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Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U.S. Courts of Appeals

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SPLITS IN THE *ROCK*: THE CONFLICTING INTERPRETATIONS OF THE *SEMINOLE ROCK* DEFERENCE DOCTRINE BY THE U.S. COURTS OF APPEALS

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The Seminole Rock *deference doctrine instructs federal courts to defer to an administrative agency's interpretation of its own regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation." This crucial administrative law doctrine has largely escaped judicial and scholarly examination for close to seventy years. And this is astonishing because, as Chief Justice Roberts recently observed, this deference doctrine goes "to the heart of administrative law" and* Seminole Rock *questions "arise as a matter of course on a regular basis."*

But, at long last, a newfound skepticism and willingness to reconsider the Seminole Rock *doctrine is gaining momentum in the U.S. Supreme Court. In the Court's 2012–2013 Term, at least three members of the Court explicitly suggested that they were interested in re-evaluating this deference regime. Thus, further examination of the doctrine is both warranted and timely, especially given the Supreme Court's likely review of the doctrine.*

With that in mind, this Article analyzes how the federal appellate courts have interpreted and applied the Seminole Rock *doctrine, also referred to as "*Auer *deference." This analysis reveals that there are inconsistencies—to the point of being characterized as widespread confusion—on many aspects of the* Seminole Rock *doctrine, including its scope, applicability, and the relevant factors to be weighed when applying the doctrine.*

The analysis further shows that the lack of consistency in the practical application of the Seminole Rock *deference regime cannot be ignored any further, particularly because agency regulations rather than statutes are the principal way in which legal rights and obligations are established today. Consequently, the Article concludes that there are*

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compelling pragmatic reasons why the Supreme Court should re-examine the doctrine to bring clarity to this important area of federal law.

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INTRODUCTION

For close to seventy years, the *Seminole Rock* deference doctrine has "lurked beneath the surface and evaded scholarly and judicial criticism."[1] The U.S. Supreme Court, in *Bowles v. Seminole Rock & Sand Co.*,[2] held that federal courts must defer to an administrative agency's interpretation of its own regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation."[3] This doctrine, which recently has been referred to as "*Auer* deference,"[4] is critically important in administrative law because agency regulations rather than statutes are the primary way in which the rights and obligations of private parties are established in the administrative state today.[5] And because courts regularly review agency interpretations of regulations, *Seminole Rock* questions "arise as a matter of course on a regular basis."[6]

Applying such a high level of deference, called by many a "controlling" deference standard,[7] is problematic for many reasons. For one, the

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1. Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 99 (2000); *see* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 696 (1996) ("*Seminole Rock* deference has not received anything like the attention devoted to *Chevron*, its more famous counterpart. But it is no less, and is arguably more, important to constitutional governance."); *see also* Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 229 (2013) (asserting that unlike *Chevron*, the *Seminole Rock* deference doctrine has "gone largely unexamined"); *cf.* Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587, 589 (1984) ("Although commentators have lavished attention on the subject of statutory construction, they have virtually ignored the problem of how to interpret regulations.").

2. 325 U.S. 410 (1945).

3. *Id.* at 414.

4. Auer v. Robbins, 519 U.S. 452, 461 (1997). It is unknown why the legal community now refers to it as *Auer* deference, instead of *Seminole Rock* deference. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1088–89 n.26 (2008) (observing and seeking to explain Justice Scalia's use of the term in his dissent in *Gonzales v. Oregon*, 546 U.S. 243, 277 (2006) (Scalia, J., dissenting)).

5. *See* Manning, *supra* note 1, at 614–15 (reasoning that *Seminole Rock* requires closer scrutiny as agency rules impact the public's legal rights and obligations more directly than statutes); *see also* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring) (noting that the *Seminole Rock* doctrine goes "to the heart of administrative law").

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

7. As I did in my article, Leske, *supra* note 1, at 230 & n.3, I will refer to *Seminole Rock* deference as "controlling" deference because it conforms to the Court's view that the agency's "administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414; *accord* Weaver, *supra* note 1, at 591 (calling certain deference rules, including *Seminole Rock*'s, "controlling"

application of the *Seminole Rock* standard can encourage the agency "to promulgate excessively vague legislative rules" and "leave the more difficult task of specification to the more flexible and unaccountable process of later 'interpreting' these open-ended regulations."[8] In other words, because the agency will know that its interpretation of its own vague application will likely prevail during judicial review, it has no incentive to go through the notice and comment process of the Administrative Procedure Act (APA).[9]

Furthermore, as persuasively argued by Professor John F. Manning in 1996, the current *Seminole Rock* standard also raises separation of powers concerns.[10] When a court defers to an administrative agency under *Seminole Rock*, the agency has, in a sense, both made the law, via the promulgation of its regulation, and interpreted that "law," by receiving controlling deference for its interpretation. This power of "self-interpretation"[11] thus "contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and law-exposition is especially dangerous to our liberties."[12]

Practically speaking, as noted by Professor Russell Weaver, the courts

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because they are outcome determinative). Other scholars have referred to it as "binding deference." *See* Manning, *supra* note 1, at 617 (discussing the concept of "binding deference," which requires "a reviewing court to accept an agency's reasonable interpretation of ambiguous legal texts, even when a court would construe those materials differently as a matter of first impression").

8. Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 290 (1999–2000); *see also* Robert A. Anthony & Michael Asimow, *The Court's Deferences—A Foolish Inconsistency*, 26 A.B.A. SEC. ADMIN. & REG. L. NEWS, no.1, Fall 2000, at 10–11 (observing that if an agency is confident that it will receive controlling deference for its interpretation, it creates "a powerful incentive for agencies to issue vague regulations, with the thought of creating the operative regulatory substance later through informal interpretations").

9. Administrative Procedure Act (APA), 5 U.S.C. § 552(a)(4)(A)(i) (2012); *see* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1309 (2007) (stating that "the [*Seminole Rock*] doctrine may tempt agencies to issue vague regulations through the relatively burdensome notice and comment process"); *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.").

10. *See* Manning, *supra* note 1, at 638–39, 654, 696 (discussing the relationship between *Chevron* and *Seminole Rock* and the "separation of lawmaking from law-exposition," and applying a separation of powers analysis to the *Seminole Rock* decision).

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

12. *Id.* at 617.

"have experienced great difficulty in interpreting regulations and applying the [*Seminole Rock*] deference rule to them."[13] Other legal scholars have also come to the conclusion that the amount of deference given to an agency when it interprets its own regulation is ambiguous at best.[14]

Last, *Seminole Rock* deference doctrine—at least as it is currently understood—appears to be wholly at odds with the APA.[15] As Professor Robert Anthony has set forth, the requirement that courts defer to an agency's interpretation of its regulation under *Seminole Rock* undermines the parallel requirement in the APA that the courts determine "'the meaning or applicability of the terms of an agency action.'"[16] Application of a controlling deference standard, such as the *Seminole Rock* standard, thus conflicts with the APA's goal to give "affected persons . . . recourse to an independent judicial interpreter of the agency's legislative act."[17] This is particularly so because, "after all, the agency is often an adverse party" in any dispute regarding the interpretation of that regulation.[18]

But at long last, the Supreme Court has finally taken note of the doctrinal concerns inherent in the *Seminole Rock* deference regime.[19]

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13. Weaver, *supra* note 1, at 589.

14. *See, e.g.*, Eskridge & Baer, *supra* note 4, at 1184 ("[T]he amount of deference *Seminole Rock* requires has always been ambiguous, also contributing to doctrinal confusion for those lower courts and commentators who follow such matters."); Hickman & Krueger, *supra* note 9, at 1307 ("The Court has not clearly established the bounds of *Seminole Rock* deference . . . .").

15. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 9–10 (1996) (stating that the intent of § 706 of the APA requiring a reviewing court to determine the meaning of the terms of an agency action "manifestly was to arm affected persons with recourse to an independent judicial interpreter of the agency's legislative act, where, after all, the agency is often an adverse party" and the role of the court is "a far cry" from pure deference to the agency).

16. *Id.* at 23 (internal citation omitted).

17. *Id.* at 9. Professor Anthony also contends that the *Seminole Rock* doctrine contradicts the APA's purpose by allowing an "exception for interpretative rules in § 553" because these rules should be subject to "plenary judicial review." Anthony & Asimow, *supra* note 8, at 11 (internal citation omitted).

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

19. Over the years, the Court has expressed some unease over the doctrine, but it is unlike the attention now given by several of the current Justices. For example, over twenty years ago, Justice Thurgood Marshall warned that *Seminole Rock* deference must not be "a license for an agency effectively to rewrite a regulation through interpretation." Mullins Coal Co., Inc. of Va. v. Dir., Office of Workers' Comp. Programs, 484 U.S. 135, 170 (1987) (Marshall, J., dissenting) (referencing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). Likewise, Justice Clarence Thomas (joined by three colleagues) suggested that "agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law." Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

Beginning in 2011, Justice Scalia has made his skepticism of the *Seminole Rock* doctrine known to the rest of the Court. In a short concurring opinion, he first openly opined: "For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity."[20] He then concluded that while the Court had "not been asked to reconsider *Auer* in the present case. . . . [he] will be receptive to doing so" in a future case.[21]

Then, in the Court's 2012–2013 Term, in *Decker v. Northwest Environmental Defense Center*, Justice Scalia signaled his continued displeasure with the vitality of the *Seminole Rock* doctrine.[22] This time he expressly called for the rejection of *Seminole Rock/Auer* deference based on his view that it has "no principled basis [and] contravenes one of the great rules of separation of powers [that he] who writes a law must not adjudge its violation."[23]

Justice Scalia's unabashed view encouraged Chief Justice Roberts, joined by Justice Alito, to write separately to agree that it "may be appropriate to reconsider that principle in an appropriate case" where "the issue is properly raised and argued."[24] The Chief Justice concluded by stating that practitioners are now "aware that there is some interest in reconsidering those cases."[25]

With the legal community now on clear notice that several members of the Court are interested in exploring not only the contours of the *Seminole Rock* doctrine, but also its continued existence as a deference doctrine, this Article seeks to contribute to the scarce scholarship on the issue. To do so, this Article analyzes how the federal appellate courts have interpreted the doctrine with the goal of highlighting the numerous, significant inconsistencies among the courts of appeals.[26] This analysis shows that in addition to doctrinal concerns voiced by both scholars and judges, there are compelling pragmatic reasons that *Seminole Rock* deference warrants the Supreme Court's re-examination.

Part I of this Article begins by briefly reviewing the *Seminole Rock* doctrine, its theoretical underpinnings, and the Supreme Court's recent

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20. Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

21. *Id.* (Scalia, J., concurring).

22. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part).

23. *Id.* at 1339, 1342 (Scalia, J., concurring in part and dissenting in part) (stating that "I believe that it is time to do so").

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

25. *Id.* at 1339 (Robert, C.J., concurring).

26. *See* Leske, *supra* note 1, at 244–71 (describing the Supreme Court's interpretation and application of the *Seminole Rock* doctrine).

interest in the doctrine.[27] Part II analyzes how the courts of appeals have applied the various factors that the U.S. Supreme Court has found important in its *Seminole Rock* analyses. It then evaluates the trends and the differences between and among the circuits regarding the application and interpretation of the doctrine. The Article concludes that the inconsistencies and splits among the circuit courts raise legitimate pragmatic concerns, which, in addition to doctrinal considerations, militate in favor of re-evaluation of the doctrine by the Supreme Court.

I. THE *SEMINOLE ROCK* DEFERENCE DOCTRINE

The Supreme Court in *Bowles v. Seminole Rock & Sand Co.* established a new standard to govern judicial review of an agency's interpretation of its own regulation.[28] Under *Seminole Rock*, courts must defer to an agency's interpretation of its regulation unless it "is plainly erroneous or inconsistent with the regulation."[29]

Before analyzing the interpretation and application of the doctrine by the U.S. Courts of Appeals, it is worthwhile to review the genesis of the doctrine, including its doctrinal underpinnings, as well as to explain the Supreme Court's recent interest in the doctrine. Accordingly, this Part begins by briefly discussing the Court's ruling in *Seminole Rock*. Next, it briefly examines the legal justification for granting controlling deference to an agency under the doctrine, which was not articulated by the Supreme Court until nearly fifty years after *Seminole Rock* was decided. Finally, it seeks to explain the Supreme Court's recent interest in the doctrine.

