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Benjamin Clements

J.D. Candidate, May 2014, Loyola Law School, Los Angeles

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DEPARTING FROM *SEMINOLE ROCK* DEFERENCE: IN *DECKER*, A SHIFT IN TIDE

*Benjamin Clements**

In *Decker v. Northwest Environmental Defense Center*,¹ the Supreme Court upheld a deferential standard of review first announced in 1945.² Under the standard, courts defer to an administrative agency's interpretation of its own regulation unless "it is plainly erroneous or inconsistent with the regulation."³

The *Decker* Court aptly recognized that the standard "go[es] to the heart of administrative law" and "arise[s] as a matter of course on a regular basis."⁴ But in addition, the Court for the first time raised serious questions about the standard's propriety.⁵

I. INTRODUCTION

The *Decker* litigation began after logging and paper-products companies (the "logging companies") contracted with the state of Oregon to harvest timber.⁶ The logging companies used two roads for that purpose.⁷ Rainfall caused water to run off the roads, displacing dirt and crushed gravel into nearby rivers and streams, endangering fish and other aquatic life.⁸

The Northwest Environmental Defense Center (NEDC) filed suit, asserting that the logging companies discharged stormwater into

* J.D. Candidate, May 2014, Loyola Law School, Los Angeles; B.A. Economics, French, Bucknell University, May 2010. I am extremely grateful to Professor Daniel P. Selmi for his insight, guidance, and encouragement throughout the writing process. Thank you also to the staff and editors of the *Loyola of Los Angeles Law Review* for their commitment to the editorial process and discerning feedback. Finally, thank you to my parents and sister, who always have supported me in my endeavors.

1. 133 S. Ct. 1326 (2013).

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

3. *Id.* at 414.

4. *Decker*, 133 S. Ct. at 1338–39 (Roberts, C.J., concurring).

5. *Id.* at 1339–44 (Scalia, J., concurring in part and dissenting in part).

6. *Id.* at 1333 (majority opinion).

7. *Id.*

8. *Id.*

two Oregon rivers without obtaining the permits required by the Clean Water Act.⁹ The district court dismissed the action, ruling that the Act did not require permits for the runoff.¹⁰ The Court of Appeals for the Ninth Circuit reversed, concluding that permits were required.¹¹

The Supreme Court reversed.¹² A seven-justice majority upheld the standard by deferring to the Environmental Protection Agency's (EPA) interpretation of its own regulation.¹³ In a brief concurring opinion, Chief Justice Roberts acknowledged that the Court had "some interest" in reconsidering the standard, but decided that *Decker* was not the case to reexamine the standard's propriety.¹⁴ Justice Scalia, in an opinion concurring in part and dissenting in part, disagreed.¹⁵ It is his dissent that makes *Decker* a potentially significant development in administrative law, essentially inviting practitioners to preserve the issue for appeal and raise it for review by the Court.¹⁶

This Comment posits that *Decker*'s legacy will be to change the standard, known as *Seminole Rock* deference. For sixty-eight years, the standard has been a hallmark of administrative law. It has enjoyed a relatively unblemished existence. But Justice Scalia's opinion in *Decker* gives voice to the criticisms of the standard on a new and elevated platform, and it consolidates them into a succinct—if one-sided—argument.

In particular, the principle of separation of powers undermines *Seminole Rock* deference.¹⁷ The proposition that the same entity

9. *Id.*

10. *Id.*

11. *Id.* at 1333–34.

12. *Id.* at 1338.

13. Justice Breyer did not participate. *Id.*

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

15. *Id.* at 1339–44 (Scalia, J., concurring in part and dissenting in part).

16. See Quin M. Sorenson, *Decker v. NEDC: A New Dispute over Judicial Deference to an Agency's Interpretation of Its Own Regulation*, 44 No. 6 ABA TRENDS 9, 12 (July/August 2013) ("[C]ounsel in any administrative law case . . . in which the *Auer* doctrine may play a role would be well-advised to preserve and press that challenge throughout the proceedings, to ensure that their case, if it reaches the Court, qualifies as one in which . . . 'the issue is properly raised and argued.'").

17. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 631 (1996) ("By permitting agencies both to write regulations and to construe them authoritatively, *Seminole Rock* effectively unifies

should not make law and enforce it favors a lower standard of deference than that currently afforded. The principle also distinguishes *Seminole Rock* deference from a similar deferential standard announced more recently in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁸ which requires courts to defer to an agency's "permissible" construction of a *statute* it administers if the statute is "silent or ambiguous with respect to the specific issue" under review.¹⁹

This distinction is important because much of the discussion surrounding *Seminole Rock*'s propriety stems from that surrounding *Chevron*.²⁰ Consequently, any reason for departing from *Seminole Rock* deference would ideally explain why courts should treat agency interpretations of agency rules differently from agency interpretations of statutes. In that respect, the separation of powers concern fits the bill.²¹

The Comment proceeds as follows: Part II presents the history of the deferential standard, discussing relevant case law and the Administrative Procedure Act. Part III examines the *Decker* Court's analysis, progressing from the majority opinion to Justice Scalia's concurring and dissenting opinion. Part IV then offers thoughts about the case's impact on the future of the standard, arguing that the separation of powers demands a lower degree of judicial deference for agency interpretations of regulations. Finally, Part V concludes.

II. HISTORY

A. *Seminole Rock*

The deferential standard of review originated in the 1945 case of *Bowles v. Seminole Rock & Sand Co.*²² In April 1942, to stymie wartime inflation, the administrator of the Office of Price

lawmaking and law-exposition—a combination of powers decisively rejected by our constitutional structure.”).

18. 467 U.S. 837 (1984).

19. *Id.* at 843.

