details, it could announce a rule that is far more stringent than the desired outcome. The agency can then use its enforcement discretion to limit the effect of the rule to the desired circumstances by declining to bring any actions outside of those circumstances. This approach would allow the agency to achieve flexibility even if it is denied access to *Seminole Rock* deference—indeed, limiting *Seminole Rock* deference might cause agencies to pursue this suboptimal strategy.[251] By contrast, if other entities could enforce the overly-stringent rule, the agency would not have the

248. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985).

249. Kovvali, *supra* note 138, at 869 n.72. Naturally, the courts could still reject a broad interpretation of the regulation by dismissing or overturning an enforcement action based on an aggressive interpretation. The resulting bias in favor of a narrow interpretation of regulations may be justifiable on substantive grounds, like those captured by the rule of lenity. *Cf.* Sunstein & Vermeule, *supra* note 13, at 302 ("Perhaps many cases in which agencies seek to benefit from the *Auer* principle should be resolved against the government, on the theory that if agencies have not expressly regulated private conduct through a legislative rule, the matter is at an end.").

250. The point need not be limited to situations in which *private* suits are authorized. It also applies to situations where other agencies or state governments can bring suit. Courts already recognize that a decision to allocate power to several agencies suggests that no one agency has an authoritative take on certain legal issues. *See* Gonzales v. Oregon, 546 U.S. 243, 265 (2006) (declining to grant *Chevron* deference to the Attorney General because the Attorney General did not have "sole delegated authority under the" relevant statute).

251. Such an approach would impose real costs by allowing the agency to behave arbitrarily. To draw a rough analogy, speed limits on American roads are normally so stringent that no one complies. This allows traffic enforcement officers to "be selectively severe" and to use traffic enforcement to pursue other goals. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 3 (The Belknap Press of Harvard Univ. Press 2011). Although enforcement discretion is plainly executive in nature, it allows the enforcer to exercise the type of interpretive power that *Seminole Rock* critics complain of: "[W]ho or what determines the real speed limits, the velocity above which drivers risk traffic tickets or worse? The answer is: whatever police force patrols the relevant road. Law enforcers—state troopers and local cops—define the laws they enforce." *Id.*

ability to control the application of the rule and so would lack authority to determine its practical impact. The overly-stringent rule would be applied according to its terms.

As a result, a regulatory regime that allows legal questions to be resolved in different contexts, such as through private suits, suggests that deference is less appropriate. Admittedly, there are some countervailing considerations. When an agency is an actual party to a lawsuit, the interpretations it offers may be self-serving efforts to advance its litigation strategy. But that type of behavior can be—and already is—identified and policed on a case-by-case basis.[252]

Courts have taken some tentative steps in this direction, but they have generally relied on the somewhat abstract and formalistic notion that a judicially-inferred, private cause of action is uniquely within the judiciary's power to control.[253] This notion smacks of the old judicial approach, in which courts believed they had a prerogative to create and administer private judicial rights of action without grounding their analysis in the text and structure of the underlying statutes.[254] Moreover, this judicial approach does not reflect the realities of many regimes governing private suits—that they reflect input and action by all three branches.[255]

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252. *See* Christopher v. SmithKline Beecham Corp., 567 U.S. 142 , 155 (2011) (noting that deference is inappropriate when the interpretation is "nothing more than a 'convenient litigating position' " or a "*post hoc* rationalization") (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988)); *cf.* Comment, *Administrative Law*—Auer *Deference—Seventh Circuit Defers to Department of Education Amicus Brief Interpreting Student Loan Regulations*—Bible v. United Student Aid Funds, Inc., 129 HARV. L. REV. 2281, 2287 (2016) ("Practically, it appears that most judges already afford less deference to briefs than to more formal documents.").

253. *See* Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 145 n.8 (2011) (noting that the Court had "previously expressed skepticism over the degree to which the SEC should receive deference regarding the private right of action"); Pimco Funds: Pacific Inv. Mgmt Co. v. Mayer Brown LLP, 603 F.3d 144, 151 n.3 (2d Cir. 2010) ("We note at the outset that the SEC's views on the scope of the *judicially created* implied right of action available under § 10b and Rule 10b-5 are entitled to little or no deference."). Admittedly, courts have sent somewhat different signals when focusing on the *form* of the agency's articulation of its position. Courts will normally extend *Seminole Rock* deference to agency interpretations even if they are announced in amicus briefs in private suits. But there are exceptions to the principle which could be expanded. *See Christopher*, 567 U.S. at 155 (acknowledging that courts normally defer even when an "interpretation is advanced in a legal brief"; but, there are exceptions, as when the interpretation is "nothing more than a convenient litigating position" or a "*post hoc* rationalization") (internal citation omitted).

