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## UNEARTHING THE LOST HISTORY OF SEMINOLE ROCK

Sanne H. Knudsen\*  
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*In 1945, the Supreme Court blessed a lesser-known type of agency deference in Bowles v. Seminole Rock. Also known as Auer deference, it affords deference to agency interpretations of their own regulations. Courts regularly defer to agencies under this doctrine, regardless of where the interpretations first appear or how long-standing they are.*

*Recently, members of the Supreme Court have signaled a willingness to reconsider, and perhaps jettison, Seminole Rock. Our work supports this kind of reconsideration. Seminole Rock has been widely accepted but surprisingly disconnected from any analysis of its origins and justifications. This Article—the first historical explication of Seminole Rock deference—argues that Seminole Rock cannot support the theoretical weight that subsequent courts and evolving administrative law doctrines have complacently put upon it. Seminole Rock was the product of its time—the 1940s, an era of war-time price controls and a new age of administrative law. Later cases wrongly divorced Seminole Rock from that context.*

*This Article documents the untethering of Seminole Rock. It shows how, in the 1960s and 1970s, alongside an expanding administrative state, the doctrine transformed into a more mechanical and highly deferential form of agency deference. It further shows that this transformation is marked by a consistent lack of scholarly or judicial reflection on its underpinnings. In doing so, this Article provides new depth to the emerging critiques of Seminole Rock deference and lends critical support for reexamination of the doctrine.*

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## INTRODUCTION

Citing the 1945 decision of *Bowles v. Seminole Rock & Sand Co.*,<sup>1</sup> modern courts afford great deference to an agency's interpretation of its own regulations. In describing the basic doctrine, scholars and courts routinely explain, "strong deference is to be paid to an agency's interpretation of its own regulations even if that interpretation was not binding and was not the exercise of law-making powers."<sup>2</sup> Compared to other forms of deference, some argue, "an agency's interpretation of its own regulations may receive stronger deference than its interpretation of a statutory provision."<sup>3</sup>

Despite the obvious self-interest of the agency in interpreting its own regulations, modern decisions do not require that these agency interpretations be the result of any particular process for input or for providing notice.<sup>4</sup> They do not need to have appeared in the *Federal Register* or even to have been articulated in any publicly available document prior to litigation. In fact, when the Court reaffirmed its view of *Seminole Rock* deference in the 1997 case

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<sup>1</sup> 325 U.S. 410 (1945).

<sup>2</sup> WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, *ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES* 391 (4th ed. 2010) (citing *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)); see also *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (noting that a court gives the agency's interpretation controlling weight unless it is "plainly erroneous or inconsistent with the regulation"); 3 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW & PRACTICE* § 10:26 (3d ed. 2010) ("*Auer v. Robbins* has become the leading recent authority for the well-established principle that an agency's interpretation of its own rules must be given substantial deference.>").

<sup>3</sup> FUNK ET AL., *supra* note 2, at 392. The line that follows this point—"Is there good reason for this outcome?"—is a fitting question for one of the book's authors, Russell Weaver, who has explored the question of interpretation of regulations for many years. Weaver noted long ago that "[j]udicial and legislative attention to the deference rule's application to regulations is long overdue. The rule is presently applied in a haphazard and inconsistent manner that conflicts with sound judicial decisionmaking [sic]. One of the most serious problems is that some courts apply the rule in a result-oriented manner." Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587, 623 (1984); see also Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 519–20 (2011) (engaging in an empirical study showing that district courts and circuit courts have a comparatively higher rate of upholding agency action—76% in one study—when *Seminole Rock* deference is applied); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (reflecting on this high rate of deference and positing that "the Supreme Court seems to be sending the lower courts an unmistakable, if implicit, message that they should confer extraordinary deference on agency interpretations of agency rules").

<sup>4</sup> KOCH, *supra* note 2, § 10:26. Since *Seminole Rock*, "the Court has held deference appropriate in several different circumstances: to an agency's interpretation of its regulations contained in an amicus brief filed by the agency, to an interpretive rule issued by the United States Sentencing Commission, and to an [Occupational Safety and Health Administrative] citation alleging that a regulation had been violated." FUNK ET AL., *supra* note 2, at 391 (citations omitted).

*Auer v. Robbins*,<sup>5</sup> it accepted an agency interpretation that was put forth for the first time in the agency’s amicus brief in that litigation.<sup>6</sup> The doctrine has even been applied to interpretations of an entire regulatory scheme rather than being limited to a particular regulation.<sup>7</sup> There are, in short, few limits on this doctrine.<sup>8</sup>

All of that may be about to change. In recent terms, the Supreme Court has shown increasing discomfort with *Seminole Rock* deference. That discomfort has even manifested as express calls for wholesale reexamination of this deference doctrine that has been hornbook law for decades.

Angst over *Seminole Rock* deference was most visible two years ago in *Decker v. Northwest Environmental Defense Center*,<sup>9</sup> when Chief Justice Roberts, joined by Justice Alito, openly invited scholars to take up the question of whether *Seminole Rock* (*Auer*) deference should be reconsidered.<sup>10</sup> In his opinion in *Decker*, Justice Scalia went further, calling for its elimination: “Our cases have not put forward a persuasive justification for *Auer* deference. The first case to apply it, *Seminole Rock*, offered no justification whatever—just the *ipse dixit* that ‘the administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.’”<sup>11</sup> He also cautioned that the practical benefits of deference in this context are not enough to justify it: “In any case, however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not

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<sup>5</sup> 519 U.S. 452, 461 (1997). Although deference to agency interpretations of their own regulations is now referred to as *Auer* deference, this Article focuses on the historical origins of this type of deference. We therefore mostly refer to this kind of deference as *Seminole Rock* deference.

<sup>6</sup> *Id.* at 462.

<sup>7</sup> *Coeur Alaska, Inc. v. Se. Alaska Conserv. Council*, 557 U.S. 261, 284 (2009) (“The Memorandum presents a reasonable interpretation of the regulatory regime. We defer to the interpretation because it is not ‘plainly erroneous or inconsistent with the regulation[s].’” (quoting *Auer*, 519 U.S. at 461)).

<sup>8</sup> One such limit was identified in *Gonzales v. Oregon*. 546 U.S. 243 (2006). There, the Court announced an anti-parroting rule: “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.” *Id.* at 244. For similar reasons, the Court clarified in *Christensen v. Harris County* that *Seminole Rock* deference applies only when the agency’s regulations are ambiguous. 529 U.S. 576, 588 (2000). In that case, the Court began by rejecting the agency’s request to defer to its interpretation in an opinion letter under *Chevron*; it then flatly rejected the request for *Seminole Rock* deference after finding the regulation unambiguous. *Id.* at 587–88.

<sup>9</sup> 133 S. Ct. 1326 (2013).

<sup>10</sup> *Id.* at 1339 (Roberts, C.J., concurring).

<sup>11</sup> *Id.* at 1340 (Scalia, J., concurring in part and dissenting in part) (ellipsis in original) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

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.”<sup>12</sup>

While criticism came to a head in *Decker*, skepticism of *Seminole Rock* deference has been building over several Supreme Court cases.<sup>13</sup> In *Talk America v. Michigan Bell Telephone*, Justice Scalia, the author of *Auer*, announced, “while I have in the past uncritically accepted [the *Auer*] rule, I have become increasingly doubtful of its validity.”<sup>14</sup> Justice Scalia then echoed the concern raised by Professor John Manning: “[D]eferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.”<sup>15</sup> In particular, Justice Scalia expressed concern with applying *Auer* deference in situations where “an agency . . . has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends.”<sup>16</sup>

Shortly after Justice Scalia raised his concerns, the Court in *Christopher v. SmithKline Beecham Corp.* refused to afford *Seminole Rock* deference to the Department of Labor when it changed a long-standing interpretation of whether pharmaceutical sales representatives were exempt from Fair Labor Standards Act wage and hour requirements.<sup>17</sup> The Court held that deference should not be accorded when “there is reason to suspect that the agency’s interpretation ‘does not reflect the agency’s fair and considered judgment on the matter in question.’”<sup>18</sup> In reaching this conclusion, the Court in *Christopher* explained that *Auer* deference “creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit.”<sup>19</sup> This, the Court observed, created fair notice concerns: “[T]o require regulated

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<sup>12</sup> *Id.* at 1342.

<sup>13</sup> *See, e.g.*, *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.”).

<sup>14</sup> 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 618 (1996).

<sup>17</sup> 132 S. Ct. 2156, 2167–68 (2012).

<sup>18</sup> *Id.* at 2166. The factors the Court uses in *Christopher*, 132 S. Ct. at 2168, to evaluate whether *Seminole Rock* deference should be afforded sound like the *Skidmore* factors: “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>19</sup> *Christopher*, 132 S. Ct. at 2168.