20. See Manning, *supra* note 17, at 627 (“*Seminole Rock* adopts an approach to agency interpretations of regulations that . . . is quite similar to Chevron’s framework for statutes.”).

21. *Id.* at 639 (“[W]hereas Chevron retains one independent interpretive check on lawmaking by Congress, *Seminole Rock* leaves in place *no* independent interpretive check on lawmaking by an administrative agency.”).

22. 325 U.S. 410 (1945).

Administration issued regulations controlling the prices of goods and services in the national economy.²³ The regulatory scheme required sellers to charge no more for their goods and services than the prices they had charged during the month of March 1942 (the “price freeze requirement”).²⁴ A dispute arose over the Administrator’s interpretation of the price freeze requirement.²⁵

In October 1941 the Seminole Rock & Sand Company, a manufacturer of crushed stone, contracted to sell crushed stone to a railroad company at a price of sixty cents per ton.²⁶ Then, in January 1942 it contracted to sell crushed stone to a construction company for \$1.50 per ton.²⁷ It delivered the stone from the first sale in March 1942 and the stone from the second sale in January and August 1942.²⁸ When Seminole Rock then made new contracts with the railroad company at both prices of eighty-five cents and \$1.00 per ton, the administrator filed suit, asserting that the price freeze requirement set Seminole Rock’s maximum price for crushed stone at sixty cents per ton.²⁹

This conclusion turned on the administrator’s interpretation of the regulatory phrase “[h]ighest price charged during March, 1942.”³⁰ In his opinion, because Seminole Rock had delivered crushed stone to the railroad in March 1942, the regulation precluded it from charging more than the price charged for that delivery: sixty cents per ton.³¹

Seminole Rock disagreed, asserting that the administrator’s interpretation of the price freeze requirement attached to a sale only if both the charge and the delivery occurred during March 1942. Since it had entered its contract with the construction company prior to March but not yet delivered all of the ordered stone, Seminole

23. *Id.* at 413.

24. *Id.*

25. *Id.* at 413–15.

26. *Id.* at 412.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 414; *see also id.* at 415 (“The dispute in this instance centers about the meaning and applicability of rule (i).”).

31. *Id.* at 415.

Rock argued that its highest offering price as of that month—\$1.50 per ton—should determine the new maximum.³²

The Court reasoned that it “must necessarily look to the administrative construction of the regulation” to resolve any textual ambiguity.³³ It continued: “[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. . . . Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the [administrative agency].”³⁴

Applying these “tools,” the Court first examined the regulation’s language, concluding that the price freeze requirement turned on whether goods were actually delivered during the month of March 1942.³⁵ To bolster that conclusion, the Court pointed to evidence of the administrator’s interpretation—that “delivery during March, rather than the making of a sale during March, is controlling.”³⁶

The *Seminole Rock* Court provided no justification or citation to authority for the standard it articulated.³⁷ Over the years, however, academics and courts have fleshed out the rationales ostensibly underlying *Seminole Rock* deference.³⁸ Today, the standard is a centerpiece of administrative law.³⁹

B. The Administrative Procedure Act

Shortly after the Court decided *Seminole Rock*, Congress enacted the Administrative Procedure Act of 1946 (APA).⁴⁰ The purpose of the APA was to create a check on the power of administrative agencies, by protecting private rights from administrative “excesses.”⁴¹

32. *Id.*

33. *Id.* at 413–14.

34. *Id.* at 414.

35. *Id.* at 415–17.

36. *Id.* at 417 (internal quotation marks omitted).

37. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (Scalia, J., concurring in part and dissenting in part); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1454 (2011).

38. See discussion *infra* Part II.C.

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

40. 5 U.S.C. §§ 500–596, 701–706 (2006).

41. *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950); see also 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 APA intended to “arm affected persons with recourse to an

The APA set in place two means of accomplishing that task. First, it established procedural requirements that must be met before agency rules have the force of law. Second, it provided for judicial review of agency actions.⁴²

1. Procedural Safeguards for Legislative Rules

To promulgate rules that have the force of law, agencies must abide by certain procedural safeguards that act as a check on administrative actions.⁴³ The most prominent of these are notice-and-comment requirements, under which agencies must provide the public with notice of proposed rules and the opportunity to respond.⁴⁴

Section 553 outlines these requirements.⁴⁵ The agency's notice must state the time and place of the rulemaking proceedings, the legal basis authorizing the proposed rule, and a description of the underlying issues, if not the terms of the rule.⁴⁶ The agency must then allow the public to participate in the proceedings.⁴⁷

Exempted from section 553's notice-and-comment requirements are "interpretative,"⁴⁸ often referred to as "interpretive," rules.⁴⁹ These rules do not have the force of law but are instead issued "to advise the public" of how the agency interprets the statutes and rules it administers.⁵⁰

independent judicial interpreter of the agency's legislative act, where, after all, the agency is often an adverse party").

42. Stephenson and Pogoriler refer to this dichotomy as the "pay me now or pay me later" principle." Stephenson & Pogoriler, *supra* note 37, at 1464.

43. See Anthony, *supra* note 41, at 3; Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog, 8 ADMIN. L.J. AM. U. 1, 1, 3-4 (1994).

44. See Anthony, *supra* note 41, at 3; Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog, 8 ADMIN. L.J. AM. U. 1, 1, 3-4 (1994).

45. 5 U.S.C. § 553 (2006).

46. *Id.* § 553(b)(1)-(3).

47. *Id.* § 553(c).

48. *Id.* § 553(b)(A).