A. Bowles v. Seminole Rock & Sand Co.

The *Seminole Rock* standard under which a court must defer to an agency's interpretation of its regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation" was announced in a case decided in the midst of World War II involving the Emergency Price Control Act of 1942, which sought to curb wartime inflation.[30] In *Seminole Rock*, the Court was required to interpret and apply provisions of Maximum Price Regulation No. 188, part of a regime that brought price controls to nearly the entire American economy.[31]

A central requirement of the regulation at issue was that "each seller shall charge no more than the prices which he charged during the selected

27. *See* Manning, *supra* note 1, at 638–39, 654, 696.
28. 325 U.S. 410, 414 (1945).
29. *Id.*
30. *Id.* at 411, 413–14.
31. *Id.* at 411, 413.

base period of March 1 to 31, 1942."[32] The controversy in the case involved three parties: Seaboard Air Line Railway (Seaboard), V. P. Loftis Co., and Seminole Rock & Sand. In October 1941, Seaboard had entered into a contract with Seminole Rock & Sand to purchase crushed stone "when called for" at a price of 60 cents per ton, which Seminole Rock & Sand subsequently delivered to Seaboard in March 1942.[33] In January 1942, Seminole Rock & Sand entered into a contract with V. P. Loftis Co. to sell crushed stone at a price of $1.50 per ton, as needed.[34] V. P. Loftis Co., however, had been unable to use or store the stone until August of that year.[35]

Later, after Seminole Rock & Sand began to negotiate additional contracts for crushed stone with Seaboard for 85 cents and $1.00 per ton, Chester Bowles, the Administrator of the Office of Price Administration, sought to enjoin Seminole Rock & Sand from selling at a price higher than 60 cents per ton because there had been an actual delivery in March 1942 at that price.[36] Seminole Rock & Sand argued that there must have been both a charge and a delivery at that price to fix the ceiling price at 60 cents per ton.[37] Further, because the contract with Seaboard occurred in October 1941, the outstanding January 1942 contract with V.P. Loftis Co. calling for a $1.50 per ton should be considered the ceiling price.[38] The district court ruled that Seminole Rock & Sand had not violated the Maximum Price Regulation No. 188 because it agreed that $1.50 per ton was the highest price Seminole Rock & Sand had charged during the selected base period based on the January 1942 contract.[39] On appeal, the Fifth Circuit affirmed.[40]

The principal question for the Supreme Court was therefore whether Seminole Rock & Sand charged prices exceeding the regulatory maximum during the period in question.[41] Before it looked to the Administrator's interpretation of the regulation, the Court found that the regulatory language would only be probative if it was ambiguous.[42] If there was an ambiguity, it ruled, "a court must necessarily look to the administrative

32. *Id.* at 413.
33. *Id.* at 412.
34. *Id.*
35. *Id.*
36. *Id.* at 412, 415.
37. *Id.* at 415.
38. *Id.*
39. *Id.* at 412–13.
40. *Id.* at 413.
41. *Id.*
42. *Id.* at 414.

construction of the regulation."[43] And, when a court then determines the definition of the regulation, it held that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[44]

The Court then reviewed the regulation's language and considered the "administrative construction" of the regulation found in a bulletin issued at the time the Maximum Price Regulation No. 188 was issued.[45] In light of the ambiguous phrase "highest price charged during March, 1942" and "the consistent administrative interpretation" set forth in the bulletin interpreting that phrase, the Court found that the highest price of an *actual* delivery during March 1942 established the price ceiling.[46] Therefore, the Court found that both the district court and circuit court had erred in finding that $1.50 per ton, rather than 60 cents—which Seminole Rock & Sand had charged for the actual delivery of stone to Seaboard in March 1942—was the "highest price charged during March, 1942."[47] Thus, the Court deferred to the agency's interpretation of the regulation and reversed the judgment of the court of appeals.[48]

B. A Very Brief Doctrinal Explanation of Seminole Rock

Looking back, we now see that the Court's decision in *Seminole Rock* gave rise to a new administrative law standard that has governed the review of agencies' interpretations of their own regulations to this day. Surprisingly, however, when the Court in *Seminole Rock* held that administrative interpretation is the determining factor "unless it is plainly erroneous or inconsistent with the regulation," it did not explain the basis for this standard.[49] In fact, it was not until two cases in the early 1990s that the Court provided its reasoning for establishing the *Seminole Rock* doctrine.

The first case was *Martin v. Occupational Safety & Health Review Commission*.[50] In *Martin*, the Court noted that judicial deference to agency

43. *Id.*

44. *Id.*

45. *Id.* at 417.

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

47. *Id.* at 418.

48. *Id.*

49. *Id.* at 414.

50. 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."). For further background on *Martin*, see Leske, *supra* note 1.

interpretations was based on the agency's delegated lawmaking powers. Later, in *Pauley v. BethEnergy Mines, Inc.*,[51] the Court expanded upon its reasoning and explained that implicit in Congress's delegation to an agency is the authority to interpret regulations. And this delegation to agencies, in turn, is the foundation for giving agencies controlling deference for their interpretations.[52]

Although of enormous significance in determining the proper meaning of regulatory language, the Supreme Court largely avoided additional explanation of its controlling deference standard or any discussion in response to any perceived deficiencies or shortcomings of the doctrine. That would eventually change, but it would take another several decades for any further examination to take place.[53] In the meantime, the Supreme Court and appellate courts began developing various factors to be applied when considering agency deference under *Seminole Rock*, without regard to whether those factors were consistent with the doctrine's underpinnings or might otherwise be problematic.

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

The Supreme Court has been interpreting and applying the *Seminole Rock* doctrine on a somewhat regular basis since it established the doctrine in 1945.[54] The Court's opinions in these cases have generally shown its acceptance of the standard, but it has not hesitated to incorporate new factors or considerations into the *Seminole Rock* analysis on an ad hoc basis.[55] But it has only been within the past five years that members of the Court have expressed willingness to re-evaluate the doctrine. And this interest culminated with an outright statement by Chief Justice Roberts during the Court's 2012–2013 Term that there is interest in reconsidering the doctrine in a future case.[56]

The Court's June 2011 decision in *Talk America, Inc. v. Michigan Bell*

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51. 501 U.S. 680 (1991). For further background on *Pauley*, see Leske, *supra* note 1.

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

53. *See* Leske, *supra* note 1.

54. For a detailed review of the Supreme Court's interpretation and application of the *Seminole Rock* doctrine, see Leske, *supra* note 1, at 248–71.

55. *See infra* Part II for further discussion on these factors.

56. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring).

Telephone Co.[57] marked the Court's first signal that the *Seminole Rock* doctrine was on at least one member of the Court's radar. In a short concurrence, Justice Scalia highlighted his newfound skepticism toward the *Seminole Rock* doctrine.[58] At issue in *Talk America* was whether local telephone service providers are required by the Telecommunications Act to offer competitors use of their transmission facilities at cost-based regulated rates.[59] Because both the statute and regulations at issue were ambiguous, the Court needed to "turn to the FCC's [Federal Communications Commission's] interpretation of its regulations."[60] The Court applied the *Seminole Rock* standard and deferred to the agency.[61]

In reversing the Sixth Circuit, the Court stated that the application of the *Seminole Rock* doctrine was dispositive: "The FCC as *amicus curiae* has advanced a reasonable interpretation of its regulations, and we defer to its views."[62] Although Justice Scalia had joined the opinion of the Court, he dedicated a concurring opinion to announce that he was re-thinking the *Seminole Rock* doctrine: "For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity."[63] He concluded his short concurrence by stating: "We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so."[64]

The following year, the Court explored the *Seminole Rock* standard in *Christopher v. SmithKline Beecham Corp.*[65] and ultimately declined to grant the Department of Labor (DOL) *Seminole Rock* deference.[66] In *SmithKline*

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57. 131 S. Ct. 2254 (2011).

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

59. *Id.* at 2257.

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

61. *Id.* at 2261. The FCC was not a party to the litigation but submitted an amicus curiae brief. *Id.*

62. *Id.* at 2265.

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

64. *Id.* (Scalia, J., concurring).

65. 132 S. Ct. 2156 (2012).

66. *Id.* at 2167–68. To support its decision to withhold agency deference, the Court cited several past cases, some of which are not even part of the *Seminole Rock/Auer* line of

Beecham, the Court was called upon to determine whether DOL's regulation defining "outside salesman" included pharmaceutical sales representatives.[67]

The Court first discussed the DOL regulations and the agency's interpretation and then considered whether it should defer to that interpretation.[68] Although the Court recognized that it usually defers under *Seminole Rock*, the Court stated that "this general rule does not apply in all cases."[69] More specifically, it relied upon its previous observation in *Auer* that deference might not be appropriate "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'"[70] After analyzing this issue, the Court declined to give DOL's interpretation deference under *Seminole Rock*.[71] And although the Court did not question whether to look to doctrine, *SmithKline Beecham* is significant because it is a rare case where the Court declined to defer under *Seminole Rock*.[72]

Both *Talk America* and *SmithKline Beecham* set the stage for the re-emergence of the *Seminole Rock* doctrine in two opinions written in the 2013 case of *Decker v. Northwest Environmental Defense Center*.[73] Given these opinions, especially Chief Justice Roberts's concurrence, it seems likely that the Court will decide to re-evaluate the doctrine in a future case.

In *Decker*, the Court determined whether the federal Clean Water Act (CWA) implementing regulations define a discharge into navigable waters to include stormwater runoff channeled from logging roads.[74] In an amicus

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cases. *Id.* at 2167 (referencing Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 158 (1991) and NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974)).

67. *Id.* at 2161.

68. *Id.* at 2166.

69. *Id.*

70. *Id.* (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)). The Court detailed two instances when an agency's interpretation might not reflect its fair and considered judgment: "when the agency's interpretation conflicts with a prior interpretation," *id.* (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)), and when an agency's interpretation appears to be "nothing more than a 'convenient litigating position,'" or a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Id.* (citation omitted) (quoting *Auer*, 519 U.S. at 462) (internal quotation marks omitted).

71. *Id.* at 2168–69. The Court found that acceptance of the Department of Labor's (DOL's) interpretation would not give fair warning to the public and would constitute "unfair surprise." *Id.* at 2167.

72. *See id.* at 2167–68.

73. 133 S. Ct. 1326 (2013).

74. *Id.* at 1330. A permit for such runoff is necessary if the discharge is "deemed to be 'associated with industrial activity'" as those terms are interpreted under the Clean Water Act (CWA) and the implementing regulations issued by the Environmental Protection

curiae brief filed in the case, the Government stated that "[t]he EPA [Environmental Protection Agency] interprets its regulation to exclude the type of stormwater discharges from logging roads at issue."[75] Applying the *Seminole Rock* standard, the Court determined that, because the EPA's view was a "reasonable interpretation of its own regulation," it would defer to that interpretation under *Seminole Rock*.[76] The majority reasoned that, not only was the "EPA's interpretation [] a permissible one," but "there is no indication that the [EPA's] current view [was] a change from prior practice or a *post hoc* justification adopted in response to litigation."[77]

Writing separately, Justice Scalia made clear his outright frustration with the *Seminole Rock* doctrine by bemoaning that "[e]nough is enough" with respect to "giving agencies the authority to say what their rules mean[] under the harmless-sounding banner of" *Seminole Rock* deference.[78] He then identified many of the criticisms of the doctrine set forth by scholars in academic literature and by Justices in past decisions while observing that the Court had never set forth a "persuasive justification" for *Seminole Rock* deference.[79] Before addressing the merits of the case, he concluded his criticism of the *Seminole Rock* doctrine as follows: "however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."[80]

But even apart from Justice Scalia's vehement attack on the *Seminole Rock* doctrine, another significant development was the concurring opinion of Chief Justice Roberts, which was joined by Justice Alito. Dedicated to highlighting the Court's interest in the *Seminole Rock* line of cases, the

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Agency (EPA). *Id.* (citing 33 U.S.C. § 1342(p)(2)(B) (2012)). In turn, an EPA regulation defines "the term 'associated with industrial activity' to cover only discharges 'from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.'" *Id.* (citing 40 C.F.R. § 122.26(b)(14) (2012)).

75. *Id.* at 1331.

76. *Id.* (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

77. *Id.* at 1329–30, 1337 (citing *SmithKline Beecham*, 132 S. Ct. at 2166–67).

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

79. *Id.* at 1340–41 (Scalia, J., concurring in part and dissenting in part) (referencing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting), Anthony, *supra* note 15, at 11–12, and Manning, *supra* note 1).

80. *Id.* at 1342 (Scalia, J., concurring in part and dissenting in part). Justice Scalia would have determined a regulation's meaning by applying "familiar tools of textual interpretation," such as implementing the fairest reading of the regulations. *Id.*

opinion acknowledged that Justice Scalia's opinion had raised "serious questions about the principle set forth" in *Seminole Rock* and *Auer*.[81] The opinion also acknowledged the view that the doctrine goes "to the heart of administrative law" and that *Seminole Rock* issues "arise as a matter of course on a regular basis."[82]

The Chief Justice signaled that although "[i]t may be appropriate to reconsider that principle in an appropriate case," the present case was not appropriate due to the lack of fully developed arguments by the parties on the doctrine.[83] He concluded by specifically announcing his intent to make the legal bar "aware that there is some interest in reconsidering" *Seminole Rock* and *Auer*.[84]

All told, the Justices' pronouncements in *Decker*, as well as in *Talk America* and *SmithKline Beecham*, unmistakably demonstrate that it is simply a matter of time before the Court will accept a case for review with the goal of re-evaluating the *Seminole Rock* doctrine.[85] With that in mind, the consideration of the doctrine by the various federal courts of appeals can serve several important purposes. First, the analysis could provide a valuable point of reference for the Supreme Court as to how the *Seminole Rock* doctrine is being interpreted and applied by federal courts in practice, including any major areas of disagreement. Next, to the extent the conflicts are significant, the analysis could provide additional support for the need to re-examine *Seminole Rock* for pragmatic, rather than doctrinal, reasons as soon as possible.