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" would be unfair.<sup>20</sup>

Scholars criticizing *Seminole Rock* have raised similar concerns.<sup>21</sup> Most notably, Manning has warned that "*Seminole Rock* leaves an agency free both to write a law and then to 'say what the law is' through its authoritative interpretation of its own regulations."<sup>22</sup> He has urged the Court to "replace *Seminole Rock* with a standard that imposes an independent judicial check on the agency's determination of regulatory meaning."<sup>23</sup> Similarly, Professor Robert Anthony has argued that *Seminole Rock* deference should be abandoned because "[the] prospect [of deference] generates incentives to be vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures."<sup>24</sup>

Most recently, the Court's decision in *Perez v. Mortgage Bankers Ass'n*<sup>25</sup> leaves little doubt that the Court stands poised to reconsider *Seminole Rock* deference. In that case, where the Court held that an agency's interpretive rules were not required to undergo notice and comment rulemaking, issues of *Seminole Rock* deference were not squarely presented. Still, four Justices have now expressed their readiness to reconsider *Seminole Rock* (*Auer*) deference in

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<sup>20</sup> *Id.*

<sup>21</sup> See Robert A. Anthony & Michael Asimow, *The Court's Deferences: A Foolish Inconsistency*, 26 ADMIN. & REG. L. NEWS, Fall 2000, at 10–11; Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1309 (2007); Kevin O. Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 230 (2013) (footnotes omitted) (citing Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 290 (2000)). We restated these concerns in a recent brief on behalf of amicus law professors in the *Decker* case: "[*Seminole Rock*] deference would encourage the agency to adopt regulations that amount to little more than close-enough approximation, knowing that the details could be sorted out through litigation and that the court would defer to the agency's decisions under the guise of deferring to interpretations. If agencies are permitted to leave these details to case-by-case determinations, agencies could create de facto new regulation through litigation without ever providing adequate notice of those expectations prior to the litigation." Brief for Law Professors as Amici Curiae on the Propriety of Administrative Deference in Support of Respondent at 35, *Decker v. N.W. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (Nos. 11-338, 11-347), 2012 WL 5361523; see also Daniel Mensher, *With Friends Like These: The Trouble with Auer Deference*, 43 ENVTL. L. 849, 849, 852 (2013) (remarking that "[t]he starkness of the facts in *Decker* suggests something is off-kilter with *Auer* deference" and suggesting a sliding-scale approach to the issue).

<sup>22</sup> Manning, *supra* note 16, at 618.

<sup>23</sup> *Id.* at 617.

<sup>24</sup> Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 12 (1996).

<sup>25</sup> 135 S. Ct. 1199 (2015).

an appropriate case: Chief Justice Roberts, Justice Alito, Justice Scalia, and Justice Thomas.<sup>26</sup> The full Court also appeared concerned. Footnote 4 of the majority opinion by Justice Sotomayor expressed clear reservations about *Seminole Rock* (*Auer*) deference: “Even in cases where an agency’s interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, *Auer* deference is not an inexorable command in all cases.”<sup>27</sup>

While the moment is ripe for reconsidering *Seminole Rock* deference, courts and scholars continue to lack the historical context necessary for that reconsideration. The modern debate as to whether and how to reform *Seminole Rock* deference remains untethered from its roots and evolution.<sup>28</sup> In particular, scholars have yet to carefully consider how *Seminole Rock* came to take on a life of its own in the lower courts when it was, as Justice Scalia has observed, backed by little theory at its birth.<sup>29</sup>

This Article provides the Court with the information that it will need to reconsider *Seminole Rock* deference. To that end, this Article engages in detailed historical analysis of the evolution of *Seminole Rock* deference from its inception in 1946 to its acceptance as “axiom of judicial review” in the 1970s.<sup>30</sup> Through this historical analysis, this Article shows that the confidence with which courts reflexively apply *Seminole Rock* deference—a confidence that seems to presume the doctrine has been deliberately developed and carefully examined—is misplaced. Far from being a product of robust debate and deeply theorized roots, *Seminole Rock* deference is best described as a doctrine that has become untethered from its roots.

As we explain, *Seminole Rock* began as a doctrine with significant constraints, at a vastly different moment in administrative law. In particular, the doctrine was born in highly specific circumstances of the post-war era of the 1940s. It was applied only in the price control context and only to official

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<sup>26</sup> *Id.* at 10, 12; *Decker v. N.W. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1340 (2013) (Roberts, C.J., concurring).

<sup>27</sup> *Perez*, 135 S. Ct. at 1208 n.4.

<sup>28</sup> *Cf.* Michael P. Healy, *The Past, Present, and Future of Auer Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633 (2014) (examining the origins of *Auer* deference in Supreme Court jurisprudence). As this Article demonstrates, an examination of the origins of *Auer* deference does not start far enough back in the story. The key contextual insights for this doctrine take place long before *Auer v. Robbins* was decided in 1997.

<sup>29</sup> *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring).

<sup>30</sup> *Allen M. Campbell Co. Gen. Contractors v. Lloyd Wood Constr. Co.*, 446 F.2d 261, 265 (5th Cir. 1971).

agency interpretations. And notably, courts applying the doctrine took a heavy hand in examining the text of the regulation—often deferring only after engaging in an independent review of the regulatory text.

Over the course of thirty years, *Seminole Rock* became completely divorced from these modest and restrained origins. By the 1970s, it was transformed; it was mechanically applied and reflexively treated as a constraint upon the careful inquiry that one might ordinarily expect of courts engaged in textual analysis.

Most notably, when courts began to apply the doctrine more widely in the 1960s and 1970s, the rationale for the expansion was curiously absent. In other words, the expansion of *Seminole Rock*—which had the consequence of placing the power of rulemaking and interpretation in the hands of a single entity—has occurred largely without explanation from the courts and with very little commentary from academics.<sup>31</sup> In this way, *Seminole Rock* stands in stark contrast to other types of deference that have been studied in great detail.<sup>32</sup>

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<sup>31</sup> In a 1947 article discussing distinctions between interpretive and legislative rules, giants in the field like Professor Kenneth Culp Davis could not help but flag the issues raised by *Seminole Rock* as a “special circumstance” and an “increasingly important subject.” Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 936 n.72 (1948). And yet, close to the time that *Seminole Rock* was decided, only a handful of scholars took up the case with any real vigor. See, e.g., Frank C. Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374, 389 (1953); Helen B. Norem, *The “Official Interpretation” of Administrative Regulations*, 32 IOWA L. REV. 697, 708–11 (1947). To date, a search of Westlaw’s law review database prior to 1980 turns up only fourteen articles that cite to *Seminole Rock* but do not necessarily discuss it. This might be why modern scholars frequently observe the relative dearth of discussion of *Seminole Rock* compared to other key doctrines. See, e.g., Leske, *supra* note 21, at 229 & n.4 (describing how *Seminole Rock* “has gone largely unexamined both by the legal community and by the Supreme Court, particularly when compared to the landmark deference doctrine announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*”); Manning, *supra* note 16, at 696 (“*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.”); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1451–52 (2011) (“By contrast, courts and commentators have paid less attention to analogous questions regarding *Seminole Rock*’s domain.”).

<sup>32</sup> See, e.g., *Coeur Alaska, Inc. v. Se. Alaska Conserv. Council*, 557 U.S. 261, 295–96 (2009) (Scalia, J., concurring in part and concurring in the judgment) (criticizing the articulation of deference in that case for being too complicated); *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (questioning the Court’s readoption of *Skidmore* deference in lieu of applying *Chevron* deference); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN L.J. AM. U. 1, 11–12 (1996); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 562 (2009). See generally Manning, *supra* note 16, at 613–14, 613 n.9, 614 n.10.



This Article's descriptive effort—namely tracing the evolution of *Seminole Rock*—has significant normative implications. In particular, the findings of this Article lend weight to the emerging view of some scholars and Justices of the Supreme Court that *Seminole Rock* deference ought to be reconsidered. These findings are useful regardless of whether one tends to favor retaining, reshaping, or rejecting *Seminole Rock*. For those who favor retaining it, this Article identifies gaps between the original and the modern day application. In doing so, this Article challenges courts and scholars to provide a cogent rationale for the current doctrine in light of its origins. For those who favor reshaping *Seminole Rock*, this Article provides, through its detailed examination of early approaches, some potential criteria for restraint. Finally, for those who favor rejecting *Seminole Rock*, this Article suggests that the stability provided by early formulations may be worth retaining but that the larger expansion of the doctrine was and remains unjustified.

This Article proceeds in five parts. Parts I, II, and III provide the lost history of *Seminole Rock* by tracing the doctrine's evolution from the 1940s to the 1970s. Part IV then places the expansion in context with other key transformations in administrative law. Finally, Part V offers suggestions for a guiding path forward. In the end, the message is simple: The time is ripe to demand a rationale for the transformation of *Seminole Rock* deference.

## I. HISTORY AND ORIGINS OF *SEMINOLE ROCK* IN THE 1940S AND 1950S

For courts and scholars to fully assess the future of *Seminole Rock*, it is important to understand how the doctrine has substantially evolved from its original context. In tracing this evolution, we start with the historical context of the 1940s to determine why *Seminole Rock* deference did not initially appear to be the target of controversy as it is now.