49. Anthony, *supra* note 43, at 1-2; Anthony, *supra* note 41, at 8 n.16.

50. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

Though the APA explicitly distinguishes between legislative and interpretive rules, *Seminole Rock* deference does not.⁵¹ A common criticism of the standard, therefore, is that it applies regardless of whether the agency interpretation is of a legislative rule promulgated pursuant to the APA's procedures—and thus subject to notice and comment by the public—or an interpretive rule exempted from those procedures.⁵²

2. Judicial Review

Section 706 addresses the judiciary's role in reviewing agency decisions.⁵³ It provides that “the reviewing court *shall* decide all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action.”⁵⁴ The latter term—“agency action”—specifically encompasses “the whole or a part of an agency rule.”⁵⁵

Congress thus exercised its constitutional authority to expressly define the relationship between the judiciary and administrative agencies. It chose to delegate to the courts the power to determine the meaning or applicability of agency rules. Another common criticism of *Seminole Rock* deference, therefore, is its apparent defiance of Congress's prerogative.⁵⁶ Similarly, the deferential standard seems to contravene *Marbury v. Madison*,⁵⁷ which unequivocally pronounced the judicial role: “to say what the law is.”⁵⁸

51. See Anthony, *supra* note 41, at 6 (“The Court appears to be willing to accept any ‘interpretation’ that is not inconsistent with the regulation . . . regardless of agency failure to observe notice-and-comment rulemaking procedures.”).

52. See *id.* (“The Court fails to separate the question of the weight to be given the interpretation from the question of whether the interpretative document is one that is entitled to exemption from APA notice-and-comment requirements.”).

53. See 5 U.S.C. § 706 (2012).

54. *Id.* (emphasis added).

55. *Id.* § 551(13).

56. See Robert A. Anthony & Michael Asimow, *The Court's Deferences—A Foolish Inconsistency*, 26 ADMIN. & REG. L. NEWS 10, 10–11 (2000) (“The review standard directly flouts § 706's command”); Anthony, *supra* note 41, at 6 (“[*Seminole Rock* deference] contravenes the spirit of the APA”); Manning, *supra* note 17, at 621 (“[T]he APA . . . instructs reviewing courts” to interpret regulations.).

57. 5 U.S. (1 Cranch) 137 (1803).

58. *Id.* at 177; see also *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part) (explaining that the agency's role is to formulate the rules, and the court's role “is to determine the fair meaning of the rule”); Manning, *supra* note 17, at 621; Stephenson & Pogoriler, *supra* note 37, at 1457.

And yet the Court rarely addresses the APA when it should.⁵⁹ Consistently, the Court fails to mention section 706 when applying *Seminole Rock* deference.⁶⁰ As a consequence, the degree of deference afforded by *Seminole Rock* encourages agencies “to issue vague regulations, and then to make the operative law through ‘interpretations’ of those regulations.”⁶¹ This unchecked authority was precisely the worry underlying Justice Scalia’s dissent in *Decker*,⁶² and one that implicates the separation of powers, a concern going to the core of our nation’s constitutional structure.⁶³

C. Rationales

Chief among the rationales offered to justify *Seminole Rock* deference is the theory of implied delegation. The theory posits that Congress, by expressly delegating rulemaking authority to agencies, impliedly delegates the authority to say what those rules mean.⁶⁴

Whether or not courts explicitly refer to this rationale,⁶⁵ courts employ this legal fiction to justify deferring to agencies’ expertise, which makes sense due to the technical nature of many regulatory

59. Anthony, *supra* note 41, at 2.

60. *Id.* at 5 n.10.

61. *Id.* at 6; *see also* Auer v. Robbins, 519 U.S. 452, 463 (1997) (“A rule requiring the Secretary [of Labor] to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute.”); Manning, *supra* note 17, 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.”).

62. *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) (explaining that when an agency interprets its own rules, “[t]he power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a ‘flexibility’ that will enable ‘clarification’ with retroactive effect”).

63. *Id.*; *see also* Manning, *supra* note 17, at 654 (asserting that *Seminole Rock* deference “contradicts the constitutional premise that lawmaking and law-exposition must be distinct”).

64. *See* Manning, *supra* note 17, at 627, 654; Stephenson & Pogoriler, *supra* note 37, at 1457.

65. *E.g.*, Martin v. Occupational Safety & Health Review Comm’n, 499 U.S. 144, 151 (1991).

schemes.⁶⁶ It also excuses unelected judges from making potentially political decisions better left to another branch of government.⁶⁷

The theory of implied delegation appears to have largely replaced the “originalist” explanation for the doctrine.⁶⁸ The originalist theory rationalizes *Seminole Rock* deference on the ground that the agency interpreting the regulation under review also issued the regulation and understands it better than courts, particularly where the subject matter is technical.⁶⁹ This explanation, however, ignores the reality that courts determine a regulation’s meaning primarily by looking at its plain language, not the intent of the issuing agency.⁷⁰ It also raises new questions without answering them, such as whether deference should be due when a significant amount of time has passed since the regulation’s promulgation, or when an agency has inconsistently interpreted a regulation over time.⁷¹

D. *Auer*

These rationales were much more fully developed by 1997, when the Court decided *Auer v. Robbins*.⁷² In *Auer*, a unanimous Court upheld the secretary of labor’s interpretation of a regulation promulgated under authority delegated by the Fair Labor Standards Act of 1938 (FLSA).⁷³

In 1988, St. Louis police sergeants and a lieutenant filed suit against members of the board of police commissioners seeking overtime pay under section 7(a)(1) of the FLSA (the “overtime pay requirement”).⁷⁴ The FLSA, however, exempts from the overtime

66. Stephenson & Pogoriler, *supra* note 37, at 1456–57, 1459; *see also* *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part) (“To give an agency less control over the meaning of its own regulations than it has over the meaning of a congressionally enacted statute seems quite odd.”); Manning, *supra* note 17, at 629–30 (explaining that the agency’s expertise justifies deference to agency interpretations of regulations).