254. *See* Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (rejecting the "*ancien regime*" of a free-wheeling judicial approach and insisting on clear statutory signals before permitting private suits).

255. *See, e.g.*, Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 961, 968 (1994) (arguing that private suits under federal securities laws are built on judicial creativity and inaction by both the executive and judiciary).

6. Practical Considerations

Certain statutory regimes reflect practical judgments that bear on the propriety of *Seminole Rock* deference. While these arrangements send a less powerful signal than the congressional commands discussed above, they are worthy of consideration.

Some statutory provisions limit judicial review of certain administrative actions to the United States Court of Appeals for the District of Columbia Circuit.[256] Such statutory provisions are a mild indication that *Seminole Rock* deference is less necessary. Deference doctrines help create uniformity in courts across the country—if all courts nationwide defer to the single interpretation offered by the agency, there is less room for variation than if each court does what it thinks is best.[257] By concentrating review in a single court, such statutory provisions eliminate this rationale for deference. Such statutory provisions also signal that Congress wanted judicial review to be conducted by a court with relative expertise in administrative matters, which suggests a desire for a more searching analysis.

By contrast, many statutes contain safe harbor provisions to ensure that regulated entities cannot be held liable for conduct taken in the good faith belief that it was lawful.[258] Such provisions support the use of *Seminole Rock* deference. They suggest that Congress was aware of the need for regulatory flexibility in that particular context, and they limit the potential injustice caused by a non-obvious interpretation of a rule.

7. Substantive Canons

In certain contexts, courts construe legal texts in a manner that advances specific substantive preferences. For example, ambiguities in statutes governing benefits for veterans are normally resolved in veterans' favor,[259] and there is authority suggesting the same principle applies to ambiguities in regulations.[260] Courts have struggled to reconcile this canon with deference to agency interpretations.[261]

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256. Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 143 (2013) (noting that a significant number of statutes contain "jurisdictional provisions [that] grant exclusive jurisdiction to the D.C. Circuit"); *see, e.g.*, 42 U.S.C. § 300j-7(a)(1) (2012).

257. *See* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 621 (2013) (Scalia, J., concurring in part and dissenting in part) (acknowledging that under *Seminole Rock*, "[t]he country need not endure the uncertainty produced by divergent views of numerous district courts and courts of appeals" as to the proper reading of a regulation, though ultimately rejecting this consideration).

258. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1209 (2015) (giving 29 U.S.C. § 259(a) as an example).

259. *See* Brown v. Gardner, 513 U.S. 115, 117-19 (1994).

260. *See* Hodge v. West, 155 F.3d 1356, 1361-62 (Fed. Cir. 1998).

261. James D. Ridgway, *Toward a Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. MASS. L. REV. 388, 398-407 (2014).

This type of substantive canon could be understood as implementing Congress's instructions as to how a statutory regime should be administered. The Department of Veterans Affairs and other agencies operating under such instructions are required to speak clearly in a regulation—and brave the wrath of congressional overseers and pressure groups during the rulemaking process—to achieve a disfavored result. Denying *Seminole Rock* deference in such circumstances would further this requirement, in much the same way that denying deference can help enforce special rulemaking requirements.[262]

The Supreme Court declined an opportunity to pass on the interaction between substantive canons and *Seminole Rock* in *Kisor v. Wilkie*, instead using the case to tee up the question of whether *Seminole Rock* should be abolished entirely.[263] But that decision may have been based on idiosyncratic problems with *Kisor*.[264] In the future, giving effect to substantive canons could be a constructive step toward tailoring deference to statutory context.

V. CONCLUSION

Several members of Congress and the Supreme Court are clearly eager to remake administrative law. But administrative law reform should be undertaken carefully, with a focus on the existing statutes, an adequate appreciation of undesirable consequences, and careful targeting at a clearly defined problem. In the context of *Seminole Rock*, these principles weigh in favor of an approach that recognizes the salient features of the organic statutes that create particular regulatory regimes. Consulting guideposts in each organic statute will lead to a better and more tailored understanding of whether deference should be accorded.

262. *See supra* Part IV.B.4

263. *See* Petition for a Writ of Certiorari, *supra* note 79, at *i (stating that second question presented was "whether *Auer* deference should yield to a substantive canon of construction"); Kisor v. Wilkie, 139 S. Ct. 657 (2018) (only granting certiorari as to first question presented by the petition; that is, whether *Seminole Rock* should be overturned).

264. *See* Brief for Respondent in Opposition, *Kisor*, 139 S. Ct. 657 (No. 18-15), at *24 (noting that the issue had not been raised on a timely basis below, and that the lower courts had not addressed it).