When the early cases and historical context are examined, some simple but important patterns emerge from the start. First, the doctrine did not start as one that applied to a wide range of agencies or types of regulations; for at least a decade after its inception, *Seminole Rock* deference was applied only in cases that arose in the precise context of price control. To be fair, most regulations of this period were in the price control context and, as a result, there may not have been many options to consider deference in other contexts. Second, in the early cases, *Seminole Rock* deference was given mainly when the agency interpretation was published as an official interpretation, which was often published concurrently with the regulation itself. Third, when an agency

interpretation was not an official publication, the lower courts rejected *Seminole Rock* deference and appeared to apply *Skidmore*'s framework.

A. *World War II, the Price Control Era, and OPA*

The story of *Seminole Rock* is intertwined with the story of the Office of Price Administration (OPA) and the particular challenges of the price control era. But the broader historical context of *Seminole Rock* is an equally important piece of the narrative. In fact, the Supreme Court's seemingly casual turn to agency deference in *Seminole Rock* may reflect the Court's deeper understanding of the unique challenges and self-imposed procedural safeguards that motivated a particular agency at a particular time.

Scholars of the price control era distinguished between OPA and its peer agencies. Importantly, before OPA entered the picture, agencies did not generally seek deference for their regulatory interpretations. As Helen B. Norem, a former District Price Attorney for OPA, explained in a 1947 article, “[u]ntil the emergence of the OPA, no governmental agency had either the authority or the inclination to elevate its interpretations to [have the force and effect of law].”<sup>33</sup> The most contentious issue during that period was instead whether agencies would be estopped, or bound, by interpretations of their employees.<sup>34</sup>

Prior to . . . OPA, an interpretation was a statement given in writing or orally by an employee of an agency which applied to a specific set of facts. Since it had no general application . . . a person relied on the statement at his own peril. There were no clear-cut procedural guides to the enunciation of interpretations, or to the effect which was to be given to them by the agency. As a logical corollary, the courts might recognize and use the interpretation if they chose, but usually only after a detailed study of the content of the interpretation.<sup>35</sup>

As but one example of this issue, Norem pointed to the Supreme Court decision in *American Telephone & Telegraph Co. v. United States*,<sup>36</sup> in which the Court bound an agency to the interpretation of its employee during the hearing on the order: “We accept this declaration as an administrative construction binding upon the Commission in its future dealings with

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<sup>33</sup> Norem, *supra* note 31, at 700.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (footnotes omitted).

<sup>36</sup> *AT&T Co. v. United States*, 299 U.S. 232 (1936).

companies.”<sup>37</sup> As Norem described, this was clearly an example of “the Court binding the agency to an interpretation, and not the agency binding the Court.”<sup>38</sup>

Much changed, however, when the United States went to war and began diverting vast amounts of raw material and labor away from civilian markets and manufacturing. As Army historian Maurice Matloff wrote, “[T]he single greatest tangible asset the United States brought to the coalition in World War II was the productive capacity of its industry.”<sup>39</sup> This productive capacity, while beneficial to the war effort, threatened to wreak havoc on labor and material supply in domestic markets.<sup>40</sup> For some goods, military procurement would reduce civilian supply to levels only seen during the starkest years of the Depression<sup>41</sup>: “Even the enormous American economy was not exempt from the laws of scarcity and the iron necessity of choice.”<sup>42</sup> When workers moved from plant to plant and city to city in search of greater wages, and as sellers enjoyed the economy’s insatiable demand for raw materials, the federal government grew deeply concerned about wartime inflation and post-war letdowns.<sup>43</sup>

To combat the inflationary gap, the federal government turned to price controls. Congress passed the Emergency Price Control Act in 1942.<sup>44</sup> The sense of urgency to curb inflation was high.<sup>45</sup> According to historian Meg Jacobs, the Senate Committee on Banking and Currency reported that “[t]he need for price stability is urgent. The cost of living must be stabilized.”<sup>46</sup> The issue was urgent enough that Congress moved OPA out of the National

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<sup>37</sup> *Id.* at 241.

<sup>38</sup> Norem, *supra* note 31, at 701.

<sup>39</sup> DAVID M. KENNEDY, *THE AMERICAN PEOPLE IN WORLD WAR II: FREEDOM FROM FEAR, PART II* 206 (1999) (quoting Maurice Matloff, *The 90-Division Gamble*, in *COMMAND DECISIONS* (Kent Roberts Greenfield ed., 1960)).

<sup>40</sup> *Id.* at 212 (describing the adverse consequences of the war economy on the civilian side).

<sup>41</sup> At least one historian estimated that “fulfilling all the army and navy orders would cut civilian consumption to 60 percent of its level in 1932, the darkest year of the Depression.” *Id.* at 203.

<sup>42</sup> *Id.*

<sup>43</sup> Meg Jacobs, “How About Some Meat?”: *The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941–1946*, 84 J. AM. HIST. 910, 914 (1997) (“[R]ecalling their experiences of World War I, Washington officials feared the inflationary threat of a full-employment, war production economy. Because the Roosevelt administration chose a loose monetary policy to finance wartime borrowing, the burden of fighting inflation fell directly on price controls.”).

<sup>44</sup> Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23.

<sup>45</sup> Jacobs, *supra* note 43, at 914.

<sup>46</sup> *Id.* (quoting S. REP. NO. 77-931, at 3 (1942)).

Defense Advisory Commission, gave it independent status, and provided the authority necessary to establish and enforce price controls.<sup>47</sup>

Norem explained that, unlike the administrative practice of other agencies, OPA knew it would need to provide interpretations that “would give protection to the person who asked for and received an interpretation.”<sup>48</sup> Accordingly, in that same year, OPA issued Procedural Regulation No. 1,<sup>49</sup> and then a Revised Procedural Regulation No. 1,<sup>50</sup> which were designed to provide a way for the public to “obtain an administrative interpretation [that] would be binding upon the agency.”<sup>51</sup> The regulation explained how individuals could request binding interpretations and what the limits of those requests would be, including that no interpretations would be provided for hypotheticals<sup>52</sup> and that only certain named officials could provide binding interpretations.<sup>53</sup>

What makes these “official interpretations” most intriguing is that they were not supervised or even commented on by the Enforcement Division. Unlike many agencies that exist today, the legislative and executive functions of OPA were bureaucratically separate.<sup>54</sup> According to Norem, this meant that the interpretations “could be, and frequently were, of detrimental effect on pending cases in the Enforcement Division” because the Price Division and Enforcement Division operated separately.<sup>55</sup>

In addition to its unique approach to providing interpretations to the public, as a matter of substance OPA had a unique job to do. While it initially attempted to curb inflation by instituting price controls on select materials and goods, OPA eventually adopted the widely applicable General Max regulations that were at issue in *Seminole Rock*.<sup>56</sup> The General Max regulations were an

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<sup>47</sup> *Id.*

<sup>48</sup> Norem, *supra* note 31, at 702.

<sup>49</sup> 7 Fed. Reg. 971 (1942).

<sup>50</sup> 7 Fed. Reg. 8961 (1942).

<sup>51</sup> Norem, *supra* note 31, at 702.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Years later, Bernard Schwartz would note that segregating the functions of agencies was one of the proposals made by the President’s Committee on Administrative Management in 1937. Bernard Schwartz, *The Administrative Agency in Historical Perspective*, 36 IND. L.J. 263 (1961). In that 1961 article, Schwartz likewise urged that the “ideal development of our administrative law” would start with the “complete segregation of administrative from judicial functions in the independent federal agencies.” *Id.* at 279.

<sup>55</sup> Norem, *supra* note 31, at 704.

<sup>56</sup> Donald H. Wallace & Philip H. Coomes, *Economic Considerations in Establishing Maximum Prices in Wartime*, 9 LAW & CONTEMP. PROBS. 89, 104 (1942) (“[S]elective price control becomes inadequate as a means of achieving the objectives of war price control when inflationary pressures become generalized. By the

enormous undertaking. OPA was attempting to institute a general price freeze on “thousands of commodities and millions of buyers and sellers to achieve the same intensive analysis of individual cases and the same detailed application of criteria that are feasible under narrower ceilings over fewer items.”<sup>57</sup> The key to the success of the effort would be “the highest degree of cooperation and understanding among businessmen, consumers, and Government.”<sup>58</sup> Scholars at the time observed that, given the kind of task that was given to OPA, “[g]overnment officials have the responsibility of making the spirit of regulations as clear as possible.”<sup>59</sup> OPA therefore provided a highly organized and self-binding mechanism for providing interpretations to those who sought them.