67. Stephenson & Pogoriler, *supra* note 37, at 1456–57, 1459–60; *accord* Manning, *supra* note 17, at 630.

68. Stephenson & Pogoriler, *supra* note 37, at 1457; Manning, *supra* note 17, at 630–31.

69. *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part); Manning, *supra* note 17, at 631; Stephenson & Pogoriler, *supra* note 37, at 1454.

70. *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part).

71. Stephenson & Pogoriler, *supra* note 37, at 1455.

72. 519 U.S. 452 (1997).

73. *Id.* at 453, 461–62.

74. 29 U.S.C. § 207(a)(1) (1994); *Auer*, 519 U.S. at 455.

pay requirement those “employed in a bona fide executive, administrative, or professional capacity.”⁷⁵ To clarify when an employee falls within the exemption, the secretary issued regulations extending the exemption only to employees earning a salary.⁷⁶ The regulations defined “salary” as a predetermined amount of money not “subject to reduction” based on the quality or quantity of the employee’s work.⁷⁷

The parties disputed whether the sergeants’ and lieutenant’s pay was “subject to” reduction within the meaning of the regulations.⁷⁸ The sergeants and lieutenant asserted that they were not salaried employees because the department’s policy theoretically provided for disciplinary deductions in pay.⁷⁹ The secretary, however, read the regulation to require more than a theoretical possibility of reductions in pay.⁸⁰ Under his reading, the regulation required either “an actual practice of making such deductions” or “a ‘significant likelihood’ of such deductions.”⁸¹ His interpretation accounted for the reality that to find otherwise would potentially subject employers with vague disciplinary policies to substantial overtime pay liability.⁸²

The Court, citing *Seminole Rock*, deferred to the secretary’s interpretation.⁸³ It confined its review of that interpretation to two dictionary definitions of the “critical phrase”: “subject to.”⁸⁴ It then concluded that the phrase “comfortably bears the meaning the Secretary assigns,”⁸⁵ and it denied the sergeants and lieutenant relief.⁸⁶

E. Chevron

For good reason, much of the recent scholarship focusing on *Seminole Rock* deference incorporates the deferential standard

75. 29 U.S.C. § 213(a)(1) (1994); *Auer*, 519 U.S. at 455.

76. *Auer*, 519 U.S. at 455; see 29 C.F.R. § 541.2(e) (1996).

77. 29 C.F.R. § 541.118(a) (1996); *Auer*, 519 U.S. at 455.

78. *Auer*, 519 U.S. at 459.

79. *Id.* at 455, 459–60.

80. *Id.* at 461.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 464.

announced in *Chevron*.⁸⁷ *Chevron* requires courts to defer to an agency's "permissible" construction of a statute if the statute is "silent or ambiguous with respect to the specific issue" under review.⁸⁸ Deference is due whether Congress expressly or impliedly leaves statutory ambiguities for the administrative agency to resolve.⁸⁹

The Court has made clear that the theory of implied delegation supports *Chevron* deference.⁹⁰ That theory seeks to identify congressional intent by asking, What governmental body did Congress want to resolve the ambiguities it left in its statutory language? According to the theory, Congress prefers administrative agencies to courts.⁹¹ In other words, the theory is just as much about judicial self-restraint and adhering to the Constitution's separation of powers mandate as it is about recognizing the expertise of agencies.⁹²

Increasingly, however, the Court has backed away from the blanket rule of *Chevron*, favoring instead a more nuanced approach.⁹³ In 2000, for example, the Court held that a statutory interpretation issued in an informal opinion letter "do[es] not warrant *Chevron*-style deference."⁹⁴ In 2001, the Court affirmed that principle, holding that statutory constructions issued by agencies, without procedural safeguards, should not necessarily be afforded *Chevron* deference.⁹⁵

Decker indicates that a similar retreat from the blanket deference afforded by *Seminole Rock* may be on the horizon. A retreat would be appropriate because of the principle of separation of powers. For although the theory of implied delegation does not violate that principle when an administrative agency interprets a statute, the same cannot be said when the agency interprets a regulation—a creature of

87. 467 U.S. 837 (1984).

88. *Id.* at 843.

89. *Id.* at 843–44.

90. *See* *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996); Manning, *supra* note 17, at 630–31.

91. *Id.*

92. *See* Manning, *supra* note 17, at 629 (explaining that courts interpreting statutes and regulations must be "sensitiv[e] to the proper roles of the political and judicial branches in our system of government" (internal quotation marks omitted)).

93. *See* Stephenson & Pogoriler, *supra* note 37, at 1450–51.

94. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

95. *United States v. Mead Corp.*, 533 U.S. 218, 235–38 (2001).

its own making. Tempering *Seminole Rock*, therefore, is, at least in one respect, more easily justified than tempering *Chevron*.⁹⁶

III. ANALYSIS

During the March 2013 Term, the *Decker* Court upheld *Seminole Rock* deference by affirming the EPA's interpretation of a regulation promulgated under authority delegated by the Clean Water Act.⁹⁷ But three of the Court's members seemed to signal a growing distaste for the standard.⁹⁸

Before addressing *Decker*'s three opinions, this Comment will discuss three matters to set the stage: first, the provisions and implementing regulations of the Clean Water Act necessary to explain the dispute; second, the Ninth Circuit's ruling; and third, the EPA's interpretation of its own regulation.