II. SPLITS IN THE *ROCK*

A. Introduction

Despite the close to seven decades that the *Seminole Rock* doctrine has functioned in our jurisprudence, the judges in the courts of appeals and the

81. *Id.* at 1338 (Roberts, C.J., concurring) (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) and Auer v. Robbins, 519 U.S. 452 (1997)).

82. *Id.* at 1339 (Roberts, C.J., concurring).

83. *Id.* at 1338–39 (Roberts, C.J., concurring) (stating he "would await a case in which the issue is properly raised and argued").

84. *Id.* at 1339 (Robert, C.J., concurring).

85. The Court has already agreed to hear a consolidated case that could slightly alter the *Seminole Rock* analysis. *See* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom.* Perez v. Mortg. Bankers Ass'n, 82 U.S.L.W. 3533 (U.S. June 16, 2014) (Nos. 13–1041 & 13–1052) (determining whether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation). The precise contours and impact of this case, however, remain to be seen and are beyond the scope of this Article except to note that it could impact part of the *Seminole Rock* analysis. *See* discussion *infra* Part II.

justices of the Supreme Court have shown a similar restraint, or disinterest perhaps, in analyzing the doctrine critically. While every circuit has engaged in an analysis of the doctrine in the context of a specific case, there are very few cases where a judge has gone beyond questioning the result of a particular application of the doctrine. Moreover, unlike the recent criticism by Justice Scalia, extensive research revealed no so-called "crusaders" at the court of appeals level who explicitly advocate a complete re-evaluation of the doctrine or dispensing with the doctrine altogether.

With respect to the interpretation of the *Seminole Rock* doctrine by the circuit courts, five key observations can be made. First, it is evident that, like the Supreme Court's own jurisprudence[86] on the *Seminole Rock* doctrine, the courts of appeals have undertaken an evaluation of whether to defer that is much more robust than the standard seems to call for. Second, also like the opinions of the Supreme Court,[87] substantial inconsistency, even confusion, exists with respect to how courts interpret and apply the standard. Third, the enhanced analyses by the courts of appeals, for the most part, successfully incorporate many of the factors that the Supreme Court identified and grafted onto its own *Seminole Rock* analysis over the past sixty-nine years. But they have done so on an ad hoc basis.

Fourth, although some of these inconsistencies among the interpretations of the doctrine can be attributed to the uniqueness of the factual circumstances of each case, panels of several circuits have interpreted the doctrine in a way that squarely conflicts with both Supreme Court precedent and other circuit courts' decisions. Fifth, and finally, based on this confusion, inconsistency, and outright conflict over the contours of the *Seminole Rock* doctrine, Supreme Court review is certainly warranted to re-visit the doctrine, particularly given the pragmatic concerns it raises.

Therefore, in light of the Supreme Court's own inconsistent formulation and interpretation of the contours of the *Seminole Rock* doctrine for the past sixty-nine years, one goal of this Part is to explain how the circuits interpret and apply the doctrine. Relatedly, given the Supreme Court's recent interest in re-evaluating the doctrine, another goal of this Part is to facilitate the Court's consideration of a future case involving the doctrine. As such, this Part seeks to provide additional insight and to show that the courts of appeals are split on their actual understanding of how (e.g., what factors must be considered) to apply the doctrine, as well as on the impact of the Supreme Court's subsequent cases expounding the *Seminole Rock* standard.

86. Leske, *supra* note 1, at 235.

87. *Id.*

B. Differences and Inconsistencies Among the Courts of Appeals

As set forth above, the circuits diverge as to which of the Supreme Court's *Seminole Rock* factors they incorporate into their analysis. Thus, the circuit courts are just as inconsistent as the Supreme Court in interpreting and applying the *Seminole Rock* doctrine. Consequently, the circuits vary as to what formulation of the standard they employ.

Accordingly, the most straightforward way to discuss and highlight the key disparities and disagreements among the courts of appeals is through consideration of the factors either explicitly or implicitly found by the Supreme Court to be important to its *Seminole Rock* inquiry.[88] For example, these factors, which appear on an ad hoc and overlapping basis, include (1) whether the regulation being interpreted is ambiguous, which prevents a subsequent interpretation of that regulation from creating "de facto" a new regulation; (2) whether the agency had stated its intent when the regulation at issue was promulgated and relatedly whether acceptance of the agency's interpretation would result in "unfair surprise"; (3) whether the agency's interpretation of its regulation is consistent with prior interpretations and reflects the agency's "fair and considered" judgment on the issue; (4) whether the regulation being interpreted merely repeats statutory language; (5) whether the agency interpretation appears in a format that carries the force of law; and, (6) whether the agency has a specialized expertise in the matter in question. These factors provide the basis for the discussion below.

1. Whether the Regulation Being Interpreted is Ambiguous, which Prevents a Subsequent Interpretation of that Regulation from Creating "De Facto" a New Regulation

It should be well settled that the *Seminole Rock* standard should only be applied if the regulation in question is ambiguous because accepting an interpretation of an unambiguous regulation would allow the agency to create "de facto" a new regulation. This feature of the doctrine was established in the Supreme Court's original decision in *Seminole Rock*. Immediately before the Court established the *Seminole Rock* standard that the agency's interpretation must be accepted unless "plainly erroneous or inconsistent with the regulation," it stated that the agency's interpretation of the regulation was only relevant "if the meaning of the words used [in the regulation was] in doubt."[89] Although this predicate to the application

88. These factors also provide the basis for a new approach to the *Seminole Rock* analysis proposed in Leske, *supra* note 1, at 235.

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

of the standard had been overlooked over the years, the Supreme Court in *Christensen v. Harris County* reaffirmed that *Seminole Rock* "deference is warranted only when the language of the regulation is ambiguous."[90]

The courts of appeals, for the most part, recognize that the *Seminole Rock* doctrine only applies when an agency is interpreting an ambiguous regulation. They do, however, differ on how they effectuate this part of the analysis. Some circuits, such as the Second Circuit and Sixth Circuit, simply state the standard as requiring that the regulation be ambiguous without much elaboration beyond quoting or paraphrasing the Supreme Court's holding.[91]

The Second Circuit's opinions in *Mullins v. City of New York*,[92] *Yourman v. Giuliani*,[93] *Linares Huarcaya v. Mukasey*,[94] and *M. Fortunoff of Westbury Corp. v. Peerless Insurance Co.* illustrate this point.[95] For example, in *Mullins*, the panel explicitly found that "[d]eference to an agency's interpretation is owed only when the regulation at issue is ambiguous,"[96] and in *Linares Huarcaya*, another panel noted that "*Auer* deference, like Chevron deference, 'is warranted only when the language of the regulation is ambiguous.'"[97] Similarly, the panels in both *M. Fortunoff of Westbury Corp.*[98] and *Yourman v. Giuliani*[99] cited the same language from *Christensen.*

Panels in some circuits, such as the Federal, Fourth, and Fifth Circuits, however, are more formal and employ a two-step test, like the one established in *Chevron.*[100] For example, in *Gose v. U.S. Postal Service*, the

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90. Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000).

91. *See, e.g.*, Mullins v. City of New York, 653 F.3d 104, 113 (2d Cir. 2011); Linares Huarcaya v. Mukasey, 550 F.3d 224, 229 (2d Cir. 2008); Ky. Waterways Alliance v. Johnson, 540 F.3d 466, 474–75 (6th Cir. 2008); Yourman v. Giuliani, 229 F.3d 124, 128 (2d Cir. 2000)*; see also* Takacs v. Hahn Auto. Corp., 246 F.3d 776, 782 (6th Cir. 2001) (quoting *Christensen*, 529 U.S. at 588) ("'[D]eference [to an agency's interpretation of its own regulation] is warranted only when the language of the regulation is ambiguous.'").

92. *Mullins*, 653 F.3d at 113.

93. *Yourman*, 229 F.3d at 128.

94. *Linares Huarcaya*, 550 F.3d at 229.

95. M. Fortunoff of Westbury Corp. v. Peerless Ins. Co., 432 F.3d 127, 139 (2d Cir. 2005).

96. *Mullins*, 653 F.3d at 113 (citing *Christensen*, 529 U.S. at 588).

97. *Linares Huarcaya*, 550 F.3d at 229 (citing *Christensen*, 529 U.S. at 588).

98. *M. Fortunoff of Westbury Corp.*, 432 F.3d at 139 (quoting *Christensen*, 529 U.S. at 588) ("'*Auer* deference is warranted only when the language of the regulation is ambiguous.'").

99. Yourman v. Giuliani, 229 F.3d 124, 128 (2d Cir. 2000) (quoting the same language from *Christensen*).

100. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *see, e.g.*, Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 193–94 (4th Cir. 2009) (citations omitted) (stating that "we must first determine whether the regulation itself is unambiguous; if so, its plain language controls" and "[i]f

Federal Circuit court explained that the *Seminole Rock* analysis involved separate inquiries as to whether the agency's interpretation applied in a particular case was directed to "regulatory language that is unclear" and then, if so, whether such interpretation was "plainly erroneous or inconsistent with the regulation."[101] Likewise, the Fourth Circuit, in *United States v. Deaton*, before deferring under *Seminole Rock*, noted that it "first decide[s] whether the regulation is ambiguous."[102] Finally, the Fifth Circuit, in *Belt v. EmCare, Inc.*, explained that it "employ[s] a similar two-step" process, like *Chevron*, first determining whether the language of the regulation is ambiguous, and second granting deference if the interpretation is not inconsistent or plainly in error.[103]

Relatedly, as warned by the Supreme Court in *Christensen*, if a court defers under *Seminole Rock* to an unambiguous regulation, it would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."[104] The various courts of appeals are relatively uniform in recognizing and enforcing this facet of the *Seminole Rock* standard to ensure that this does not occur, with the best examples being in the Sixth Circuit.[105] For example, in a 2012 case, *Summit Petroleum Corp. v. EPA*, a panel of the Sixth Circuit made clear that it "afford[s] an agency's interpretation no deference . . . if the language of the regulation is unambiguous, for doing so would 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'"[106] Similarly, in *Kentucky Waterways Alliance v. Johnson*, the Sixth Circuit highlighted that "'deference is warranted only when the language of the regulation is ambiguous.'"[107] Accordingly, it explained, the consequences were clear if it ignored the plain text: "If the language of the regulation is clear, then '[t]o defer to the agency's [contrary] position would be to permit the agency, under the guise of interpreting a regulation, to create a *de facto* new

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ambiguous, . . . *Auer*/*Seminole Rock* deference is applied").

101. 451 F.3d 831, 839 (Fed. Cir. 2006).

102. 332 F.3d 698, 710 (4th Cir. 2003) (citing *Christensen*, 529 U.S. at 588).

103. Belt v. EmCare, Inc., 444 F.3d 403, 407–08 (5th Cir. 2006).

104. *Christensen*, 529 U.S. at 588.

105. *See* Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund, 724 F.3d 129, 140 (1st Cir. 2013); Humanoids Grp. v. Rogan, 375 F.3d 301, 306 (4th Cir. 2004) (quoting *Christensen*, 529 U.S. at 588) (rejecting arguments that the interpretation by the Patent and Trademark Office (PTO) would effectively constitute a "'*de facto* new regulation,' thereby removing it from the scope of *Auer*").

106. Summit Petroleum Corp. v. EPA, 690 F.3d 733, 740–41 (6th Cir. 2012) (quoting *Christensen*, 529 U.S. at 588).

107. Ky. Waterways Alliance v. Johnson, 540 F.3d 466, 474 (6th Cir. 2008) (citing and quoting *Christensen*, 529 U.S. at 588).

regulation.'"[108]

Thus, there are these differences among the circuits on how courts articulate and apply *Seminole Rock*'s foundational requirement that the regulation be ambiguous. The Court may therefore be well-advised to make clear that *Seminole Rock* analysis entails a separate and initial analysis as to whether the regulation at issue is ambiguous, such as re-formulating the *Seminole Rock* analysis to include a more formal two-step test, as it has created under the *Chevron* doctrine.[109] Such a framework would help ensure that *Seminole Rock* doctrine could not be used by agencies to create new regulations de facto.

2. Whether the Agency had Stated its Intent when the Regulation at Issue was Promulgated, and Relatedly Whether Acceptance of the Agency's Interpretation would Result in "Unfair Surprise"

In 1988, in *Gardebring v. Jenkins*,[110] and then again six years later in *Thomas Jefferson University v. Shalala*,[111] the Supreme Court added a new factor to the *Seminole Rock* deference analysis.[112] It found that deference was required "unless that alternative reading is compelled by the regulation's plain language *or by other indications of the Secretary's intent at the time of the regulation's promulgation*."[113] One principle behind looking to the intent when the regulation was first promulgated is that the agency should be held to its expressed interpretation when the regulation underwent the notice and comment process under the APA. For example, looking to whether the agency had declared an intent concerning a regulation, such as in a preamble, ensures that the public can then rely upon that interpretation to govern its future conduct. Thus, the incorporation of an analysis of the agency's stated intent in deciding whether to defer helps to ensure this reliance is effectuated and also avoids "unfair surprise" to parties.[114] This is

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108. *Id.* at 474–75 (quoting *Christensen*, 529 U.S. at 588); *see also* Zhou Hua Zhu v. U.S. Atty. Gen., 703 F.3d 1303, 1309 (11th Cir. 2013) (quoting *Christensen*, 529 U.S. at 588) ("*Auer* deference is warranted only when the language of the regulation is ambiguous,'" and that deference cannot be used to "shield an agency's attempt 'to overcome the regulation's obvious meaning.'").

109. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *see* Leske, *supra* note 1, at 275–76.

110. 485 U.S. 415, 430 (1988).

111. 512 U.S. 504, 515 (1994).

112. *See* Leske, *supra* note 1, at 253–57 (discussing how the Court in *Gardebring* and *Thomas Jefferson* added consideration of the agency's original intent in promulgating a regulation as a factor in deciding whether to grant the agency *Seminole Rock* deference).

113. *Gardebring*, 485 U.S. at 430 (emphasis added).

114. *See* Leske, *supra* note 1, at 277–78 (discussing why this factor should be required in the proposed new test for the *Seminole Rock* standard).

a related factor that the Supreme Court looks to in determining whether to defer under *Seminole Rock*.

The intent factor, however, has not been commonly found by the circuits to be a mandatory element of the *Seminole Rock* analysis even though it "most closely approximates the Supreme Court's announced guidance."[115] However, panels in many of the circuits, such as the First, Third, Fourth, Fifth, Sixth, Tenth, and Federal Circuits have, at one time or another, looked at whether the agency expressed an intent at the time it promulgated the regulation in question, especially if that inquiry impacted whether acceptance of a new agency interpretation would result in "unfair surprise."[116]

For example, the Third Circuit, in *Morrison v. Madison Dearborn Capital Partners III L.P.*, analyzed the Securities and Exchange Commission's (SEC's) interpretation of a regulation involving derivative securities and short-swing trading.[117] In performing the *Seminole Rock* analysis, it noted that "[p]articular weight is given to agency interpretations made at the time the regulations are promulgated."[118] And in deferring to SEC's interpretation, it placed significant weight on the fact that the agency declared its view "[i]n the release announcing the new regulations" and had thus already "anticipated[] and rejected" the argument made by the defendant in the case at bar.[119]

The Fourth Circuit looked to whether the agency had expressed a contrary intent at the time when the regulations in question were issued in *Taylor v. Progress Energy, Inc.*[120] There, the original panel granted a petition for rehearing that had been supported by DOL. In rejecting DOL's interpretation of the regulation promulgated under the Family and Medical

115. Noah, *supra* note 8, at 291–92.

116. *See, e.g.*, Sw. Pharmacy Solutions, Inc. v. Ctrs. for Medicare & Medicaid Servs., 718 F.3d 436, 442 (5th Cir. 2013) (citing Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2169 (2012)); Morris v. U.S. Nuclear Regulatory Comm'n, 598 F.3d 677, 684 (10th Cir. 2010); Taylor v. Progress Energy, Inc., 493 F.3d 454, 461 (4th Cir. 2007) (citing *Thomas Jefferson Univ.*, 512 U.S. at 512); Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1273 (10th Cir. 2007) (citing *Thomas Jefferson Univ.*, 512 U.S. at 512); Rucker v. Lee Holding Co., 471 F.3d 6, 7–8 (1st Cir. 2006) (discussed *infra* notes 152–158 and accompanying text); Gose v. U.S. Postal Serv., 451 F.3d 831, 838 (Fed. Cir. 2006) (citing *Gardebring*, 485 U.S. at 430) (explaining how "evidence that the proffered interpretation runs contrary to the intent of the agency at the time of enactment of the regulation . . . detracts from the deference we owe to that interpretation"); United States v. Cinemark USA, Inc., 348 F.3d 569, 578 (6th Cir. 2003) (citing *Thomas Jefferson Univ.*, 512 U.S. at 512).

117. Morrison v. Madison Dearborn Capital Partners III L.P., 463 F.3d 312, 315–16 (3d Cir. 2006).

118. *Id.* at 315 (citing *Gardebring*, 485 U.S. at 430).

119. *Id.*

120. *Progress Energy, Inc.*, 493 F.3d at 461.

Leave Act of 1993 (FMLA), the court placed heavy weight on the fact that the proffered interpretation was "inconsistent with what the DOL said it intended the regulation to mean at the time it was promulgated."[121] Citing *Thomas Jefferson University*, the court held that it does "not defer to an agency's interpretation if 'an alternative reading is compelled by . . . indications of the Secretary's intent at the time of the regulation's promulgation.'"[122]

In *Gose v. U.S. Postal Service*, the Federal Circuit was called upon to determine whether a Veterans of Foreign Wars (VFW) post was a "public place" within a U.S. postal regulation prohibiting the consumption of intoxicating beverages while in uniform.[123] After citing the *Seminole Rock* standard, the court noted that deference is even broader than it is under *Chevron*.[124] It included in its analysis the principle that "[j]ust as an agency's inconsistent interpretation of its regulation detracts from the deference we owe to that interpretation, so does evidence that the proffered interpretation runs contrary to the intent of the agency at the time of enactment of the regulation."[125] Thus, although not dispositive, a contrary intent is a factor that weighed against granting *Seminole Rock* deference.

In the First Circuit, the prime, and most recent, example of the related concern that an interpretation does not result in an unfair surprise—regardless of whether the agency had announced its intent previously—is its 2013 decision in *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*.[126] Here, Sun Funds, a private equity fund, had sought a declaratory judgment from the district court that it was not subject to "withdrawal liability" under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).[127] In rejecting the federal agency's interpretation of a regulation defining the term "trade or business" that had been set forth in an appeals letter, the district court found that this interpretation "was owed deference only to the extent it could persuade."[128]

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121. *Id.*

122. *Id.* (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). The Sixth Circuit also recognized this factor in United States v. Cinemark USA, Inc., 348 F.3d 569, 578 (6th Cir. 2003) (citing *Thomas Jefferson Univ.*, 512 U.S. at 512).

123. Gose v. U.S. Postal Serv., 451 F.3d 831, 834 (Fed. Cir. 2006).

124. *Id.* at 837 (stating it defers "even more broadly to an agency's interpretations of its own regulations than to its interpretation of statutes, because the agency, as the promulgator of the regulation, is particularly well suited to speak to its original intent in adopting the regulation").

125. *Id.* at 838.

126. 724 F.3d 129 (1st Cir. 2013).

127. *Id.* at 137.

128. *Id.* The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) is administered by the Pension Benefit Guaranty Corp., a wholly owned United States

On appeal, the agency argued that its letter should have received *Seminole Rock* deference.[129] In declining to apply the doctrine, the court found that "such deference is inappropriate where significant monetary liability would be imposed on a party for conduct that took place at a time when that party lacked fair notice of the interpretation at issue."[130] This determination was consistent with the Supreme Court's recent announcement in *SmithKline Beecham*, that "'where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.'"[131]

Likewise, the Fifth Circuit has addressed the unfair surprise factor in two recent cases. In *Southwest Pharmacy Solutions, Inc. v. Centers for Medicare & Medicaid Services*, the court deferred to an interpretation by the Department of Health and Human Services (HHS) of certain Medicare regulations.[132] The court recognized the limits of the *Seminole Rock* doctrine: "we have declined to extend deference under *Auer* to an agency's interpretation [that] is a novel litigating position wholly unsupported by regulations, ruling, or administrative practice."[133] But because the agency had not applied the regulation "in a manner inconsistent with its proffered interpretation," it deferred to the agency.[134] Likewise, it recognized that *Seminole Rock* deference could be withheld "when doing so would impose liability" or constitutes "unfair surprise," but did not find that was the case here.[135]

In another case decided in 2013, a panel of the Fifth Circuit declined to defer to an agency's interpretation of its own interpretive manual after a careful analysis under *Seminole Rock* based primarily on the unfair surprise factor. In *Elgin Nursing & Rehabilitation Center v. U.S. Department of Health & Human Services*, the court properly noted that "'opinion letters, handbooks and other published declarations of an agency's views, including amicus briefs, are authoritative sources of the agency's interpretation of its own

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government corporation, which is modeled after the Federal Deposit Insurance Corporation (FDIC) and is authorized to promulgate regulations under the MPPAA. *Id.* at 133 n.2.

129. *Id.* at 140.

130. *Id.* (citing Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012)).

131. *Id.* at 140–41 (quoting *SmithKline Beecham*, 132 S. Ct. at 2168).

132. Sw. Pharmacy Solutions, Inc. v. Ctrs. for Medicare & Medicaid Servs., 718 F.3d 436, 442 (5th Cir. 2013).

133. *Id.* (internal quotation marks omitted).

134. *Id.*

135. *Id.* (citations omitted) ("'Petitioners invoke the [agency's] interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced.' . . . '[A]s long as interpretive changes create no unfair surprise . . . the change in interpretation alone presents no separate ground for disregarding the [agency's] present interpretation.'").

regulations.'"[136] But it declined to follow *Seminole Rock* because accepting the agency's interpretation would mean "deferring to its interpretation of its manual interpreting its interpretive regulation," something for which it had "never granted such extraordinary deference to an agency."[137] To do so, in the court's view, would "unfairly surprise the sanctioned party and seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires."[138] Because deference in these situations "'frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government,'" the court refused to defer.[139]

The Tenth Circuit was also well aware of the unfair surprise factor in *EEOC v. Abercrombie & Fitch Stores, Inc.*, where the defendant had been sued by the Equal Employment Opportunity Commission (EEOC) for failing to accommodate a potential employee's religious belief that required wearing a headscarf.[140] During the interview process, the potential employee never stated a need to wear her headscarf due to her religious beliefs.[141] Thus, a question arose concerning the interpretation of a regulation that required employers to make certain religious accommodations upon "notification" of the employee's need.[142]

In its careful approach to determining whether to defer under *Seminole Rock*, the court stressed the "importance of safeguarding the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires."[143] It quoted at length the Supreme Court in *SmithKline Beecham*:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.[144]

The court found EEOC had not given adequate notice or fair warning and

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136. Elgin Nursing & Rehab. Ctr. v. U.S. Dept. of Health & Human Servs., 718 F.3d 488, 493 (5th Cir. 2013).

137. *Id.*

138. *Id.* at 494 (internal citation and quotation marks omitted).

139. *Id.* (quoting Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (Scalia, J., concurring)).

140. EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1110–11 (10th Cir. 2013).

141. *Id.*

142. *Id.* at 1110–11, 1114.

143. *Id.* at 1137 (alteration in original) (internal quotation marks omitted) (citing Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012)).

144. *Id.* at 1138 (quoting *SmithKline Beecham*, 132 S. Ct. at 2168).

declined to defer to the agency's interpretation.[145]

In sum, although the circuits correctly demonstrate a core concern that parties receive fair warning of an agency interpretation, they do not all analyze whether the agency had expressed its intent concerning the meaning of the regulation at the time it was first promulgated. Certain panels have held that *Seminole Rock* deference is not appropriate when the agency has declared a contrary intent,[146] while others merely view it as "evidence" to consider in their analysis.[147] And because the requirement comes directly from the Court's decision in *Gardebring v. Jenkins*,[148] panels that do not analyze this factor are failing to follow Supreme Court precedent. With that said, the Supreme Court's own inconsistency in analyzing the factor in subsequent cases has likely contributed to this confusion.[149]

3. Whether the Agency's Interpretation of its Regulation is Consistent with Prior Interpretations and Reflects the Agency's "Fair and Reasoned Judgment"

In *Christopher v. SmithKline Beecham Corp.*, the Supreme Court found that *Seminole Rock* deference might not be appropriate "when the agency's interpretation conflicts with a prior interpretation."[150] And in other cases, the Court has found that "the consistency of an agency's position is a factor in assessing the weight that position is due."[151] A court's consideration of an agency's consistency before granting deference under *Seminole Rock* also reinforces related and overlapping principles articulated by the Court that

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145. *Id.* at 1139 (citations omitted).

146. *See, e.g.*, Taylor v. Progress Energy, Inc., 493 F.3d 454, 461 (4th Cir. 2007) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)) (stating that the court does "not defer to an agency's interpretation if 'an alternative reading is compelled by . . . indications of the Secretary's intent at the time of the regulation's promulgation'").

147. Gose v. U.S. Postal Serv., 451 F.3d 831, 838 (Fed. Cir. 2006) (finding that "evidence that the proffered interpretation runs contrary to the intent of the agency at the time of enactment of the regulation" takes away from deference to the agency's interpretation); *see also* Morrison v. Madison Dearborn Capital Partners III L.P., 463 F.3d 312, 315 (3d Cir. 2006) (stating that "particular weight" is accorded to an agency's interpretation at the time of promulgation).

148. 485 U.S. 415 (1988).

149. *See* Leske, *supra* note 1, at 257–60, 277–78 (discussing the factor's disappearance in subsequent cases and why this factor should be required in the proposed new test for the *Seminole Rock* standard).

150. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012); *Thomas Jefferson Univ.*, 512 U.S. at 515 (internal quotation marks omitted) ("[I]t is true that an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view . . . .").

151. Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993).

an interpretation reflect the agency's fair and considered judgment and not be a post hoc rationalization.