When *Seminole Rock* was decided in 1945, it was on the heels of courts becoming more familiar with OPA’s method of issuing interpretations and understanding why OPA issued them. In fact, in the years leading up to *Seminole Rock*, courts began to show divergent views on the level of respect that OPA’s interpretations could properly garner. Several courts refused to be bound by OPA’s interpretations despite the fact that the interpretations adhered to Revised Procedural Regulation No. 1. For example, the Seventh Circuit concluded that it would not accept an interpretation of the administrator as controlling on the courts because the “[t]he Administrator had not grown to any such stature.”<sup>60</sup> In addition, as noted by Norem, a trial court in New York refused to give any weight to an interpretation that had been issued by the Regional Price Attorney pursuant to the procedural regulation because it was just “the opinion of one of the attorneys employed by that agency.”<sup>61</sup>

Other courts, however, began to see value in the interpretations,<sup>62</sup> perhaps due to the rigorous process required and separation between the interpreting body and enforcement personnel within the agency. Initially, some courts concluded that OPA’s interpretations could appropriately be accorded some

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end of the first quarter of 1942 it was apparent that the American economy was threatened by a mounting inflationary tidal wave. The only effective measure against such a deluge is a broad price freeze.”)

<sup>57</sup> *Id.* at 104; *see also* Jacobs, *supra* note 43, at 918 (“By 1944, OPA affected more than 3 million business establishments and issued regulations controlling 8 million prices, stabilizing rents in 14 million dwellings occupied by 45 million tenants, and rationing food to 30 million shoppers.”).

<sup>58</sup> Wallace & Coomes, *supra* note 56, at 106.

<sup>59</sup> *Id.*

<sup>60</sup> *Bowles v. Simon*, 145 F.2d 334, 337 (7th Cir. 1944).

<sup>61</sup> Norem, *supra* note 31, at 704 (quoting *Tompkins Cty. Milk Producers Coop., Inc. v. Luce*, 4 P & F, OPA OPS. & DEC. 2087 (N.Y. Sup. Ct. 1945)).

<sup>62</sup> *Id.* at 707.

respect or value.<sup>63</sup> The Tenth Circuit went furthest, concluding that an OPA interpretation should be treated as controlling “so long as [it did] not distort or pervert the plain intendment of the Act.”<sup>64</sup>

It was with this backdrop that the case of *Seminole Rock* was brought. Chester Bowles, the Chief of OPA, sought to enjoin Seminole Rock & Sand Company from violating the Emergency Price Control Act.<sup>65</sup> In particular, the question was whether the price charged for crushed rock violated the General Max regulations, which stated “each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942.”<sup>66</sup>

The particular price control dispute in *Seminole Rock* turned on whether the company could properly charge \$1.50 per ton for crushed rock when it had entered into a contract for that price during March 1942 but had failed to actually deliver the crushed rock during that timeframe. In other words, was the maximum price set by the date of the formation of the contract or the date of the actual delivery within the base period?<sup>67</sup> To determine the meaning of the regulation, the Supreme Court announced the oft-quoted language that became known as *Seminole Rock* deference:

Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.<sup>68</sup>

The full opinion is quite short. It provides little rationale for announcing this principle,<sup>69</sup> which has meant that for many years, courts and scholars have not thought much about what drove the decision.

Taking a few steps back, however, we can make some observations about the case itself. First, when the Supreme Court was asked to clarify the General

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<sup>63</sup> See *id.* (citing, inter alia, *Lubin v. Streg*, 56 F. Supp. 146 (E.D.N.Y. 1944)).

<sup>64</sup> *Bowles v. Nu Way Laundry Co.*, 144 F.2d 741, 746 (10th Cir. 1944).

<sup>65</sup> *Seminole Rock*, 325 U.S. at 410–12.

<sup>66</sup> *Id.* at 413.

<sup>67</sup> *Id.* at 413–14.

<sup>68</sup> *Id.*

<sup>69</sup> *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part).

Max Regulations in *Seminole Rock*, the Court was faced with much more than a run of the mill contract dispute. The nation was looking for clarity in an evolving situation involving a complex regulatory undertaking that demanded expediency and broad-based compliance.<sup>70</sup> The entire price control strategy to combat wartime inflation would be undermined if the price freeze was not effectively and expeditiously implemented. The Supreme Court recognized the importance of this task, granting certiorari “because of the importance of the problem in the administration of the emergency price control and stabilization laws.”<sup>71</sup> Economists at the time were also calling for price control efforts that were “capable of rapid and flexible operation.”<sup>72</sup>

This historical context, and the sense of urgency to provide clarity to price control measures, may have contributed to the Court’s willingness to give great weight to the administrative interpretation in *Seminole Rock*. In fact, the Emergency Court of Appeals, which was established to exercise exclusive jurisdiction over wartime price control cases, more directly observed the need to give OPA flexibility:

It must be remembered that the Emergency Price Control Act imposed upon the Administrator the Herculean task of stabilizing the price structure of a great nation and of doing so with unprecedented speed under the immediate threat of inflation. . . . It is enough if in the exercise of judgment he has promulgated regulations which are generally fair and equitable and are such as will effectuate the purposes of the act.<sup>73</sup>

It could be, then, that we might understand the outcome in *Seminole Rock* as a result of the unique circumstances of war and economic depression and qualify it as such.<sup>74</sup> But even taking *Seminole Rock* outside the war context, it is often overlooked that the Supreme Court’s opinion was limited in several ways.

First, as between regulatory text and agency interpretation, the Court’s reasoning placed greater weight on the text.<sup>75</sup> In concluding that *Seminole*

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<sup>70</sup> See *supra* notes 42–54 and accompanying text.

<sup>71</sup> *Seminole Rock*, 325 U.S. at 413.

<sup>72</sup> Wallace & Coombs, *supra* note 56, at 99.

<sup>73</sup> James A. Durham, *The Present Status of Price Control Authority*, 52 COLUM. L. REV. 868, 872 (1952) (quoting *Safeway Stores v. Bowles*, 145 F.2d 836, 845 (Temp. Emer. Ct. App. 1944)).

<sup>74</sup> Cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528–29 (1935).

<sup>75</sup> Others have made similar observations. See Healy, *supra* note 28, at 637, 639 (“The strong rule of deference described by the Court [in *Seminole Rock*] is, however, undercut by the analysis that follows the

Rock & Sand Co. had charged too much for their crushed rock, the Court did not jump directly to the agency's interpretation. The Court first considered the plain language of the regulation itself. After independently judging the interpretation to be consistent with the plain text, the Court then looked to the agency's own interpretation of the regulation to confirm what it had concluded.<sup>76</sup>

Second, although the Supreme Court announced a general principle of deference for agency interpretations of their own regulations, it also reminded readers that the agency's interpretation is subservient to the regulatory text, statutory mandates, and constitutional limits. Immediately after announcing a principle of deference, the Court went on to say, with little fanfare and as though the point were obvious enough, that determining the meaning of the regulation was only the first step; the ultimate outcome as dictated by the meaning of the regulation would have to pass muster under the statute and Constitution: "The legality of the result reached by this process, of course, is quite a different matter. In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188."<sup>77</sup> Because there was no question that the OPA regulations were valid, the Court went on to observe that "[o]ur only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator."<sup>78</sup>

There were also unique aspects to the OPA interpretation at issue in *Seminole Rock*. First, it had been issued concurrently with the Maximum Price Regulation.<sup>79</sup> Because the regulation was issued before the Administrative Procedure Act (APA) was enacted, there was no statement of basis and purpose that accompanied the regulation that might supply, as it would now, further explanation of the regulation and how it should be interpreted. The interpretation was issued in a bulletin entitled *What Every Retailer Should Know About the General Maximum Price Regulation*.<sup>80</sup> Bulletins like it were regularly published by OPA to explain the price control regulations, that is, "to explain lawyer's language to laymen."<sup>81</sup> In general, it provided detailed illustrations of how to calculate maximum sales prices, when to ask for

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Court's statement of the rule. . . . Only after this extensive analysis of the regulatory text does the Court turn its attention to the agency's own interpretation of the regulation.").

<sup>76</sup> *Seminole Rock*, 325 U.S. at 414–15.

<sup>77</sup> *Id.* at 414.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 417.

<sup>80</sup> Frank C. Newman, *How Courts Interpret Regulations*, 35 CALIF. L. REV. 509, 531 (1947).

<sup>81</sup> *Id.*



adjustments, and what information to keep on file with OPA.<sup>82</sup> The bulletins also reminded citizens of the importance of adhering to price controls and that “patience is itself good patriotism.”<sup>83</sup>

Second, the bulletin relevant to resolving the *Seminole Rock* dispute was directly on point. It reminded businesses that “[t]he highest price charged during March 1942 means the highest price which the retailer charged for an article *actually delivered* during that month.”<sup>84</sup> In the spirit of putting regulated entities on clear notice, the bulletin reemphasized this interpretation through a direct example: “It should be carefully noted that *actual delivery* during March, rather than the making of a sale during March, is controlling.”<sup>85</sup>

Finally, although not published in the *Federal Register*, the bulletin was signed by the Administrator of the OPA.<sup>86</sup> It was also, at least at the time,<sup>87</sup> widely available: “[H]undreds of thousands of copies [were] distributed throughout the country”<sup>88</sup> to manufacturers, wholesalers, and retailers.<sup>89</sup>

Properly understood, then, the Supreme Court in *Seminole Rock* was operating in unique economic and wartime circumstances. It also began in a much different place than modern *Auer* analyses: It arrived at its own interpretation after examining the text of the regulation first and then concluding that its interpretation was consistent with that of the agency<sup>90</sup> as well as the organic statute and the Constitution. In addition, the interpretation

<sup>82</sup> OFFICE OF PRICE ADMINISTRATION, BULL. NO. 2, WHAT EVERY RETAILER SHOULD KNOW ABOUT THE MAXIMUM PRICE REGULATION 2 (1942) [hereinafter OPA BULL. NO. 2].