A. *The Clean Water Act and Its Implementing Regulations*

The Clean Water Act of 1972⁹⁹ (the "Act") implemented a permitting scheme to protect the nation's waters from pollution.¹⁰⁰ Under the Act, pollution from any "point source" requires a National Pollutant Discharge Elimination System (NPDES) permit, unless the particular discharge is exempted.¹⁰¹ A "point source" is any "conveyance"—such as a pipe, ditch, or tunnel—"from which pollutants are or may be discharged."¹⁰²

Congress has exempted most discharges "composed entirely of stormwater."¹⁰³ There is, however, an exception to that exemption: stormwater discharges "associated with industrial activity" continue to require permits.¹⁰⁴ The question in *Decker* was whether particular stormwater discharges were "associated with industrial activity" as the EPA defined the term.¹⁰⁵

96. See discussion *infra* Part IV.

97. *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1329–30 (2013).

98. *Id.* at 1338–39 (Roberts, C.J., concurring); *id.* at 1339–44 (Scalia, J., concurring in part and dissenting in part).

99. 86 Stat. 816; 33 U.S.C. § 1251(a) (2006).

100. *Decker*, 133 S. Ct. at 1331.

101. *Id.*

102. 33 U.S.C. § 1362(14) (1994).

103. See *infra* Part III.A.2.

104. See *infra* Part III.A.2.

105. *Decker*, 133 S. Ct. at 1336.

1. The Silvicultural Rule

In 1973, the EPA issued regulations exempting some point-source discharges from the Act's permit requirements.¹⁰⁶ For example, it exempted discharges composed entirely of uncontaminated stormwater and discharges from silvicultural activities¹⁰⁷—that is, activities dealing with “the development and care of forests.”¹⁰⁸ It did so because these discharges accounted for a large number of point sources and including them made the permitting scheme “unworkable.”¹⁰⁹

The Natural Resources Defense Council filed suit, challenging the EPA's authority to create the exemptions.¹¹⁰ The District Court for the District of Columbia held that the Act did not authorize the EPA to exempt any type of point-source discharge.¹¹¹ Congress, it reasoned, did not “approve[] exemptions for . . . categories of point sources” other than those it itself expressly exempted.¹¹² Thus, in 1976, while its appeal was pending, the EPA amended the regulations to more precisely define the types of discharges that were point sources, rather than categorically exempt some point sources.¹¹³

One such regulation (the “Silvicultural Rule”) concerned discharges from silvicultural activities. Under the Silvicultural Rule, only activities discharging pollutants “as a result of controlled water used by a person” qualified as point sources.¹¹⁴ Those activities, the EPA decided, included only “rock crushing, gravel washing, log

106. *Natural Res. Def. Council, Inc. v. Train*, 396 F. Supp. 1393, 1395 (D.D.C. 1975).

107. *Id.*

108. *Silviculture Definition*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/silviculture> (last visited Nov. 9, 2013).

109. *Train*, 396 F. Supp. at 1395.

110. *Id.*

111. *Id.* at 1398, 1402.

112. *Id.* at 1398.

113. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1331 (2013). In 1977, the Court of Appeals for the District of Columbia Circuit upheld the district court's ruling. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

114. *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1074 (9th Cir. 2011) (quoting 41 Fed. Reg. 6282 (Feb. 12, 1976)).

sorting, or log storage facilities.”¹¹⁵ Not included were timber “harvesting operations” “from which there is natural runoff.”¹¹⁶

2. The Industrial Activity Rule

In 1987, Congress amended the Act to exempt from the NPDES permitting scheme most discharges “composed entirely of stormwater” (the “stormwater exemption”).¹¹⁷ It did so to ease the EPA’s burden of managing discharges composed only of stormwater runoff.¹¹⁸ The burden was tremendous, because the definition of “point source” encompassed a broad variety of potential sources of stormwater runoff—including schools, churches, and homes—all of which would require permits.¹¹⁹

Congress, however, did not exempt stormwater discharges “associated with industrial activity.”¹²⁰ Thus, even if a particular discharge fell within the stormwater exemption, it still required an NPDES permit if it was “associated with industrial activity”—a term Congress did not define.¹²¹

In 1990, the EPA promulgated regulations for the exempted stormwater discharges.¹²² In 1992, history repeated itself: The Ninth Circuit held some of the regulations invalid because the EPA did not have authority to exempt discharges coming from concededly industrial activity.¹²³

One 1990 regulation (the “Industrial Activity Rule”) filled the void that Congress had left by defining the term “associated with industrial activity.”¹²⁴ For example, stormwater discharges are associated with industrial activity if they are “directly related to manufacturing, processing or raw materials storage areas at an industrial plant.”¹²⁵ The same is true if stormwater discharges come

115. 40 C.F.R. § 122.27(b)(1) (2011). The current version of the Silvicultural Rule, quoted above, differs only slightly from the amended version issued in 1976. *Brown*, 640 F.3d at 1077.

116. 40 C.F.R. § 122.27(b)(1).

117. *Decker*, 133 S. Ct at 1332 (internal quotation marks omitted).

118. *Id.* at 1331–32.

119. *Brown*, 640 F.3d at 1082.

120. 33 U.S.C. § 1342(p)(2)(B) (1994).

121. *Decker*, 133 S. Ct at 1332 (2013).

122. *Brown*, 640 F.3d at 1083.

123. *Natural Res. Def. Council v. E.P.A.*, 966 F.2d 1292, 1306 (9th Cir. 1992); see *supra* note 112 and accompanying text.

124. 40 C.F.R. § 122.26(b)(14) (2006).