These related concerns are the most widely cited by the circuits in the *Seminole Rock* analysis, and accordingly, these factors are the most widely accepted and least controversial aspect of the *Seminole Rock* inquiry performed by the circuits. With that said, the D.C. Circuit and Seventh Circuit stand alone in suggesting an agency must also follow the provisions in the APA if the agency sets forth an inconsistent interpretation. Therefore, there is wide-spread inconsistency on the precise contours of these factors, such as whether they are separate factors, or encompass or subsume each other. Conflicts also exist as to what role, if any, the APA plays in the inquiry.

For example, in the First Circuit case of *Rucker v. Lee Holding Co.*, Rucker sued his previous employer alleging that he had been improperly terminated under the FMLA.[152] The employee had worked for a car dealership for five years but then left for five years before returning again as an employee.[153] Seven months later, Rucker filed for medical leave under the FMLA.[154] DOL interpreted its ambiguous regulation to allow non-consecutive terms of employment to count toward the twelve-month requirement.[155] Although DOL presented its view in an amicus brief filed in the case, it also had expressed this interpretation in the preamble published in the Federal Register.[156] Combining the factors, the court found that *Seminole Rock* deference was appropriate because DOL's interpretation in the amicus brief was "consistently held."[157] The court held that it was in accord with the language of the preamble, and therefore, there was "no risk here that the agency's view is any sort of 'post hoc rationalization,' rather than 'the agency's fair and considered judgment.'"[158]

In 2011, in another First Circuit case, the court in *Massachusetts v. Sebelius* quoted the *Seminole Rock* standard as set forth in *Auer*.[159] It made clear that "[d]eference is not given . . . to a '*post hoc* rationalizatio[n] advanced by an agency seeking to defend past agency action against attack' or when there is reason to 'suspect that the interpretation does not reflect the agency's fair

152. 471 F.3d 6, 8 (1st Cir. 2006).
153. *Id.* at 7–8.
154. *Id.* at 8.
155. *Id.*
156. *Id.* at 12.
157. *Id.*
158. *Id.* at 13.
159. Massachusetts v. Sebelius, 638 F.3d 24, 30 (1st Cir. 2011) (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).

and considered judgment on the matter in question.'"[160] When performing the *Seminole Rock* analysis, the panel combined the inquiry of these two factors, noting that "it is true that an agency's interpretation of its regulation may not be entitled to deference if it is merely a post hoc rationalization for past agency action rather than the agency's fair and considered judgment on the issue."[161]

The Second Circuit has similarly analyzed the consistency of an agency's interpretation to help it determine whether an agency's interpretation was a post hoc rationalization. For example, in *Cordiano v. Metacon Gun Club, Inc.*, the court noted "the consistency of the EPA's interpretation" of the regulation at issue, which relied on the Supreme Court's view in *Auer* that an agency's consistent interpretation demonstrates it was not made merely to defend the agency after the onset of litigation.[162]

The Federal Circuit, in *Gose v. U.S. Postal Service*, highlighted the importance of the consistency factor, but also cited to the related post hoc rationalization and fair and reasoned judgment language found in the Supreme Court case law.[163] As discussed above, the court had to determine whether a VFW post was a "public place" under a U.S. postal regulation.[164] After citing the *Seminole Rock* standard, the court noted that deference is even broader than it is under *Chevron*.[165] It then analyzed a number of considerations such as the fact that "[d]eference is particularly appropriate when the agency interpretation has been consistently

160. *Id.* at 30 (alteration in original) (quoting *Auer*, 519 U.S. at 462).

161. *Id.* at 34; *see also* Kolbe v. BAC Home Loans Servicing, LP, 738 F.3d 432, 452 (1st Cir. 2013) (rejecting the argument that *Seminole Rock* deference was not appropriate under the Supreme Court's recent holding in *Christopher v. SmithKline Beecham Corp.* because the agency's interpretation "was inconsistent with past agency practice").

162. Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 208 (2d Cir. 2009) (citing *Auer*, 519 U.S. at 462); *see also* Mullins v. City of New York, 653 F.3d 104, 114 (2d Cir. 2011) (internal quotation marks omitted) (citing Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2261 (2011)) (incorporating the Supreme Court's inquiry as to whether "there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question"); Meineker v. Hoyt Cinemas Corp., 69 F. App'x 19, 24–26 (2d Cir. 2003) (directing district court on remand to consider whether the government's interpretation represented a "fair and considered judgment" consistent with the history of the regulation, or rather whether it had proffered a post hoc rationalization); Callaway v. Comm'r of Internal Revenue, 231 F.3d 106, 133 (2d Cir. 2000) (declining to defer where it was evident that the agency's interpretation was a "post-hoc rationalizatio[n]" in order to defend the agency's past action).

163. Gose v. U.S. Postal Serv., 451 F.3d 831, 837–38 (Fed. Cir. 2006).

164. *Id.* at 834; discussed *supra* notes 123–125.

165. *Id.* at 837 (stating it defers "even more broadly to an agency's interpretations of its own regulations than to its interpretation of statutes," because the regulating agency "is particularly well suited to speak to its original intent in adopting the regulation").

applied"[166] and conversely, that "an agency's interpretation of a statute *or regulation* that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view."[167] It then also laid out the various Supreme Court cases that stand for the proposition that an agency position cannot amount to a "convenient litigating position" or post hoc rationalization.[168] But the court ultimately recognized the standard for *Seminole Rock* deference "is often easily met," quoting *Auer*'s language that even agency interpretations set forth in legal briefs warrant respect because "'there is simply no reason to suspect that the interpretation . . . does not reflect the agency's fair and considered judgment on the matter in question.'"[169]

The consistency and considered judgment factors appear as separate factors in Eighth Circuit cases. One example is *Fast v. Applebee's International, Inc.*, in which a petition for rehearing en banc was denied, but four judges would have granted the petition.[170] After analyzing the "anti-parroting" exception,[171] which will be discussed below, the unanimous court employed a straightforward analysis of the *Seminole Rock* standard by noting that the "Supreme Court has accorded *Auer* deference to agency interpretations of ambiguous regulations with regular frequency in recent years."[172] It noted the occasions when deference is generally appropriate, such as when the agency's stated position "was consistent with its past views," and even where an agency's interpretation has changed over time, the panel accepted that deference would be appropriate "where there was simply no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question."[173]

For its part, the Ninth Circuit has construed the Court's fair and considered judgment factor as specifically including a consideration of the consistency of the agency's interpretation, whether the interpretation appears to be a convenient litigation position, and whether the interpretation is a post hoc rationalization. In 2013, in *Independent Training & Apprenticeship Program v. California Department of Industrial Relations*, a panel performed an in-depth analysis of the *Seminole Rock* standard.[174] At issue

166. *Id.*

167. *Id.* (internal quotation marks omitted) (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)).

168. *Id.* at 838 (citations omitted).

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

170. 638 F.3d 872, 872 (8th Cir. 2011).

171. See infra Part II.B.4.

172. *Fast*, 638 F.3d at 878.

173. *Id.* at 878–79 (citations and internal quotation marks omitted).

174. 730 F.3d 1024, 1028 (9th Cir. 2013).

was a new interpretation by DOL of a federal apprenticeship regulation.[175] Although the court stated *Seminole Rock* deference was appropriate unless the interpretation was "'plainly erroneous or inconsistent with the regulation,'" it would also decline to defer if "'there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'"[176]

The panel then elucidated circumstances when agency interpretation might be suspect by citing a 2012 en banc decision by the Ninth Circuit:

> Indicia of inadequate consideration include conflicts between the agency's current and previous interpretations; signs that the agency's interpretation amounts to no more than a convenient litigating position; or an appearance that the agency's interpretation is no more than a post hoc rationalization advanced by an agency seeking to defend past agency action against attack.[177]

Based on these factors, it declined to defer under *Seminole Rock* to the newly minted DOL interpretation that had "pull[ed] the rug out from under litigants that have relied on a long-established, prior interpretation of a regulation."[178] Proceeding otherwise, it stated, "would validate the criticism that *Auer* enables agencies to 'promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking.'"[179]

Likewise, the Tenth Circuit has construed the fair and considered judgment factor to include the others. In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the court noted that *Seminole Rock* "'deference is likewise unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question.'"[180] According to the panel, "'This might occur when the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a convenient litigating

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175. *Id.*

176. *Id.* at 1034.

177. *Id.* In addition, it included the consideration that *Seminole Rock* deference should not be given in circumstances "when to do so 'would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires.'" *Id.* at 1034–35 (citing Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012)). This reinforced the principle noted by the Supreme Court in *SmithKline Beecham*, that *Seminole Rock* deference is "unsuitable when such deference would result in 'unfair surprise' to one of the litigants." *Id.* at 1035.

178. *Id.*

179. *Id.* (quoting *SmithKline Beecham*, 132 S. Ct. at 2168).

180. EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1137 (10th Cir. 2013) (quoting Auer v. Robbins, 519 U.S. 452, 461–62 (1997)).

position.'"[181]

In the Eleventh Circuit's 2011 case of *Ramos-Barrientos v. Bland*, however, the panel addressed these factors collectively.[182] In *Ramos*, the court was called upon to determine the meaning of a regulation involving "wage credits" promulgated under the Fair Labor Standards Act (FLSA) by DOL.[183] In assessing DOL's interpretation, which had been submitted in an amicus brief, the court found that DOL's interpretation was controlling unless "'plainly erroneous or inconsistent with the regulation.'"[184] It then made clear that it was "irrelevant" that DOL's interpretation was presented in a legal brief because it found that it was "in no sense a *post hoc* rationalizatio[n] advanced by an agency seeking to defend past agency action against attack."[185] It also found that the facts in the case revealed that there did not appear to be "any other reason to suspect that the interpretation does not reflect the [Secretary's] fair and considered judgment on the matter in question."[186] Thus, it appears that the court views these as separate factors.

Despite the cases demonstrating most of the circuits' usages of the consistency factors, as well as the related fair and reasoned and post hoc rationalization factors to determine whether to defer under *Seminole Rock*, there have been panels in at least two circuits that have cited an additional reason for why an inconsistent interpretation might not receive *Seminole Rock* deference. These circuits have found that the requirements set forth in the APA bear on the inquiry on whether to defer. In this respect, these courts conflict with other circuits, as well as the Supreme Court's current interpretation of the doctrine.

For example, the D.C. Circuit has sought to resolve the tension commentators have outlined that exists between the *Seminole Rock* standard and the APA.[187] Although it has not cited the *Seminole Rock* doctrine, the circuit has in a sense *abandoned* giving *Seminole Rock* deference in situations where an agency has changed its interpretation by requiring that an agency adhere to the notice and comment procedures if it wants to change that interpretation.[188] In *Paralyzed Veterans of America v. D.C. Arena L.P.* and its progeny, the court established the rule that although an agency may issue

181. *Id.* (quoting *Auer*, 519 U.S. at 461–62).

182. Ramos-Barrientos v. Bland, 661 F.3d 587, 590 (11th Cir. 2011).

183. *Id.* at 596.

184. *Id.* (citing *Auer*, 519 U.S. at 461).

185. *Id.* (internal quotation marks omitted) (citing *Auer*, 519 U.S. at 462).

186. *Id.* (quoting Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2263 (2011) and *Auer*, 519 U.S. at 462) (internal quotation marks omitted).

187. *See supra* notes 9–18 and accompanying text.

188. *See* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966, 968 (D.C. Cir. 2013).

an initial interpretative rule without going through notice and comment, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."[189] Although this holding has stood in conflict for more than fifteen years with many other circuit courts,[190] the Supreme Court has recently decided to determine whether the D.C. Circuit is correct in its view.[191]

The Seventh Circuit has also identified this conflict between the APA and the *Seminole Rock* doctrine. In *Exelon Generation Co., LLC v. Local 15, International Brotherhood of Electrical Workers, AFL-CIO,* the court distinguished *Seminole Rock*, and declined to defer under *Seminole Rock* to an industry-prepared document that had been approved by staff at the Nuclear Regulatory Commission (NRC).[192] In the opinion, it highlighted specific factors to justify why deference was not appropriate.[193] The court reviewed whether labor arbitrators deciding grievances for unionized nuclear power plant employees who had been denied "unescorted access" privileges were permitted to review the "access denial decisions" as well as to "order unescorted access as a remedy for a wrongful denial."[194] Although from 1991–2009, NRC had allowed such powers, its in-depth revisions of nuclear power security requirements after the terrorist attacks of September 11, 2001, arguably, changed the arbitral review policy.[195]

Following the issuance of the new regulations concerning nuclear power plant security requirements, the Nuclear Energy Institute (NEI), a private organization of nuclear power operators, updated a guidance document to

189. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997).

190. Excluding the Fifth Circuit. *See* Shell Offshore Inc. v. Babbitt, 238 F.3d 622 (5th Cir. 2001).

191. *See supra* note 85; Brief for the Federal Petitioners at 12, Perez v. Mortg. Bankers Ass'n, Nos. 13–1041 & 13–1052 (D.C. Cir. filed Aug. 20, 2014), 2014 WL 4101228, at *12 (citing Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524 (1978)) (arguing against the D.C. Circuit's view because the APA, 5 U.S.C. §§ 551–559, established the "'maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking'"). Section 553 of the APA establishes notice-and-comment rulemaking procedures, but exempts "interpretative rules," among others, from the notice and comment requirement. 5 U.S.C. § 553(b)(3)(A) (2012). Although it is impossible to predict whether the Court will address the *Seminole Rock* doctrine in its opinion, the Brief for the United States, as petitioners, did not mention the doctrine. *See* Brief for the Federal Petitioners, *Perez*, 2014 WL 4101228.