<sup>83</sup> *Id.* at iii.

<sup>84</sup> *Seminole Rock*, 325 U.S. at 417 (quoting OPA BULL. NO. 2, *supra* note 82, at 3).

<sup>85</sup> *Id.* (quoting OPA BULL. NO. 2, *supra* note 82, at 4).

<sup>86</sup> Newman, *supra* note 80, at 531.

<sup>87</sup> In a 1950 article urging agencies to publish interpretive documents in the *Federal Register*, Frank Newman explained the danger of not publishing the bulletin in the *Federal Register* when it was needed years later in *Seminole Rock*:

When Chief Justice Stone learned that the pamphlet was not in the record, he asked for copies and naturally was assured they would be provided. Several hours later I received a frantic call from an OPA secretary, who confessed that no copies could be found in the main OPA building and wanted to know if by chance I had kept a copy for my personal files when I left OPA.

Frank C. Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929, 938 n.25 (1950).

<sup>88</sup> Newman, *supra* note 80, at 531.

<sup>89</sup> *Seminole Rock*, 325 U.S. at 417.

<sup>90</sup> Properly understood, *Seminole Rock* seems to provide the kind of judicial check that John Manning proposed. See Manning, *supra* note 16, at 681–86.

was an official interpretation, was published concurrently with the regulation and made widely available, and was directly on point. There was very little risk that a regulated entity was misled by vague agency regulations. When placed in its full context, the result in *Seminole Rock* is unsurprising.

### B. Unremarkable Response to *Seminole Rock*

In the aftermath of *Seminole Rock*, there was no indication from scholars or the Court that a new doctrine of administrative law had just been announced. In fact, after a single citation for a timing issue one year after it was decided in *M. Kraus & Bros. v. United States*,<sup>91</sup> it would take the Supreme Court twenty years, until 1965, to return to *Seminole Rock* in *Udall v. Tallman*.<sup>92</sup>

The scholarly literature likewise had little to say about it. The first article to do so, Norem's article, has been infrequently cited, perhaps due to limitations in its availability in commercial databases. It certainly provides helpful context for understanding the decision, but Norem's ultimate goal was not to take a position on when it was appropriate to defer to agency interpretations of its own regulations. Instead, she thought the most important thing achieved by OPA was to give the public assurance regarding reliance on individual interpretations.<sup>93</sup> In her view, the APA was unhelpful to other agencies that wanted to embrace OPA's interpretive process for the public.<sup>94</sup> After walking through the problems under the APA,<sup>95</sup> she advocated for an amendment that would "protect the general public by giving to it a method of obtaining a binding interpretation from the agencies" similar to OPA's approach.<sup>96</sup> She concluded ominously that "[f]ailing amendment, the interpretation will die of atrophy and the administrative agencies will have lost a very important tool."<sup>97</sup>

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<sup>91</sup> 327 U.S. 614, 622 (1946).

<sup>92</sup> 380 U.S. 1 (1965). In 1955, Justice Reed's dissenting opinion in *Peters v. Hobby* cited *Seminole Rock* in a string cite for the proposition that interpretations that are "promptly adopted and long-continued . . . should be respected by the courts." 349 U.S. 331, 355 (1955) (Reed, J., dissenting). Other than this single citation, it was ten more years before the Court engaged with *Seminole Rock* in a meaningful way. See Leske, *supra* note 21, at 251.

<sup>93</sup> Norem, *supra* note 31, at 700.

<sup>94</sup> *Id.* at 711.

<sup>95</sup> *Id.* at 712–13.

<sup>96</sup> *Id.* at 713. Frank Newman in a later piece advocated for the same thing. Newman, *supra* note 31, at 389 ("In its role as counselor the Government ought to stand by its word, honorably. At the same time, effective administration of the law need nowise be impaired.")

<sup>97</sup> Norem, *supra* note 31, at 713.

Other writers were less sure of the value of *Seminole Rock* going forward. Frank C. Newman, who, like Norem, worked for the OPA but went on to even greater acclaim serving as both the Dean of Berkeley Law School and as a justice on the Supreme Court of California, wrote that the few cases<sup>98</sup> like *Seminole Rock* “seem to stand alone as authority for a rule of deference; and they have not inhibited the Court in other cases from doing what it thinks just, regardless of what the interpretations proved may have implied as to administrative intent.”<sup>99</sup> His article, later praised by Professor Kenneth Culp Davis as “especially thorough and thoughtful,”<sup>100</sup> is an effort to provide a stronger framework for courts faced with interpreting regulations, for which he suggests that “agency interpretations do control when they are properly authenticated and published”<sup>101</sup> as in the OPA example.

In 1950, Davis took this issue up briefly in his seventeenth and last article in a series of articles on the major problems in administrative law.<sup>102</sup> After describing the facts and discussion in *Seminole Rock*, Davis concluded that the statement regarding controlling weight for the interpretation “is hardly more than dictum.”<sup>103</sup> He then turned to the *Kraus* case, a criminal case that also involved OPA in which the court “paid little heed” to the Administrator’s interpretation.<sup>104</sup>

Although the criminal context of *Kraus* might justify a different rule, Davis described it as inconsistent with *Seminole Rock*: “The *Seminole* and *Kraus* cases together show that the language of an individual case about weight to be given administrative interpretations must be read in the light of the continuing wide margin for judicial discretion.”<sup>105</sup> Like Newman, Davis concluded that the courts were far from clear on what to do when interpreting agency regulations. In his proposal for what might be done, Davis urged at least

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<sup>98</sup> See, e.g., *Levers v. Anderson*, 326 U.S. 219 (1945); *Addison v. Holly Hill Co.*, 322 U.S. 607 (1944).

<sup>99</sup> Newman, *supra* note 80, at 521.

<sup>100</sup> Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 596 n.179 (1950).

<sup>101</sup> Newman, *supra* note 80, at 539.

<sup>102</sup> Davis, *supra* note 100, at 596–99.

<sup>103</sup> *Id.* at 597.

<sup>104</sup> *Id.* at 598.

<sup>105</sup> *Id.* Newman also noted this inconsistency: “[I]f *Kraus & Bros.* had been defendant in treble damage or injunction proceedings, rather than in criminal proceedings, the chances are that the Court would have regarded these official interpretations as binding.” Newman, *supra* note 80, at 518.

“sufficient notice” of the interpretation to the parties involved if the interpretation was to be binding.<sup>106</sup>

### C. Restraint by the Lower Courts

Davis’s concerns about notice would not have been an issue in the early application of *Seminole Rock*. In the early cases—namely those from the late 1940s and early 1950s—*Seminole Rock* deference was typically applied in the limited context of price control regulations. Indeed, until it was disbanded in 1947, OPA was almost exclusively the agency asking for and receiving deference under *Seminole Rock* in the decade following the decision. Of the sixteen federal courts of appeals cases citing *Seminole Rock* from 1945 to 1947, thirteen involved OPA.<sup>107</sup>

The pattern of applying *Seminole Rock* mainly to price control regulations continued until 1955. From 1947 to 1955, many of the cases involving *Seminole Rock* deference involved OPA’s successor agencies, including the Office of the Housing Expediter, the Department of Agriculture, the Department of Commerce (Division of Liquidation), and the Reconstruction Finance Company.<sup>108</sup> In all, just over two-thirds of the cases applying *Seminole Rock* deference in the first decade following the Supreme Court’s decision were price control cases. As a result, it appears that, at least in the early years, the lower courts did not take the principles of agency deference announced in

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<sup>106</sup> Davis, *supra* note 100, at 598; see also Newman, *supra* note 87, at 938 n.25 (arguing for broader compliance with APA’s requirement that interpretations be published in the *Federal Register*).

<sup>107</sup> The thirteen cases involving OPA included *Fleming v. Van Der Loo*, 160 F.2d 906 (D.C. Cir. 1947); *Fleming v. Campbell*, 160 F.2d 315 (6th Cir. 1947); *Southern Goods Corp. v. Bowles*, 158 F.2d 587 (4th Cir. 1946); *Anchor Liquor Co. v. United States*, 158 F.2d 221 (10th Cir. 1946); *Superior Packing Co. v. Porter*, 156 F.2d 193 (8th Cir. 1946); *Mechanical Farm Equipment Distributors. v. Porter*, 156 F.2d 296 (9th Cir. 1946); *Bowles v. Cudahy Packing Co.*, 154 F.2d 891 (3d Cir. 1946); *Bowles v. Mannie & Co.*, 155 F.2d 129 (7th Cir. 1946); *F. Uri & Co. v. Bowles*, 152 F.2d 713 (9th Cir. 1945); *Bowles v. Good Luck Glove Co.*, 150 F.2d 853 (7th Cir. 1945); *Bowles v. Indianapolis Glove Co.*, 150 F.2d 597 (7th Cir. 1945); *Bowles v. Wheeler*, 152 F.2d 34 (9th Cir. 1945); *White v. Bowles*, 150 F.2d 408 (Emer. Ct. App. 1945). The three anomalies involved the Internal Revenue Service, *Commissioner v. Fisher*, 150 F.2d 198 (6th Cir. 1945), the Social Security Board, *United States v. LaLone*, 152 F.2d 43 (9th Cir. 1945), and the Department of Labor, *Armstrong Co. v. Walling*, 161 F.2d 515 (1st Cir. 1947).