125. *Id.*

from “immediate access roads . . . used or traveled by carriers of raw materials” in connection with an “industrial facility” operating in one of the predetermined industries.¹²⁶ “[I]mmediate access roads” are “exclusively or primarily dedicated for use by the industrial facility.”¹²⁷

In addition to defining “associated with industrial activity,” the Industrial Activity Rule identifies certain types of business facilities across different industries that are “considered to be engaging in ‘industrial activity.’”¹²⁸ It does so by referencing the Standard Industrial Classifications—a system used by administrative agencies to group business firms by industry.¹²⁹ For example, the regulation refers to Standard Industrial Classification 24, which covers the “Lumber and Wood Products” industry and includes the logging business.¹³⁰ Logging facilities are “[e]stablishments primarily engaged in cutting timber and in producing . . . forest or wood raw materials.”¹³¹

The result is that permits are required for silvicultural point sources, as defined by the Silvicultural Rule, that are “associated with industrial activity,” as defined by the Industrial Activity Rule. The substantive question in *Decker*, therefore, was whether stormwater discharges coming from a timber-harvesting operation were “associated with industrial activity.”¹³² If so, then the Act, through the Industrial Activity Rule, required the logging companies to obtain NPDES permits.¹³³ If not, no permits were required under the stormwater exemption.¹³⁴

126. *Id.*

127. 55 Fed. Reg. 47990, 48009 (Nov. 16, 1990); see *Brown*, 640 F.3d at 1084.

128. 40 C.F.R. § 122.26(b)(14) (2006).

129. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1332 (2013).

130. *Id.* (citation omitted) (internal quotation marks omitted).

131. *Id.* at 1332 (quoting Dept. of Labor, Standard Industrial Classifications Manual, available at http://www.osha.gov/pls/imis/sic_manual.html); see 40 C.F.R. § 122.26(b)(14) (2006).

132. *Decker*, 133 S. Ct. at 1336.

133. *Id.*

134. *Id.*

B. *The Ninth Circuit's Ruling*

The logging companies argued that permits were not required.¹³⁵ They asserted that the Silvicultural Rule excluded from the definition of “point source” the stormwater runoff at issue.¹³⁶ The Ninth Circuit rejected the argument. It concluded that stormwater runoff is statutorily not a point source if “allowed to run off naturally,” but does constitute such a source if it is controlled in some manner—if, for example, it is collected and then discharged.¹³⁷

The logging companies also argued that no permits were required because of the 1987 stormwater exemption.¹³⁸ They asserted that logging sites were not “associated with industrial activity” because they were not “industrial facilities.”¹³⁹ Despite the Industrial Activity Rule’s express incorporation of logging facilities by reference to Standard Industrial Classification 24, they maintained that logging sites were not “traditional industrial plants,” meaning the roads used by them were not “immediate access roads” subject to the regulation.¹⁴⁰

The Ninth Circuit disagreed, concluding that the discharges were unambiguously “associated with industrial activity.”¹⁴¹ The court pointed to the many facilities—“including mines, landfills, junkyards, and construction sites”—that the rule classified as conducting industrial activity, even though they were not traditional industrial plants.¹⁴² Applying the same reasoning used in 1992 to strike down different EPA regulations,¹⁴³ the court concluded that the agency did not have authority to exempt point-source discharges that were concededly industrial in nature.¹⁴⁴

135. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1069 (9th Cir. 2011).

136. *Id.*

137. *Id.* at 1070–71.

138. *Id.* at 1069.

139. *Id.* at 1084.

140. *Id.*

141. *Id.* at 1085; *see also* *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1333–34 (2013) (“[T]he Court of Appeals held that . . . the discharges at issue are ‘associated with industrial action’ within the meaning of the regulation . . .”).

142. *Brown*, 640 F.3d at 1084.

143. *See supra* notes 111, 121 and accompanying text.

144. *Brown*, 640 F.3d at 1085.

C. *The EPA's Interpretation of the Industrial Activity Rule*

The EPA disagreed with the Ninth Circuit, and three days before the Supreme Court heard arguments, it amended the Industrial Activity Rule.¹⁴⁵ The agency submitted to the *Decker* Court its interpretation of the pre-amendment rule in an amicus curiae brief.¹⁴⁶ It concluded that the discharges at issue did not require permits, focusing on the regulation's reference to industrial "facilities," which it reasoned were more "fixed and permanent" than "temporary . . . logging installations."¹⁴⁷

It also concluded that timber-harvesting operations, like the one in Oregon, did not "manufacture" or "process" materials and were not "raw materials storage areas at an industrial plant."¹⁴⁸ This meant stormwater discharges could be "directly related" to the harvesting of timber without falling within the scope of the Industrial Activity Rule.

These distinctions, the agency felt, meant the discharges at issue were not "associated with industrial activity" and, therefore, did not require permits due to the 1987 stormwater exemption.¹⁴⁹ It is this interpretation to which the Court ultimately deferred.¹⁵⁰

D. *The Decker Majority*

As a preliminary matter, the Court addressed two jurisdictional questions.¹⁵¹ It first ruled that a particular provision of the Act—which made judicial review the exclusive means of reviewing certain agency actions and set a time bar for that review—did not preclude NEDC's suit.¹⁵² Second, it ruled that the EPA's amendment of the Industrial Activity Rule did not render the Court's review of the Ninth Circuit ruling moot.¹⁵³

The Court then turned to the merits. It first concluded that, as a general matter, logging activities are not necessarily "industrial" in

145. *Decker*, 133 S. Ct. at 1332; see 77 Fed. Reg. 72974 (Dec. 7, 2012) (to be codified at 40 C.F.R. pt. 122, sub pt. B).

146. See *Decker*, 133 S. Ct. at 1336 (citing "Brief for United States as Amicus Curiae").

147. *Id.* at 1336–37.

148. *Id.* at 1337.

149. *Id.* at 1337.

150. *Id.* at 1338.

151. *Id.* at 1334–36.

152. *Id.* at 1334–35.