192. Exelon Generation Co. v. Local 15, Int'l Broth. of Elec. Workers, AFL-CIO, 676 F.3d 566, 576 (7th Cir. 2012).

193. *See id.* at 576–78.

194. *Id.* at 568.

195. *Id.* (finding that "the new language was at best ambiguous as to whether the Commission had changed its policy to prohibit arbitral review").

assist members to implement the amended regulation.[196] Significantly, the document, titled NEI 03–01 (Revision 3), had construed the new regulations as having eliminated the review of decisions by arbitrators.[197] Subsequently, NRC staff reviewed the document and, in its own regulatory guide, approved of its conclusions concerning third-party review of unescorted access decisions.[198]

Although the panel recognized that *Seminole Rock* called for deference unless NRC's interpretation was "'plainly erroneous or inconsistent with the regulation,'" it refused to defer to either the NEI document or NRC's regulatory guide.[199] The court provided three "independently sufficient reasons" why *Seminole Rock* deference did not apply.[200] First, it found that deference is not appropriate when there is "'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'"[201] Because NRC staff had simply endorsed the entire NEI document, it was too attenuated to constitute the agency's fair and considered judgment on the issue of arbitral review.[202] The court also seemed suspicious of the fact that such an interpretation would contradict NRC's previous view on the issue.[203] Next, the court noted how NRC had itself disclaimed that its regulatory guide should be relied on as a representation of its interpretation; it lacked "authoritative gloss[]."[204]

Finally, the panel opined that the application of *Seminole Rock* in this case would conflict with the APA because NRC's interpretation would contradict its own prior interpretation. The court found that such a result would amount to the promulgation of a "legislative rule," which would require following the APA.[205] In other words, NRC was required to, at a minimum, announce its change of position "in a 'reasoned analysis'" in the Federal Register or arguably was required to engage in "full notice-and-comment procedures."[206] Absent such actions, the court found that it would not endorse its interpretation under cover of agency deference principles.[207]

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196. *Id.* at 569.
197. *Id.*
198. *Id.*
199. *Id.* at 570, 575–78.
200. *Id.* at 576.
201. *Id.* (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)).
202. *Id.* at 576–77.
203. *Id.* at 577.
204. *Id.*
205. *Id.* at 577–78.
206. *Id.*
207. *Id.* at 578 (allowing the Nuclear Regulatory Commission (NRC) to overrule prior policy without a reasoned explanation would "undermine democratic transparency and

In sum, with respect to considerations surrounding the consistency of the interpretation and whether it reflects the agency's fair and reasoned judgment, the circuits—with the exception of the D.C. Circuit and Seventh Circuit—have been relatively consistent, no pun intended, in enforcing this aspect of the Supreme Court's *Seminole Rock* analysis. Any conflict existing among the circuits arises primarily from their inconsistent formulation of the analysis with respect to the related post hoc rationalization and fair and reasoned judgment factors. Each panel's specific factual application of how much weight to accord a prior inconsistent or consistent interpretation is less problematic. But with respect to the interplay with the APA, the circuits are divided as to whether the APA precludes *Seminole Rock* deference where the agency has significantly changed its interpretation of one of its regulations in a subsequent interpretive rule.

4. Whether the Regulation being Interpreted Merely Repeats Statutory Language

As the Supreme Court observed in *Gonzales v. Oregon*, "[a]n 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."[208] The Court, therefore, created the "anti-parroting" factor in the *Seminole Rock* analysis, whereby if the regulation that the agency purports to interpret merely restates or parrots the statutory language, the agency's proffered interpretation is not actually an interpretation of the regulation. Rather, it is actually the agency's interpretation of the statutory language, which makes the *Seminole Rock* deference doctrine inapplicable to this situation.

This factor has been widely accepted by the circuits as a limit to the *Seminole Rock* doctrine and appears prominently in *Seminole Rock* cases in the First, Second, Third, Fourth, Eighth, Tenth, and Federal Circuits.[209]

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upset the settled expectations of regulated parties"). *But see* Abraham Lincoln Mem'l Hosp. v. Sebelius, 698 F.3d 536, 560 (7th Cir. 2012) (concluding that the *Paralyzed Veterans* doctrine is "not persuasive" because it "conflicts with the APA's rulemaking provisions, which exempt all interpretive rules from notice and comment").

208. Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

209. *See, e.g.*, Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund, 724 F.3d 129, 141 (1st Cir. 2013); Hagans v. Comm'r of Soc. Sec., 694 F.3d 287, 293–95 (3d Cir. 2012) (discussing the Social Security Administration (SSA) ruling where the agency interpreted the "term 'current,' as used in the statutory and regulatory language concerning termination of disability benefits"); Encarnacion ex rel. George v. Astrue, 568 F.3d 72, 79 (2d Cir. 2009) (citing *Gonzales*, 546 U.S. at 257); Shipbuilders Council of Am. v. U.S. Coast Guard, 578 F.3d 234, 242–43 (4th Cir. 2009) (finding that *Seminole Rock* deference is not due when a regulation "parrots" the statutory language because it does not reflect "'the considerable experience and expertise the [agency has] acquired over time with respect to the complexities of the' statutory scheme"); Fast v.

However, like other factors, the circuits diverge on whether it is a threshold inquiry before proceeding to the *Seminole Rock* analysis or whether it is simply part of the multi-factored inquiry.

For example, in the First Circuit case of *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, a private equity fund sought a declaratory judgment from the district court that would preclude it from being subject to "withdrawal liability" under the MPPAA.[210] In rejecting the federal agency's interpretation of a regulation defining the term "trade or business" that had been set forth in an appeals letter, the district court found that this interpretation "was owed deference only to the extent it could persuade."[211] On appeal, the agency argued that its letter should have received *Seminole Rock* deference.[212] Rejecting this argument, the panel cited the anti-parroting principle as an impediment to granting the agency deference in this situation.[213] The court explained the agency had not defined "trades or businesses," but rather had referred to U.S. Treasury regulations, which had also not defined that phrase.[214]

Another example of where a circuit recognized the "anti-parroting" exception as an initial factor is the Second Circuit case of *Encarnacion ex rel. George*.[215] There, the court was called upon to determine whether to defer to a policy implemented by the Commissioner of Social Security that had excluded certain children from Supplemental Security Income Benefits.[216] The plaintiffs, a putative class of children affected by the policy, argued that the policy conflicted with both the underlying statute as well as the implementing regulations.[217] The court noted that an agency does not get additional authority to "interpret its own words" when it chooses to parrot the statutory language "instead of using its expertise and experience to formulate a regulation."[218]

Applebee's Int'l, Inc., 638 F.3d 872 (8th Cir. 2011); Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm'n, 519 F.3d 1176 (10th Cir. 2008); Haas v. Peake, 525 F.3d 1168, 1187 (Fed. Cir. 2008) (holding that deference applies where the regulation "does not simply 'restate the terms of the statute itself'").

210. *Sun Capital Partners III, LP*, 724 F.3d at 141.

211. *Id.* at 137.

212. *Id.* at 140.

213. *Id.* at 141.

214. *Id.* (quoting Gonzales v. Oregon, 546 U.S. 243, 257 (2006)) ("'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.'").

215. 568 F.3d 72 (2d Cir. 2009).

216. *Id.* at 73.

217. *Id.*

218. *Id.* at 79 (quoting *Gonzales*, 546 U.S. at 257).

In a leading *Seminole Rock* case from the Third Circuit, *Hagans v. Commissioner of Social Security*, the court reviewed the Social Security Administration's (SSA's) interpretations of both a statutory provision and its regulation containing the term "current."[219] In declining to give deference to the SSA's interpretation, the court cited the parroting exception during its overall analysis as a threshold inquiry.[220] It found that the anti-parroting exception precluded giving the agency's interpretation *Seminole Rock* deference based on the "similarity between the disputed terms occurring in the statute and the regulation."[221]

The Fourth Circuit, in *Shipbuilders Council of America v. U.S. Coast Guard*, assessed the Coast Guard's interpretation of a regulation concerning the eligibility of a vessel to receive a "coastwise endorsement" to engage in trade within the United States.[222] It reviewed the district court's decision not to give *Seminole Rock*[223] deference to the Coast Guard's interpretation because the language in the Coast Guard regulation at issue constituted a parroting regulation.[224] Although it did not need to reach the question of whether the regulation at issue indeed did parrot the statutory provision, it did endorse this aspect of the *Seminole Rock* standard.[225] And in a 2012 case, *EEOC v. Randstad*, the circuit re-affirmed its understanding that this was a factor in considering whether to defer when it concluded that "[t]his is also not a situation where 'the underlying regulation does little more than restate the terms of the statute itself,' in which case *Auer* deference would be unwarranted."[226]

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219. Hagans v. Comm'r of Soc. Sec., 694 F.3d 287, 293–95 (3d Cir. 2012).

220. *Id.* at 295 n.8 (quoting *Gonzales*, 546 U.S. at 257) (declining to apply *Seminole Rock* deference because "'[a]n 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'").

221. *Id.*

222. Shipbuilders Council of Am. v. U.S. Coast Guard, 578 F.3d 234, 243 (4th Cir. 2009).

223. Although the court in the Fourth Circuit generally uses the phrase, "*Auer*" deference, the court has noted that "[t]his type of review of agency action is also sometimes referred to as *Seminole Rock* deference . . . and [b]oth terms denote the same level of deference and are applied in precisely the same circumstances." *Id.* at 242 n.2.

224. *Id.* at 242–43 (quoting *Gonzales*, 546 U.S. at 256) (finding that *Seminole Rock* deference is not due when a regulation "parrots" the statutory language because it does not reflect "'the considerable experience and expertise the [agency has] acquired over time with respect to the complexities of the' statutory scheme").

225. *Id.* at 243 (finding because the "district court erred in its application of the *Skidmore* standard, we need not reach the question of whether the major component language of the regulation merely parrots the language" of the federal act at issue).

226. EEOC v. Randstad, 685 F.3d 433, 445 (4th Cir. 2012) (quoting *Gonzales*, 546 U.S. at 257).

The Eighth Circuit applied this factor in *Fast v. Applebee's International, Inc.*, where it analyzed a DOL regulation that had established a "dual jobs" test to determine an employee's right to minimum wage.[227] But, like the First and Second Circuits, it did so as a preliminary inquiry to the analysis. The court found that the regulation was "not a mere recitation of the words used by Congress in the statute" and that the dual jobs test was "'a creature of the [DOL's] own regulation.'"[228] On that basis, it found that the anti-parroting canon did not apply and that DOL's interpretation would prevail "'unless plainly erroneous or inconsistent with the regulation.'"[229] It then proceeded with its *Seminole Rock* analysis.

The anti-parroting factor also featured prominently in the Tenth Circuit case of *Plateau Mining Corp. v. Federal Mine Safety & Health Review Commission*.[230] In *Plateau Mining*, the court reviewed the Federal Mine Safety and Health Review Commission's interpretation of a safety regulation relating to bleeder systems for methane gas ventilation that contained an implicit requirement that such systems "shall function effectively."[231] It recognized that an agency's interpretation of its own regulation normally was controlling, but then cited the anti-parroting factor as an "exception to the general rule."[232] After examining the history of the Federal Coal Mine Health and Safety Act of 1969, the underlying statutory provision at issue, and the interim and final regulations issued by the Secretary of Labor, the court found that "the concern underlying the *Gonzales* exception to *Auer* deference" did not apply because of the significant differences between the regulation and the statute.[233] Thus, the Tenth Circuit also views this factor as an exception that takes an interpretation that parrots a regulation out of *Seminole Rock*'s scope, rather than a separate factor to consider when determining whether to defer.

Likewise, the Federal Circuit looked at this factor as an anti-parroting exception in *Haas v. Peake*.[234] At issue in *Haas* was the interpretation of the statutory phrase "in the Republic of Vietnam" as it related to a statute and accompanying regulations granting benefits to veterans exposed to the toxin Agent Orange while in military service.[235] After finding that statutory

227. Fast v. Applebee's Int'l, Inc., 638 F.3d 872 (8th Cir. 2011).

228. *Id.* at 879 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

229. *Id.*

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

231. *Id.*

232. *Id.*

233. *Id.* at 1193.