<sup>108</sup> See, e.g., *Danz v. Reconstruction Fin. Corp.*, 193 F.2d 1010 (Emer. Ct. App. 1952) (Reconstruction Finance Corporation); *Woods v. Petchell*, 175 F.2d 202 (8th Cir. 1949) (Office of the Housing Expediter); *L. Gillarde Co. v. Joseph Martinelli & Co., Inc.*, 169 F.2d 60 (1st Cir. 1948) (Department of Agriculture); *Fleet-Wing Corp. v. Clark*, 166 F.2d 145 (Emer. Ct. App. 1948) (Department of Commerce, Division of Liquidation). For a list of OPA’s successor agencies, see *Records of the Office of the Price Administration: 188.1 Administrative History*, NAT’L ARCHIVES, <http://www.archives.gov/research/guide-fed-records/groups/188.html#188.1> (last visited July 29, 2015).

*Seminole Rock* and apply them broadly. Instead, the courts mainly used deference to provide stability to a post-war economy.

Even in the limited context of price control cases, the context that had been blessed by the Supreme Court, lower courts did not give themselves over to deference lightly. First, they would not give deference to all agency interpretations. Rather, deference was typically given in cases involving “officially published interpretations,”<sup>109</sup> which could include those in the *Federal Register* or, as in *Seminole Rock*, ones that had been printed in an official document of the agency and made widely available. These interpretations included examples of how price controls would be calculated under the regulations.<sup>110</sup> In contrast to today’s understanding of *Auer* deference, courts rejected *Seminole Rock* deference in cases where the interpretations were not officially published or the official interpretations came in response to litigation.<sup>111</sup>

In addition, lower courts were not likely to defer to OPA interpretations that were made through internal agency letters,<sup>112</sup> internal memos,<sup>113</sup> or private letters to the litigants.<sup>114</sup> As one court observed, “It would be absurd to hold that the courts must subordinate their judgment as to the meaning of a statute

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<sup>109</sup> See, e.g., *Woods v. Macken*, 178 F.2d 510 (4th Cir. 1949) (deferring to official published interpretation of the Office of the Housing Expediter, an OPA successor agency); *Woods v. Petchell*, 175 F.2d 202 (8th Cir. 1949) (same); *Bowles v. Mannie & Co.*, 155 F.2d 129 (7th Cir. 1946) (giving deference to meaning of maximum price regulation that was published as official interpretation); *Bowles v. Wheeler*, 152 F.2d 34 (9th Cir. 1945) (same); *White v. Bowles*, 150 F.2d 408, 410 (Emer. Ct. App. 1945) (same).

<sup>110</sup> See OPA BULL. NO. 2, *supra* note 82.

<sup>111</sup> See also *Woods v. Ginnochio*, 180 F.2d 484, 486–87 (9th Cir. 1950) (refusing to give deference when the interpretation offered by the agency is given after the start of the controversy). Compare *F. Uri & Co.*, 152 F.2d 713 (deference to official published interpretation not appropriate when the interpretation issued after events giving rise to the litigation and marketplace still confused), with *Mech. Farm Equip. Distribs.*, 156 F.2d 296 (giving deference to published official interpretation even when it was issued after conduct giving rise to the case when that interpretation was consistent with an earlier interpretation classifying farmers as subject to the regulation at issue). Following the Supreme Court’s lead, the lower courts also refused to give deference when the regulation imposed a criminal sanction. *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614 (1946); *Anchor Liquor Co.*, 158 F.2d 221 (citing *Kraus* and refusing deference where the regulation imposes a criminal sanction).

<sup>112</sup> See *S. Good Corps.*, 158 F.2d 587 (refusing deference to internal letter of advice from general counsel in OPA).

<sup>113</sup> *Fleming v. Campbell*, 160 F.2d 315 (6th Cir. 1947) (refusing deference to memo issued by the associate general counsel of OPA on issue of rent controls).

<sup>114</sup> *Fleming v. Van der Loo*, 160 F.2d 906 (D.C. Cir. 1947) (refusing deference to unpublished, private letter to the litigant after the onset of the controversy).

or regulation to the mere unsupported opinion of an associate counsel in an administrative department.”<sup>115</sup>

In the few cases not involving price control in this era, courts took a similar approach.<sup>116</sup> In one case involving Department of Labor regulations, the Second Circuit refused to give deference to an interpretation offered up during litigation.<sup>117</sup> Acknowledging the court’s general practice of deferring only to official published interpretations, the court admonished that underlying fairness concerns arise when regulated entities have not been put on notice of the agency’s proffered interpretations: “[We] must also give much weight to administrative interpretive rulings which have been published and of which the regulated are thus on notice. But here there were no published rulings giving the construction for which plaintiff contends.”<sup>118</sup>

Although the pattern is clear, there were some deviations from the otherwise uniform approach of lower courts. On a few occasions, courts accepted agency interpretations that were not official and published.<sup>119</sup> For example, the First Circuit deferred to an agency interpretation offered in an amicus brief to the litigation.<sup>120</sup> In doing so, the court noted that the agency was in the best position to understand how best to carry out the purpose of the underlying statute.<sup>121</sup> Equally important to the court, however, was that the agency interpretation had been consistently applied for ten years.<sup>122</sup> As a result, regulated entities were on notice of the agency’s interpretation, whether by

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<sup>115</sup> See *S. Good Corps.*, 158 F.2d at 590.

<sup>116</sup> *Gibson Wine Co. v. Snyder*, 194 F.2d 329 (D.C. Cir. 1952) (refusing deference to interpretive letter to litigant in case involving the Internal Revenue Service); *Tobin v. Edward S. Wagner Co.*, 187 F.2d 977 (2d Cir. 1951) (refusing deference to litigation position in case involving Department of Labor regulations); *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950) (giving deference to a Presidential Memorandum, which was published in the *Federal Register*, in a case involving the Civil Service Commission’s Loyalty Review Board); *Armstrong Co. v. Walling*, 161 F.2d 515 (1st Cir. 1947) (deferring to official published interpretation issued by the Department of Labor on a regulation implementing the Fair Labor Standards Act).

<sup>117</sup> *Tobin*, 187 F.2d 977.

<sup>118</sup> *Id.* at 979–80 (footnote omitted).

<sup>119</sup> See *L. Gillarde Co. v. Joseph Martinelli & Co.*, 169 F.2d 60 (1st Cir. 1948) (deferring to interpretation offered by agency in an amicus brief); *Superior Packing Co. v. Porter*, 156 F.2d 193, 195 (8th Cir. 1946) (accepting interpretation offered in present litigation even though the defendant offered a contrary interpretation that was based on a published Statement of Considerations).

<sup>120</sup> *L. Gillarde Co.*, 169 F.2d at 61.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* In another case, the Seventh Circuit Court of Appeals deferred to an agency interpretation that emerged from previous litigation. *Bowles v. Good Luck Glove Co.*, 150 F.2d 853, 854 (7th Cir. 1945). That case presented facts nearly identical to *Seminole Rock*, and the court deferred to the same agency interpretation accepted in *Seminole Rock. Id.*; see also *Bowles v. Indianapolis Glove Co.*, 150 F.2d 597, 599 (7th Cir. 1945) (same).

long-term and consistent agency interpretation or by interpretations blessed by previous litigation.

Despite these few outliers, an examination of the early cases suggests two things. First, by and large lower courts applying *Seminole Rock* in the 1940s did so with a heavy dose of restraint. This is not surprising given that the administrative state is relatively new in this period. Agencies did not engage in rulemaking as frequently as they would later, so there were fewer interpretations of regulations.<sup>123</sup> Second, the contexts in which *Seminole Rock* deference was applied in the early cases do not invoke modern concerns of abuse. Courts deferred to agency interpretations that were supported by procedures that provided, at a minimum, the notice that was afforded in the adoption of the regulations themselves. Courts were skeptical of deferring to interpretations that clarified the regulations only after litigation ensued. With this constrained application of *Seminole Rock*, the questions about strategic advantage and manipulation raised by those concerned about modern day applications of *Seminole Rock* were not issues in the early days, in large part because the contexts in which deference was afforded were narrow.