153. *Id.* at 1335–36.

nature, since by definition “industrial” activities might be only the limited production processes occurring in factories.¹⁵⁴ It then more specifically considered whether the discharges at issue were “associated with industrial activity.”¹⁵⁵

In so doing, the Court rejected the conclusion reached by both NEDC and the Ninth Circuit—that the Industrial Activity Rule’s incorporation of Standard Industrial Classification 24 meant logging facilities were “associated with industrial activity.” Evidently, the Court was not convinced that the logging industry as a whole qualified as “industrial activity,” even though logging facilities did.¹⁵⁶

The majority explained away the examples of nontraditional industrial sites the Industrial Activity Rule classified as engaging in industrial activity.¹⁵⁷ It reasoned that mines, landfills, junkyards, and construction sites “tend to be more fixed and permanent than timber-harvesting operations” and have a “closer connection” to traditional industrial sites.¹⁵⁸ The regulation’s inclusion of these nontraditional sites, it surmised, did not necessarily imply that all stormwater discharges from such sites were also included.¹⁵⁹

As a result, the majority deemed the EPA’s interpretation “permissible.”¹⁶⁰ Focusing on the Industrial Activity Rule’s references to “‘facilities,’ ‘establishments,’ ‘manufacturing,’ ‘processing,’ and an ‘industrial plant,’” the majority found the EPA could have reasonably concluded that only “traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities,” fall within the regulation’s scope.¹⁶¹ In deferring to that interpretation under *Seminole Rock*, the *Decker* majority adhered to the well-established principle that “an agency’s interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.”¹⁶²

154. *Id.* at 1336.

155. *Id.*

156. *Id.* at 1337.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

E. The Chief Justice's Concurrence

In his brief concurrence, Chief Justice Roberts indicated that he might be receptive to reconsidering *Seminole Rock* deference in some fashion.¹⁶³ Justice Alito joined that sentiment.¹⁶⁴ Both felt, however, that it was inappropriate to address the issue when each of the parties had limited its relevant discussion to a single footnote.¹⁶⁵

The concurrence nevertheless underscored the important role *Seminole Rock* deference plays in the Court's administrative jurisprudence. The Chief Justice characterized the issue as "a basic one going to the heart of administrative law," one that "arise[s] as a matter of course on a regular basis."¹⁶⁶ He then openly stated that the Court had "some interest in reconsidering" the standard.¹⁶⁷ But it was Justice Scalia who, in the case's last opinion, explained why the Court should act on that interest.¹⁶⁸

F. Justice Scalia's Concurrence in Part and Dissent in Part

Justice Scalia agreed only with the majority's handling of the two jurisdictional issues.¹⁶⁹ He emphatically disagreed with its handling of the substantive question.¹⁷⁰ In his view, the Court deferred to an "unnatural" regulatory interpretation "simply because [the] EPA says that it believes the unnatural reading is right."¹⁷¹ When it came to *Seminole Rock* deference, Justice Scalia reasoned, "Enough is enough."¹⁷²

Justice Scalia began from the proposition that *Seminole Rock* deference is really the same blanket deference afforded by *Chevron*, but applied to agencies' interpretations of ambiguous regulations rather than of statutes.¹⁷³ Were it anything less, the standard would be of no use, since any interpretation "different from the fairest

163. *See id.* at 1338 (Roberts, C.J., concurring).

164. *Id.*

165. *Id.*

166. *Id.* at 1339.

167. *Id.*

168. *Id.* (Scalia, J., concurring in part and dissenting in part).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

reading . . . is in that sense ‘inconsistent’ with the regulation.”¹⁷⁴ Absent *blanket* deference, the standard would compel deference only when the court adjudged the agency’s interpretation to be the “fairest”—that is, only when the court agreed with the agency.

From there, Justice Scalia discussed the prevailing rationales for the standard and concluded that none could justify the violation of separation of powers principles.¹⁷⁵ Addressing the merits, he found that permits were required.¹⁷⁶

1. Existing Rationales and the Separation of Powers

In Justice Scalia’s view, there is no “persuasive” rationale for *Seminole Rock* deference.¹⁷⁷ He dismissed the originalist rationale because courts do not consider the agency’s intent when interpreting a regulation, but the regulation’s plain language.¹⁷⁸ He dismissed the “agency expertise” rationale as confusing the role of administrative agencies with that of the courts: agencies make rules, and courts interpret them.¹⁷⁹ In his view, an agency’s expertise explains why it should regulate and decide policy but not why it should have authority to interpret the regulations it makes.¹⁸⁰ To the contrary, the “agency expertise” rationale ignores the most basic separation of powers principle: an entity with the power to make law should not also have the authority to interpret and enforce it.¹⁸¹

Justice Scalia, therefore, directly refuted the theory of implied delegation in the context of agency interpretations of regulations. In his view, though the theory explains why deference is due in the *Chevron* context, “there is surely no congressional implication that [an] agency can resolve ambiguities in its own regulations.”¹⁸²

Violating that principle creates the potential for abuse. For example, agencies may endeavor to maintain flexibility by issuing vague regulations that they may conveniently interpret when a

174. *Id.*

175. *Id.* at 1341.

176. *Id.* at 1342.

177. *Id.* at 1339.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 1341.