234. Haas v. Peake, 525 F.3d 1168, 1186 (Fed. Cir. 2008).

235. *Id.* at 1172.

term ambiguous, the court sought to interpret the Department of Veteran Affairs' (DVA's) regulation that defined that term to mean "'service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.'"[236] Because the language of the DVA regulation was ambiguous, the court looked to DVA's interpretation and noted that its interpretation would normally be controlling.[237] But it then clarified that *Seminole Rock* deference would "not apply if a particular regulation merely 'parrots' statutory language, because if it did, an agency could bypass meaningful rule-making procedures by simply adopting an informal 'interpretation' of regulatory language taken directly from the statute in question."[238]

However, after analyzing the DVA regulation, the court found that the regulation did more than simply parrot the statute.[239] Unlike the situation in *Gonzales* where the agency had repeated and summarized the statutory language, here, the court found that the DVA regulation elaborated on the statutory term by clarifying and expanding it to cover personnel who served offshore and in other locations as long as the service "involved duty or visitation in the Republic of Vietnam."[240] This language, in the court's view, qualified as "interpretation rather than reiteration."[241] Therefore, it held that, as a threshold issue, the anti-parroting exception to the *Seminole Rock* deference doctrine did not apply; the court then proceeded to analyze whether the interpretation was "plainly erroneous or inconsistent with the regulation" at issue.[242]

In sum, no circuit has expressed a doctrinal concern regarding the premise underlying the anti-parroting factor that an "agency does not acquire special authority" when it has paraphrased statutory language.[243] But the circuits do vary on how they approach the anti-parroting analysis; some making it a threshold inquiry as an exception to the *Seminole Rock* doctrine, while others merely apply it as one of many factors to consider. Thus, the *Seminole Rock* doctrine would benefit if the Court would provide direction, such as a more established framework that would include the anti-parroting factor as a required, and perhaps, threshold, inquiry for

236. *Id.* at 1186 (quoting 38 C.F.R. § 3.307(a)(6)(iii) (2007)).

237. *Id.*

238. *Id.* at 1186–87 (quoting Gonzales v. Oregon, 546 U.S. 243, 257 (2006) and Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000)) (stating that "an agency cannot 'under the guise of interpreting a regulation . . . create *de facto* a new regulation'").

239. *Id.* at 1187.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Gonzales*, 546 U.S. at 257.

courts to make when determining whether to grant *Seminole Rock* deference.

5. Whether the Agency Interpretation Appears in a Format that Carries the Force of Law

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court established a two-step test when analyzing an agency's interpretation of a statute administered by that agency. Under Step One, a court reviews the statutory language to assess whether Congress has directly spoken on the question at issue.[244] If the statute's language is unambiguous, then the court's analysis is done, and the agency's interpretation of the statutory provision is irrelevant.[245] If, however, the statute is silent or ambiguous, the court proceeds to Step Two, whereby the court determines whether the agency's interpretation is "based on a permissible construction of the statute."[246] If the agency's proffered interpretation is reasonable, then the interpretation is controlling.[247]

In 2000, however, the *Chevron* doctrine changed dramatically. In *Christensen v. Harris County*, the Supreme Court found that controlling deference under *Chevron* should not be granted to an agency's interpretation of a statute that is expressed in a format which lacks the force of law, such as an opinion letter.[248] The next year, in *United States v. Mead Corp.*, the Court similarly ruled that a court should only grant an agency *Chevron* deference when the interpretation of a statute is authorized by Congress and such interpretation carries with it the force of law.[249] The Court's decisions generally mean that formal interpretations of ambiguous statutes (i.e., notice-and-comment rulemaking and formal adjudications) are entitled to *Chevron* deference, but informal interpretations of ambiguous statutes which lack the force of law should be reviewed under the less deferential standard set forth in *Skidmore v. Swift & Co.*[250]

These holdings, however, as scholars have noted, raise a potential doctrinal inconsistency between *Chevron* deference and *Seminole Rock* deference because the Supreme Court had "repudiated strong deference for agency interpretations of ambiguous statutes contained in formats lacking the force of law, while apparently endorsing strong deference for agency

244. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).
245. *Id.* at 842–43.
246. *Id.* at 843.
247. *Id.* at 843–44.
248. 529 U.S. 576, 587 (2000).
249. 533 U.S. 218, 226–27 (2001).
250. *Id.* at 237 ("*Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked.").

interpretations of ambiguous regulations contained in such formats."[251] This is so because, under the *Seminole Rock* standard, which the Supreme Court reaffirmed in *Christensen*, such interpretations of agency regulations would continue to receive controlling deference.[252]

This confusion has now created a conflict between some circuits and the Supreme Court, as well as splits among the circuits. Panels in some circuits, such as the First and Seventh Circuits, have found that *Seminole Rock* deference did not "survive" *Christensen*, while the majority of circuits have found that it did.[253] For instance, the Second Circuit, in *Taylor v. Vermont Department of Education,* recognized that the Supreme Court in *Christensen* had "rejected the notion that *Chevron* deference was due an agency's informal interpretation of an ambiguous *statute*," but held that *Christensen* did "not overrule the longstanding rule regarding the deference generally owed to an agency's reading of its own regulations," which are almost always set forth in an informal manner and therefore do not have the force of law.[254]

The Second Circuit has since reached similar conclusions. In *Encarnacion ex rel. George v. Astrue*, it held that "regardless of the formality of the procedures used to formulate it," an agency's interpretation of a regulation is "'controlling unless plainly erroneous or inconsistent with the regulation[s].'"[255] More recently, in *Cordiano v. Metacon Gun Club, Inc.*, the court cited an earlier Second Circuit case that stated, "'while agency interpretations that lack the force of law do not warrant deference when they interpret ambiguous *statutes*, they do normally warrant deference when they interpret ambiguous *regulations*.'"[256]

The Fourth Circuit has also set forth its definitive view that the Supreme

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251. *See* Anthony & Asimow, *supra* note 8, at 10.

252. Auer v. Robbins, 519 U.S. 452, 461 (1997).

253. *See, e.g.*, Bassiri v. Xerox Corp., 463 F.3d 927, 931 (9th Cir. 2006) (continuing to apply *Auer* deference after *Christensen* (internal citations omitted)). It also noted that "[t]his circuit is not alone in this conclusion." *Id.* at 931 n.1 (citing M. Fortunoff of Westbury Corp. v. Peerless Ins. Co., 432 F.3d 127, 139 (2d Cir. 2005); Rain & Hail Ins. Serv., Inc. v. Fed. Crop Ins. Corp., 426 F.3d 976, 979 (8th Cir. 2005); Spectrum Health Continuing Care Grp. v. Anna Marie Bowling Irrecoverable Trust Dated June 27, 2002, 410 F.3d 304, 319 (6th Cir. 2005); Humanoids Grp. v. Rogan, 375 F.3d 301, 306–07 (4th Cir. 2004); Wells Fargo Bank of Tex. NA v. James, 321 F.3d 488, 494 (5th Cir. 2003)).

254. Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 780 n.7 (2d Cir. 2002).

255. Encarnacion ex rel. George v. Astrue, 568 F.3d 72, 78 (2d Cir. 2009) (quoting *Auer*, 519 U.S. at 461).

256. Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 207–08 (2d Cir. 2009) (citations omitted). *But see* Eastman Kodak Co. v. STWB, Inc., 452 F.3d 215, 222 n.8 (2d Cir. 2006) (citations omitted) (pronouncing "*Auer* was seemingly undercut by *Christensen* . . . , which held that many forms of agency interpretations that lack the force of law do not merit *Chevron* deference").

Court's decision in *Christensen* concerning agency interpretations of statutes that did not carry the force of law had no effect on the *Seminole Rock* analysis. For example, in *Humanoids Group v. Rogan*, the court analyzed the *Seminole Rock* doctrine and highlighted the difference between interpretations of statutes and regulations: "'agency interpretations that lack the force of law (such as those embodied in opinion letters and policy statements) do not warrant *Chevron*-style deference when they interpret ambiguous *statutes* but do receive deference under *Auer* when interpreting ambiguous *regulations*.'"[257] As evidenced even more recently in a 2013 case, *D.L. ex rel. K.L. v. Baltimore Board of School Commissioners*, where the panel confirmed that it grants "*Auer* deference even when the agency interpreting its regulation issues its interpretation through an informal process," it is clear that this view prevails in the Fourth Circuit.[258]

The Sixth Circuit, too, has addressed the effect of the Supreme Court's holding in *Christensen*. A panel of the Sixth Circuit in *Air Brake Systems, Inc. v. Mineta*, explicitly opined on the issue of whether informal interpretation of regulations that do not carry the force of law still warranted *Seminole Rock* deference.[259] Citing other Sixth Circuit panel decisions, such as *United States v. Cinemark USA, Inc.*, *A.D. Transport Express, Inc. v. United States*, and *American Express v. United States*, the panel concluded "*Seminole Rock* deference appears to have survived *Mead*."[260]

The Ninth Circuit in *Bassiri v. Xerox Corp.* has similarly found that "the *Christensen* [C]ourt did not overrule *Auer*."[261] The panel noted that the Supreme Court in *Christensen* had cited *Auer* as the test for an agency's interpretation of an ambiguous regulation.[262] And the panel held that it would "continue to apply *Auer* deference to an agency's interpretation of an ambiguous regulation."[263]

Several cases in the Federal Circuit also show that the circuit has accepted the parameters established by the Court with respect to agency

257. Humanoids Grp. v. Rogan, 375 F.3d 301, 306 (4th Cir. 2004) (citations omitted). It also rejected arguments that the interpretation by PTO would effectively constitute a "'*de facto* new regulation,' thereby removing it from the scope of *Auer*." *Id.*

258. D.L. ex rel. K.L. v. Baltimore Bd. of School Comm'rs, 706 F.3d 256, 259 (4th Cir. 2013).

259. Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 644 (6th Cir. 2004).

260. *Id.* The court also cited Justice Scalia's dissenting opinion in *Mead*. *Id.* (quoting United States v. Mead Corp., 533 U.S. 218, 246 (2001) (Scalia, J., dissenting)) ("'[T]he court leaves untouched today [] [the principle] that judges must defer to reasonable agency interpretations of their own regulations.'").

261. Bassiri v. Xerox Corp., 463 F.3d 927, 930 (9th Cir. 2006) (citing Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000)).

262. *Id.* at 930–31.

263. *Id.* at 931.

interpretations of regulations that are set forth in formats that do not carry the force of law. First, the circuit has acknowledged in cases such as *Smith v. Nicholson* that, as a threshold matter, *Seminole Rock* "deference is afforded to an agency's interpretation of its own regulations even when that interpretation is offered in informal rulings such as in a litigating document."[264] In another case, *American Signature, Inc. v. United States*, the court recognized that "the question whether an agency's interpretation of its regulations announced for the first time in a brief is entitled to deference has generated considerable authority both in the Supreme Court and our own court."[265] Citing its previous decisions in *Reizenstein v. Shinseki*,[266] *Abbott Laboratories v. United States*,[267] and *Caribbean Ispat Ltd. v. United States*,[268] it noted that under Federal Circuit precedent, "Where the agency's interpretation seeks to advance its litigating position, deference is typically not afforded to the agency's position announced in a brief."[269] But citing the Supreme Court's decision in *Auer*, the court further observed that an agency interpretation of a regulation found in a legal brief would receive *Seminole Rock* deference as long as it was not a "'post hoc rationalizatio[n] advanced by an agency seeking to defend past agency action from attack,'" and "'[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'"[270]

Decisions from the First Circuit and the Seventh Circuit, however, have suggested a contrary view.[271] In *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, the First Circuit questioned whether to defer to the interpretation set forth in the agency's letter because the "letter was not the result of public notice and comment, and merely involved an informal adjudication resolving a dispute between a pension fund and the equity fund."[272] Citing the Supreme Court's 2012 decision in

264. Smith v. Nicholson, 451 F.3d 1344, 1350 (Fed. Cir. 2006) (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

265. Am. Signature, Inc. v. United States, 598 F.3d 816, 827 (Fed. Cir. 2010) (citing *Auer*, 519 U.S. at 462–63).

266. 583 F.3d 1331, 1335 (Fed. Cir. 2009).

267. 573 F.3d 1327, 1332–33 (Fed. Cir. 2009).

268. 450 F.3d 1336, 1340 (Fed. Cir. 2006).

269. *Am. Signature, Inc.*, 598 F.3d at 827 (citations omitted) ("'Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.'").

270. *Id.* (citing *Auer*, 519 U.S. at 462).

271. *See* Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund, 724 F.3d 129, 140 (1st Cir. 2013); Keys v. Barnhart, 347 F.3d 990, 993 (7th Cir. 2003).

272. *Sun Capital Partners III, LP*, 724 F.3d at 140.

Christensen, the panel reasoned that "interpretations contained in formats such as opinion letters are 'entitled to respect' . . . only to the extent that those interpretations have the 'power to persuade,'" thereby rejecting *Seminole Rock* deference.[273] But the court failed to appreciate that this holding cited in *Christensen* came in the context of an agency's interpretation of a *statutory provision*—not an agency's interpretation of a regulation.[274] Thus, the First Circuit's contrary interpretation is inconsistent with the actual reach of *Christensen*'s holding on this point, and also in conflict because the Court in *Christensen* cited *Auer* approvingly when deferring to the agency's informal interpretation of a regulation set forth in a legal brief.[275]

Finally, Judge Posner's 2003 opinion on behalf of a unanimous panel of the Seventh Circuit also suggested that *Seminole Rock* deference had likely been eviscerated based on his interpretation of the Supreme Court's holdings in *Mead* and *Christensen*. He concluded that "[p]robably there is little left of *Auer*[/*Seminole Rock* deference]."[276] At issue in *Keys v. Barnhart* was a guardian's request for Social Security disability benefits on behalf of Napoleon Keys, a fourteen-year-old.[277] An administrative law judge had ruled that he was not disabled within the meaning of the disability benefit regulations, which were interim regulations at the time.[278] Thereafter, SSA adopted final regulations, which altered the definition of childhood disability.[279] Thus, the question on review was whether "the old (interim) or the new (final) regulations" governed the case.[280]

In rejecting SSA's argument that the interim regulations should apply, the court found that the government's interpretation was not saved by *Chevron*'s deferential standard of review.[281] The court reasoned that because SSA's interpretation was set forth in a legal brief, this type of informal statutory interpretation *might* only be subject to *Skidmore* deference[282] under

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273. *Id.* (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) and Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (internal quotation marks omitted).