## II. CHANGING TIDES AND EXPANDING VIEWS OF THE 1960S

Because modern views of *Seminole Rock* stand in contrast to its modest origins, one expects to find a discernible turning point when *Seminole Rock* deference moved away from price control regulations and became more widespread. That moment occurred in the 1960s, when price control cases had fallen off the court dockets and when courts were left to decide whether *Seminole Rock* would be the near-exclusive province of OPA and its successor agencies. Notably, as *Seminole Rock* deference stood at the cusp of expansion, so did the administrative state and the very idea of rulemaking through regulations.<sup>124</sup>

During this time, courts began to shed, slowly and without much fanfare, the original contextual appreciation of *Seminole Rock* as a wartime relic. Much different from the de novo analysis that typically accompanied judicial review in the early days, the 1960s would herald an era when deference became a rebuttable presumption and courts saw their role as affirmatively constrained by the agency interpretation. By the end of the 1960s, the last vestiges of

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<sup>123</sup> See *infra* Part V.B.

<sup>124</sup> See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 546 (2002); see also *infra* Part V.B.

*Seminole Rock*'s origins would be completely shed and the doctrine would be applied to interpretations in a variety of contexts, not just official agency interpretations but ones provided merely in letters or in response to litigation. Throughout this transformation, one pattern stands above the rest: the near lack of theoretical justification for *Seminole Rock*'s expansion. The nuance and contextual particularities of *Seminole Rock*'s birth would not even elicit a nod by later courts in their application of the doctrine.

A. *From Restrained Origins to a Doctrine of Judicial Restraint*

The trajectory of *Seminole Rock*'s expansion would begin with small steps—first by applying the doctrine outside the limited price control context and then slowly moving away from the baseline assumption that deference was appropriate for only official interpretations. Still courts remained restrained, and most insisted on limits rooted in well-settled administrative law, finding deference appropriate only if interpretations reflected consistent and long-standing agency practice. Momentum for change, however, began to build throughout the 1960s and would eventually accelerate to the point where the once-restrained doctrine would tie the hands of courts and create what looked like a rebuttable presumption in favor of agency deference.

1. *Moving Beyond Price Control Cases and Official Interpretations*

By the early 1960s, agencies began to ask for deference under *Seminole Rock* in contexts outside of price control, labor, or wartime loyalty. For example, in a 1957 case before the Sixth Circuit Court of Appeals, the Department of the Interior asked the court to defer to an interpretation of a regulation adopted under the Migratory Bird Treaty Act found in a letter to a litigant who had contacted the Department for clarification of the regulation before hunting season opened.<sup>125</sup> The Department responded and sent a copy of its interpretive letter to Fred Jacobson, the United States Game Management Agent-in-Charge for the Fish and Wildlife Service of the State of Ohio.<sup>126</sup> This, the Secretary of the Interior (the Secretary) later contended, made the interpretation “official” and therefore worthy of *Seminole Rock* deference.<sup>127</sup>

In considering whether to defer to the Secretary's interpretation, the Sixth Circuit concluded that the interpretation was not entitled to deference because

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<sup>125</sup> *Clemons v. United States*, 245 F.2d 298, 299 (6th Cir. 1957).

<sup>126</sup> *Id.* at 300.

<sup>127</sup> *Id.*



it had neither been published in the *Federal Register* nor been constructively adopted through consistent usage.<sup>128</sup> By setting out these tests, the Sixth Circuit synthesized a view of *Seminole Rock* deference that reflected the approach in the early years. The Sixth Circuit also expressly rejected a broader expansion of *Seminole Rock*: “Independent research has shown no case nor text supporting such wide extension of the doctrine of administrative interpretation.”<sup>129</sup> The broad reading of *Seminole Rock* proposed by the agency, the court went on to say, “has no support in the law.”<sup>130</sup> The Sixth Circuit’s restrained view of *Seminole Rock* exemplifies the fairly uniform and conservative approach to *Seminole Rock* deference until that point. The Sixth Circuit, however, may have gone a bit further than *Seminole Rock* itself by insisting that interpretations be published in the *Federal Register*. Even in *Seminole Rock* the Court accepted an interpretation that was made widely and publicly available, though not technically published in the *Federal Register* at the time of the dispute.<sup>131</sup>

Change, however, was coming. In 1962 the D.C. Circuit decided a mineral leasing case in which it held that an agency need not publish an interpretation in the *Federal Register* in order to receive *Seminole Rock* deference.<sup>132</sup> Such a requirement, the court remarked, “would make the administrative process inflexible and incapable of dealing with many of the specialized problems that arise.”<sup>133</sup> Although it took a more relaxed approach than the Sixth Circuit and was not necessarily out of line with *Seminole Rock*, its tone reflected a shift in the D.C. Circuit’s willingness to embrace a more generous approach to *Seminole Rock* deference.

## 2. *Requiring Interpretations to Reflect Long-Standing Agency Practice*

Despite, or perhaps because of, the split as to whether agency interpretations must be official in order to receive deference, courts did not embrace broader *Seminole Rock* deference immediately. Instead, they imposed other requirements with well-established roots in administrative law. In particular, at the outset of the 1960s, courts insisted that agency interpretations at least be long-standing or consistent with past practices in order to receive

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<sup>128</sup> *Id.* at 301–02.

<sup>129</sup> *Id.* at 301.

<sup>130</sup> *Id.*

<sup>131</sup> *See supra* note 87.

<sup>132</sup> *Boesche v. Udall*, 303 F.2d 204 (D.C. Cir. 1961), *aff’d*, 373 U.S. 472 (1963).

<sup>133</sup> *Id.* at 206 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947)).

deference. In *Boesche v. Udall*,<sup>134</sup> for example, although the D.C. Circuit rejected the requirement that agency interpretations be officially published, it nevertheless noted that the proffered interpretation had been consistently applied by the agency in practice and previous adjudications.<sup>135</sup> Similar requirements are found in other cases from the D.C. Circuit during this period.<sup>136</sup>

The Eighth Circuit also took this approach in *Pike v. Civil Aeronautics Board*, which involved an agency's interpretation that was advanced for the first time in the litigation.<sup>137</sup> After citing *Seminole Rock* and noting that agency interpretations may well be entitled to great weight, the court declined to give deference where there was no long-standing administrative interpretation.<sup>138</sup> Foreshadowing some of the modern day concerns with *Seminole Rock*, the court also noted reservations about deferring to an agency interpretation of vague regulations: "This lack of specificity and completeness of the Regulations disturbs us for this case."<sup>139</sup>

The requirement that an interpretation be long-standing or consistent with past practices in order to receive deference was not new to administrative law. In his early discussion of distinctions between legislative and interpretive rules, Davis explained that observations about consistency had been made by the Supreme Court as early as 1833.<sup>140</sup> Justice Cardozo would make a similar statement in *Norwegian Nitrogen v. United States* during the 1930s.<sup>141</sup> In that case, he observed that "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful."<sup>142</sup> He went on to argue that deference would also be proper for less-established agency interpretations under some circumstances: "The practice has peculiar weight when it involves

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<sup>134</sup> *Id.* at 204–06.

<sup>135</sup> *Id.* at 206 (observing that "the Secretary 'has always considered lands covered only by an outstanding application to be available for leasing'" (quoting Natalie Z. Shell, 62 I.D. 417, 419 (1955))).

<sup>136</sup> See *Wright v. Paine*, 289 F.2d 766 (D.C. Cir. 1961); *Outland v. Civil Aeronautics Bd.*, 284 F.2d 224 (D.C. Cir. 1960).

<sup>137</sup> 303 F.2d 353, 355 (8th Cir. 1962).

<sup>138</sup> *Id.* at 357.

<sup>139</sup> *Id.*

<sup>140</sup> Davis, *supra* note 31, at 921 ("More than a century ago the Supreme Court observed that 'usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits.'" (quoting *United States v. Macdaniel*, 32 U.S. (7 Pet.) 1, 15 (1833))).

<sup>141</sup> 288 U.S. 294 (1933).

<sup>142</sup> *Id.* at 315.

a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.”<sup>143</sup>

Although *Norwegian Nitrogen* involved an issue of statutory construction, the D.C. Circuit began citing it alongside *Seminole Rock* in the late 1960s<sup>144</sup> after the Supreme Court expressly connected the doctrines for statutory interpretation to an agency’s interpretation of its own regulation in *Udall v. Tallman*.<sup>145</sup>

There are other connections between *Seminole Rock* deference and the requirement that proffered agency interpretations be consistent with long-standing practice. In 1944, the year before the Supreme Court decided *Seminole Rock*, the Court set forth factors for determining how much deference was owed to an agency’s statutory interpretations in *Skidmore v. Swift & Co.*<sup>146</sup> One of those factors was the consistency of the agency’s interpretation over time.<sup>147</sup> As discussed in Part IV, *Skidmore* was sometimes cited alongside *Seminole Rock* in the early years.<sup>148</sup>

Despite its historical basis, the practice of deferring to long-standing agency interpretations is not found in the language of the *Seminole Rock* decision. There are probably two reasons for this. First, the publication and self-binding nature of OPA regulations provided the kind of notice that seemed to be gained through long-standing practice. Second, the short life of price controls did not lend itself to requiring long-standing administrative practice. As a result, although the practice of deferring to long-standing agency

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<sup>143</sup> *Id.*

<sup>144</sup> *See, e.g.,* Freeman v. Seligson, 405 F.2d 1326, 1345 (D.C. Cir. 1968) (statutory interpretation case that borrows language from *Seminole Rock* in support of giving deference); FTC v. Cinderella Career & Finishing Sch., Inc., 404 F.2d 1308, 1320 (D.C. Cir. 1968) (citing *Seminole Rock* and *Norwegian Nitrogen* in a statutory interpretation case for the proposition that the agency’s “consistent practice, involving as it does an administrative interpretation of the statute under which the Commission functions, is entitled to peculiar weight”).