182. *Id.*

dispute arises.¹⁸³ Viewed in this light, *Seminole Rock* deference “is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.”¹⁸⁴

Finally, Justice Scalia distinguished *Seminole Rock* from *Chevron* by noting that administrative agencies may amend regulations if a reviewing court disagrees with their interpretations.¹⁸⁵ The EPA, for example, amended the Industrial Activity Rule after the Ninth Circuit’s ruling but before the Supreme Court even heard arguments.¹⁸⁶ Similarly, the EPA amended the Silvicultural Rule after the D.C. District Court’s 1975 ruling but before the D.C. Circuit’s 1977 ruling.¹⁸⁷ These relatively quick turnarounds undermine the “pragmatic” benefit afforded by *Seminole Rock*’s blanket deference—namely, an expedient method of obtaining a clear articulation of a regulation’s meaning.¹⁸⁸

2. The Merits

Accordingly, Justice Scalia would have held that permits were required.¹⁸⁹ Put simply, because a “series of pipes, ditches, and channels” conveyed the runoff from the logging roads into the two Oregon rivers,¹⁹⁰ Justice Scalia reasoned that the discharges came from a point source.¹⁹¹ He rejected the EPA’s argument that, under the Silvicultural Rule, the discharges did not come from a point source because they were composed of “natural runoff.”¹⁹² In his view, “manmade pipes and ditches” conveyed the “manmade pollutants” from “manmade forest roads” to the rivers.¹⁹³ Consequently, the runoff was not “natural.”¹⁹⁴

In addition, Justice Scalia concluded that the discharges were “associated with industrial activity” and thus, under the Industrial

183. *Id.*; see also *supra* Part II.B.2.

184. *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

185. *Id.* at 1341–42.

186. *Id.* at 1342.

187. See *supra* notes 109–112 and accompanying text.

188. *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

189. *Id.*

190. *Id.*

191. *Id.* at 1342 (Scalia, J., concurring in part and dissenting in part).

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

193. *Id.*

194. *Id.* at 1343 (Scalia, J., concurring in part and dissenting in part).

Activity Rule, not exempt from the Act's permitting scheme.¹⁹⁵ Unlike the majority, he read the Industrial Activity Rule to include logging as one of the industries considered to be engaging in industrial activity.¹⁹⁶

IV. IMPLICATIONS FOR THE FUTURE

Although the *Seminole Rock* Court first articulated the standard, it did not immediately defer to the Price Administrator's interpretation of the price freeze requirement. Instead, it used the interpretation to supplement its own construction of the regulation. The Court appeared to independently conclude that the regulation attached to transactions in which goods were actually delivered in the month of March 1942. Only then did it turn to the agency's interpretation.

The same cannot be said of the Court in *Auer*. There, the Court limited its discussion of the agency interpretation to two dictionary definitions of a single phrase. This is not enough. The Court's approach in *Seminole Rock* was the better one: courts should interpret regulations for themselves.¹⁹⁷

Justice Scalia's opinion in *Decker* explains why. Throughout his opinion, Justice Scalia advocates upholding the "fairest" reading of any given regulation. In his words, the judicial role "to say what the law is"¹⁹⁸ equates "to determin[ing] the fair meaning of the rule."¹⁹⁹ Similarly, in his words, interpreting a regulation equates to determining whether "what the petitioners did . . . [was] proscribed by the fairest reading of the regulations."²⁰⁰

If the goal is to determine the "fairest" reading of a regulation, the question then becomes how the system should ensure that result. The word "fair," by definition, requires an impartial party capable of resolving a dispute.²⁰¹ Administrative agencies could be such parties. Just because an agency has an interest in the future of a regulatory

195. *Id.* at 1343–44.

196. *Id.* at 1343.

197. See Anthony, *supra* note 41, at 11 ("The court's job should be to interpret the regulation, not merely to decide whether the agency interpretation should be accepted or rejected.").

198. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

199. *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part).

200. *Id.* at 1342.

201. See *Fair Definition*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/fair> (last visited Nov. 2013).

order does not imply that its interpretation becomes compromised when challenged and under judicial review.²⁰² Similarly, just because a court reviewing an agency interpretation seeks to find the fairest reading does not imply that what it deems fair will differ from the agency's interpretation.

The principle of separation of powers, however, contemplates that administrative agencies will not be impartial, dispute-resolving parties, even if they could be. The principle not only separates the three branches of the federal government but also installs checks and balances between them.²⁰³ In this way, the principle shapes the structure of the entire system.²⁰⁴ It therefore accounts for the possibility that an agency interpreting its own regulation may not provide the fairest reading.

Thus, as a general matter, the principle of separation of powers ensures procedural fairness. No matter the result in a given case, the parties will likely dispute the "fairness" of the outcome. That is the nature of the adversarial system. Therefore, regardless of whether a court's interpretation brings about a fair result, which will always be open to debate, the fact that a court interprets the regulation in the course of deciding the dispute protects "against a gradual concentration of the several powers in the same department."²⁰⁵

The separation of powers concern, therefore, distinguishes *Seminole Rock* from *Chevron*. When an agency interprets a statute, it acts as "one independent interpretive check on lawmaking by Congress."²⁰⁶ The check on lawmaking by agencies does not exist when courts defer to agency interpretations.²⁰⁷

V. CONCLUSION

The blanket deference afforded by *Seminole Rock* has come to mean that courts no longer need to interpret regulations for

202. *But see* Anthony, *supra* note 41, at 9–10 ("The positions that agencies assert in their interpretations of regulations often are institutionally self-interested and are intended to impose adverse effects upon private persons.").

203. Matthew James Tanielian, Comment, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 965–66 (1995).

204. *Id.* at 966.

205. THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

206. Manning, *supra* note 17, at 639.

207. *Id.*

themselves. The result is an approach where courts abdicate the judicial role in contravention of *Marbury v. Madison* and the APA.

It is time for the Court to revisit *Seminole Rock*. In the words of Justice Scalia, “It is time for us to presume . . . that an agency says in a rule what it means, and means in a rule what it says there.”²⁰⁸ The opinions of Justice Scalia and Chief Justice Roberts in *Decker* indicate that three members of the Court are open to reexamining the standard. A shift in tide has come.

208. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1344 (2013) (Scalia, J., concurring in part and dissenting in part).