274. *Christensen*, 529 U.S. at 587.

275. *Id.*

276. *Keys*, 347 F.3d at 993; *see also* Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572 (7th Cir. 2001); Eastman Kodak Co. v. STWB, Inc., 452 F.3d 215, 222 n.8 (2d Cir. 2006) (citations omitted) ("[A]s the Seventh Circuit has noted, *Auer* was seemingly undercut by *Christensen v. Harris County*, which held that many forms of agency interpretations that lack the force of law do not merit *Chevron* deference.").

277. *Keys*, 347 F.3d at 991–92.

278. *Id.* at 992.

279. *Id.*

280. *Id.*

281. *Id.* at 993.

282. *Id.*; *see* United States v. Mead Corp., 533 U.S. 218, 221 (2001) (citations omitted)

the Supreme Court's then-recent decision *United States v. Mead Corp.*[283]

Judge Posner's "hedge" on this issue, he explained, concerned the Supreme Court's seemingly contrary holding in *Auer v. Robbins* that *Chevron* deference extends to agency interpretations found in legal briefs, including an amicus curiae brief.[284] He then suggested that *Auer* had likely been significantly weakened based on the Supreme Court's view that interpretations of statutes which lack the force of law no longer warrant controlling deference, and, therefore since an agency cannot make law with a brief, an informal interpretation found in a brief should not receive controlling deference.[285] But in the end, he declined to grant *Chevron* deference to the agency's interpretation because the government's brief had not offered an interpretation of the agency's regulation.[286]

Thus, like the panel's view in the First Circuit, Judge Posner's view is not shared by the majority of circuits. Accordingly, given the confusion among these panels, clarification by the Supreme Court during a subsequent case involving the *Seminole Rock* doctrine or during its re-evaluation of the doctrine, *in toto*, would benefit the courts of appeals on this issue.

6. Whether the Agency has a Specialized Expertise in the Matter in Question

In *Thomas Jefferson University v. Shalala*, the Court identified an additional factor to consider when determining whether to defer to an agency's interpretation of a regulation: whether the interpretive question involves issues in which the agency has specialized expertise.[287] In *Thomas Jefferson University*, the Court examined a Medicare regulation that prohibited reimbursement of certain educational activities borne by hospitals.[288] The Secretary of HHS interpreted the regulation "to bar reimbursement of educational costs that were borne in prior years not by the requesting hospital, but by the hospital's affiliated medical school."[289]

In analyzing the regulation, the Court held that it must defer to HHS's interpretation unless an "'alternative reading is compelled by the

("[U]nder *Skidmore v. Swift & Co.*, the [tariff classification] ruling [by the U.S. Customs Service] is eligible to claim respect according to its persuasiveness."); *see also* Anthony & Asimow, *supra* note 8, at 10–11 (discussing the holding of *Christensen* and the adoption of informal agency interpretations).

283. *Mead Corp.*, 533 U.S. at 218.

284. *Keys*, 347 F.3d at 993; *see* Auer v. Robbins, 519 U.S. 452, 462 (1997).

285. *Keys*, 347 F.3d at 993; *see Auer*, 519 U.S. at 462.

286. *Keys*, 347 F.3d at 994 ("[W]e doubt that *Chevron* has any role to play in this case because the government's brief did not offer an interpretation of the agency's regulations.").

287. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

288. *Id.* at 506.

289. *Id.*

regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation,'" which was the *Seminole Rock* test it had set forth in *Gardebring v. Jenkins*.[290] It then highlighted an additional factor that the broad deference afforded under *Seminole Rock* was "all the more warranted when . . . the regulation concerns 'a complex and highly technical regulatory program. . . .'"[291] To support the application of this factor in this case, the Court noted that HHS had been responsible for identifying and classifying criteria in the complex cost reimbursement regime of the Medicare program and subsequently deferred to HHS.[292]

Although not all circuits have incorporated whether the agency has "specialized expertise" as a "stand-alone" factor in their *Seminole Rock* analysis, there are some panels that have placed significant weight on it. Examples are found in decisions by panels in the First, Third, Eighth, and Tenth Circuits.[293] In addition, the Fourth Circuit appears to stand alone in *rejecting* to give *Seminole Rock* deference to interpretations of regulations that are not based on an expertise in a given field.

In *West Virginia Highlands Conservancy, Inc. v. Norton*, the Fourth Circuit was called upon to decide whether the Department of Interior's Board of Land Appeals (Board) had properly interpreted its own regulation in deciding that the plaintiff was ineligible for an award of attorney fees under the Surface Mining Control and Reclamation Act.[294] The court acknowledged that *Seminole Rock* deference normally applies to the Board's interpretation of its own regulation,[295] but it refused to apply the doctrine in this case.[296] It held that "'[w]hen the administrative interpretation is not based on expertise in the particular field . . . but is based on general common law principles, great deference is not required.'"[297] The court justified its use of this "exception to *Seminole Rock* deference" as being necessary to allow courts to review an agency's legal determination de novo, which it then proceeded to do with respect to the Board's decision.[298]

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290. *Id.* at 512 (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)).

291. *Id.*

292. *Id.* (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

293. Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1272 (10th Cir. 2007) (quoting the standard set forth in *Thomas Jefferson Univ. v. Shalala*); Morrison v. Madison Dearborn Capital Partners III L.P., 463 F.3d 312, 315 (3d Cir. 2006); S. Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 97 (1st Cir. 2002); HealthEast Bethesda Lutheran Hosp. & Rehab. Ctr. v. Shalala, 164 F.3d 415, 417 (8th Cir. 1998).

294. W. Va. Highlands Conservancy, Inc. v. Norton, 343 F.3d 239, 241, 245 (4th Cir. 2003).

295. *Id.* at 245.

296. *Id.* at 245–46.

297. *Id.* at 245.

298. *Id.*

The Fourth Circuit's analysis in *West Virginia Highlands*, therefore, stands in stark contrast to other circuits, which have found that agency expertise makes deference even more appropriate and have not required it as a *sine qua non* to apply *Seminole Rock*. For instance, the First Circuit in *South Shore Hospital, Inc. v. Thompson*, reviewed a different Medicare regulation involving reimbursement for the reasonable costs of specified services performed by skilled nursing facilities.[299] The court first noted that courts normally defer to agency interpretations of regulations and that a court should only withhold *Seminole Rock* deference when the agency's interpretation is "'plainly erroneous or inconsistent'" with the regulation at issue.[300] It then highlighted that *Seminole Rock* deference "is at its apex" when the regulation is within Medicare's "'complex and highly technical regulatory program.'"[301] After finding the regulation in question vague, the court deferred to the agency's interpretation and also concluded its opinion by citing *Thomas Jefferson* for the proposition that "Medicare is a complex and highly technical regulatory scheme, and courts should be hesitant to second-guess the Secretary in such matters."[302]

The Third Circuit, too, has looked to the factor as an additional reason to defer under *Seminole Rock*. For example, in *Morrison v. Madison Dearborn Capital Partners III L.P.*, the circuit quoted a litany of Supreme Court cases on deference to agency interpretations when it determined that it should defer to SEC's interpretation of a new regulation it had just promulgated involving derivative securities and short-swing trading.[303] Besides quoting the *Seminole Rock* standard,[304] it noted that an "agency's reasonable interpretation of its own regulations 'attracts substantial judicial deference,'"[305] and that "[d]eference is especially warranted when the regulations concern 'a complex and highly technical regulatory program.'"[306] After analyzing this specialized area of law, it deferred to the SEC's interpretation.[307]

Likewise, in a 2012 case, a panel of the Fourth Circuit in *Almy v. Sebelius* recognized "the importance of careful adherence" to the *Seminole Rock*

299. S. Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 95 (1st Cir. 2002).

300. *Id.* at 97.

301. *Id.*

302. *Id.* at 98, 106.

303. Morrison v. Madison Dearborn Capital Partners III L.P., 463 F.3d 312, 314–15 (3d Cir. 2006).

304. *Id.* at 315 (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). (finding "'the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation'")

305. *Id.*

306. *Id.* (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512).

307. *Id.*

standard in cases that involve "'a complex and highly technical regulatory program.'"[308] Here, the court reviewed the Secretary of HHS's interpretation of a Medicare regulation.[309] The court noted that parties had agreed that the regulation in question was technical and complex and also found that HHS "'has longstanding expertise in the area,' circumstances under which 'principles of deference have particular force.'"[310] In concluding its decision that HHS's actions had been lawful, the court noted the circuit's view that the Medicare provisions were "'among the most completely impenetrable texts within human experience.'"[311]

Finally, a unanimous panel of the Eighth Circuit, in *HealthEast Bethesda Lutheran Hospital & Rehabilitation Center v. Shalala*, reviewed yet another interpretation of a Medicare regulation by the Secretary of HHS.[312] Although the court unceremoniously concluded that the Secretary's interpretation was not "'plainly erroneous or inconsistent with the regulation,'" it did analyze the agency expertise factor.[313] Specifically, the court addressed the plaintiff's argument that *Seminole Rock* deference should not apply to the Secretary's interpretation of the regulation in question because the interpretation did not require the Secretary's "technical expertise." The court flatly rejected this argument. It found that even though deference may be especially warranted when the regulations are of a highly technical nature, the rationale for deference did not disappear in simpler cases where an agency interprets its own regulation.[314] Accordingly, it granted "'controlling weight'" to the Secretary's interpretation of the regulation at issue.[315]

Thus, when the courts of appeals analyze the agency expertise factor, the circuits are split in two respects. First, the Fourth Circuit and Eighth Circuit are squarely split as to whether an agency must have expertise in the matter in question as a predicate to giving *Seminole Rock* deference to the interpretation, with the Fourth Circuit holding that agency expertise is required and the Eighth Circuit holding that it is not. Second, the circuits are divided on their application of the agency expertise factor. Panels in some circuits closely follow the Supreme Court's holding in *Thomas Jefferson*

308. Almy v. Sebelius, 679 F.3d 297, 302 (4th Cir. 2012).
309. *Id.* at 299–301.
310. *Id.* at 302.
311. *Id.* at 311.
312. HealthEast Bethesda Lutheran Hosp. & Rehab. Ctr. v. Shalala, 164 F.3d 415, 416 (8th Cir. 1998).
313. *Id.* at 417.
314. *Id.* (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).
315. *Id.* (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

University v. Shalala that suggests *Seminole Rock* deference is even more appropriate in such cases, while other panels fail to even mention the factor as being probative in its inquiry. Guidance by the Supreme Court on the application and analysis of this factor would therefore be especially appropriate in a future case.

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In sum, the analysis above indicates that although the courts of appeals are certainly aware of the *Seminole Rock* standard and its many factors, their applications of it differ significantly in several important respects. Of foremost importance is the apparent conflict over the precise impact of *Mead* and *Christensen* on the *Seminole Rock* doctrine. The misinterpretation of this issue by certain circuits, however, can be easily resolved by the Supreme Court in a future case. More fundamentally though, serious substantive problems remain with the way the courts of appeals are interpreting the doctrine that should be corrected by the Supreme Court.

The practical impact of the conflicting interpretations of what the applicable "test" is for deference under the *Seminole Rock* doctrine is deeply troubling. The application of any non-uniform standard, which could include none, one, two, or all of the various factors outlined above—depending on those which a particular panel chooses to include—could directly affect the determination of whether to defer and, therefore, ultimately impact the conclusion as to the questioned regulation's meaning. Thus, the determination of a regulation's meaning could curiously differ depending on which circuit hears the case and whether that circuit included or attached particular significance to a factor in its own *Seminole Rock* test. Uniformity and consistency are hallmarks of our administrative and judicial states, and the current application of differing *Seminole Rock* standards significantly undermines these vital goals.

CONCLUSION

Inconsistency and widespread confusion regarding the precise parameters of the proper analysis under *Seminole Rock* have led to conflicting interpretations and application of the doctrine by the courts of appeals. Because regulations, rather than statutes, are the principal way in which legal rights and obligations are established, the in-practice application of the *Seminole Rock* deference regime is critically important. Accordingly, a re-evaluation by the Supreme Court would help resolve the inconsistencies and conflicts among the circuits. More importantly, it would lead to more clarity and uniformity in this important area of administrative law, which ultimately should promote greater fairness, increased transparency, and

more meaningful public participation.

A future re-examination of the *Seminole Rock* doctrine by the Supreme Court could take many forms: the outright rejection of the doctrine; the creation of a consistent framework or test, such as what currently exists for statutory interpretation under *Chevron*; or the addition of more chaos by endorsing the doctrine without adding limits or parameters for the lower courts to apply. Regardless, any meaningful reconsideration of the doctrine by the Court would be a positive step in the development of the doctrine as it approaches its seventh decade.