<sup>145</sup> For a discussion of the influence of *Udall v. Tallman* on the expansion of the *Seminole Rock* doctrine, see *infra* Part III.B.

<sup>146</sup> 323 U.S. 134 (1944).

<sup>147</sup> *Id.* at 140.

<sup>148</sup> *See, e.g.,* Gibson Wine Co. v. Snyder, 194 F.2d 329, 332 (D.C. Cir. 1952) (citing to both *Skidmore* and *Seminole Rock* after remarking that an unpublished interpretation would be given less weight because it is not backed by certain procedural safeguards); S. Goods Corp. v. Bowles, 158 F.2d 587, 590 (4th Cir. 1946) (citing both *Skidmore* and *Seminole Rock* after remarking that “[s]ince, however, the interpretation in question received the sanction of the Administrator as an official interpretation, it is entitled to respectful consideration by us in interpreting the regulation”).

interpretations is not found explicitly in *Seminole Rock*, it is not inconsistent with it.

### 3. *Shifting Away From Restraint and Towards Rebuttable Presumptions*

The 1960s, though, were an era of quick change. In fact, not every court agreed that *Seminole Rock* was limited to long-standing agency interpretations. Although an outlier of this early 1960s time period, the Seventh Circuit's opinion in *Daly v. United States* provides a good example.<sup>149</sup> In that case, the Seventh Circuit deferred to the FCC as to whether CBS had fulfilled its obligation to provide "fair and balanced" coverage of pending congressional legislation.<sup>150</sup> The FCC's interpretation of its rules on editorializing arose in the course of the litigation. The court deferred to that interpretation, with little discussion, observing that "[t]he Commission's own interpretation of its rule is the ultimate criterion and is entitled to controlling weight, unless it is plainly erroneous or inconsistent with the rule."<sup>151</sup>

Though the Seventh Circuit's approach may have been in the minority at the very start of the 1960s, it would soon keep broader company. By the mid-1960s, courts were consistently deferring to agency interpretations offered for the first time in the litigation itself.<sup>152</sup>

This quick evolution to accept agency interpretations that were not officially published or long-standing importantly coincided with, and perhaps is explained by, a bigger shift in courts' general interpretive approach in administrative cases. Lower courts applying *Seminole Rock* deference in the price control era often engaged in what looked like de novo interpretive analysis, only to cap off their decision with a reference and citation to *Seminole Rock*.<sup>153</sup> In the 1960s, this changed dramatically.

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<sup>149</sup> 286 F.2d 146 (7th Cir. 1961).

<sup>150</sup> *Id.* at 149.

<sup>151</sup> *Id.* (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

<sup>152</sup> See *Gray v. Johnson*, 395 F.2d 533 (10th Cir. 1968); *Cedar Rapids Television Co. v. FCC*, 387 F.2d 228 (D.C. Cir. 1967); *Rust Broad. Co. v. FCC*, 379 F.2d 480 (D.C. Cir. 1967); *JNO McCall Coal Co. v. United States*, 374 F.2d 689 (4th Cir. 1967); *Pan Am. Petrol. v. Udall*, 352 F.2d 32 (10th Cir. 1965); *Robertson v. Udall*, 349 F.2d 195 (D.C. Cir. 1965); *Sw. Petrol. Corp. v. Udall*, 325 F.2d 633 (D.C. Cir. 1963); *Morgan v. Udall*, 306 F.2d 799 (D.C. Cir. 1962).

<sup>153</sup> See cases cited *supra* note 107.

Starting with the Seventh Circuit's decision in *Daly v. United States* and then continuing more explicitly in several cases in the D.C. Circuit,<sup>154</sup> courts began to articulate *Seminole Rock* as giving rise to a type of rebuttable presumption, a burden that would have to be overcome if the court were to adopt a contrary interpretation.<sup>155</sup> In an increasing number of cases, the degree of independent inquiry regarding the reasonableness of the agency's interpretation diminished and a more expedient approach to resolving questions of regulatory interpretation took hold.

Consider, for example, the D.C. Circuit's opinion in *Southwestern Petroleum Corp. v. Udall*.<sup>156</sup> Decided in 1963, the case involved a dispute over an oil and gas lease. Instead of discussing the context of the agency interpretation for which deference was sought, the court concluded that the agency interpretation was reasonable and that the court therefore "cannot" disturb the agency's decision.<sup>157</sup> The tenor of this case approaches that of modern day applications of *Seminole Rock*, in which the court does not independently examine the interpretation but rather asks if the interpretation is unreasonable.

Not coincidentally, the administrative state underwent an expansion in this same era as well as an increase in rulemaking.<sup>158</sup> Although not articulated as such, it would appear that convenience may have played one part in eroding the previously careful approach to regulatory interpretation. That is, the appeal of an expanded *Seminole Rock* deference may have been the simplicity that it offered to those reviewing regulatory interpretations.<sup>159</sup>

The view that *Seminole Rock* deference tied the hands of courts is also reflected in another D.C. Circuit opinion of that same brief era. Around the

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<sup>154</sup> See *Pancoastal Petrol., Ltd. v. Udall*, 348 F.2d 805, 807 (D.C. Cir. 1965); *Sw. Petrol. Corp.*, 325 F.2d at 635; *Morgan*, 306 F.2d at 801; see also *JNO McCall Coal Co.*, 374 F.2d at 691–92 (adopting similar view that the court's ability to overturn an agency interpretation is limited).

<sup>155</sup> E.g., *Sw. Petrol. Corp.*, 325 F.2d at 635.

<sup>156</sup> *Id.* at 633–35.

<sup>157</sup> *Id.* at 635 ("We cannot say that the Secretary's choice of interpretation was unreasonable and, absent such a finding, we cannot disturb his decision.").

<sup>158</sup> See WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW: EXAMPLES AND EXPLANATIONS 3–4 (4th ed. 2012) (describing the expansion of the administrative state in the 1970s); Merrill & Watts, *supra* note 124, at 546; *supra* Part V.B (explaining the impetus for the increase in rulemaking).

<sup>159</sup> Cf. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("It makes the job of a reviewing court much easier, and since it usually produces affirmance of the agency's view without conflict in the Circuits, it imparts (once the agency has spoken to clarify the regulation) certainty and predictability to the administrative process.").

same time period, in *Morgan v. Udall*,<sup>160</sup> another mineral leasing case, the D.C. Circuit remarked that “[t]he Secretary’s decision is subject to judicial review only if it can be shown that he has acted arbitrarily or unreasonably or that his interpretation of what constitutes ‘public lands’ is erroneous as a matter of law.”<sup>161</sup> Rather than being an afterthought to the court’s independent examination of regulatory text, *Seminole Rock* deference was now described as a limit on the court’s ability to review the merits of the underlying case.

Interestingly, the court in *Morgan v. Udall* gave no explanation for why its perception of *Seminole Rock* deference shifted so dramatically. One clue might come from the 1961 D.C. Circuit opinion in *Wright v. Paine*,<sup>162</sup> which cites *Seminole Rock* and then quotes a case decided by the Supreme Court in 1950, *Chapman v. Sheridan-Wyoming*, for the proposition that “[t]he courts can intervene only where legal rights are invaded or the law violated.”<sup>163</sup> Like *Morgan v. Udall* and *Wright v. Paine*, it involved a question of the Department of the Interior’s implementing regulation for the Mineral Lands Leasing Act.<sup>164</sup> In *Chapman*, the Supreme Court upheld the district court’s dismissal of a complaint for failure to state a cause of action.<sup>165</sup> Though in one part of the opinion the Court upheld the agency’s interpretation of a regulation as “permissible, even if not inevitable,”<sup>166</sup> the language later quoted in *Wright v. Paine* comes from the Court’s final and generic observation that it cannot provide a remedy at law no matter the hardship if the plaintiff fails to state a cause of action.<sup>167</sup> In other words, the work that *Chapman* would later be asked to do in *Morgan v. Udall* and *Wright v. Paine* had little if anything to do with *Chapman*’s approach to evaluating the meaning of regulatory text because *Chapman* did not even cite *Seminole Rock*.

Whatever the particular influence of *Chapman*, a clear pattern emerged in the lower courts. Namely, there was a growing consensus that *Seminole Rock*, which was fairly restrained in its origins, was an active constraint on the

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<sup>160</sup> 306 F.2d 799 (D.C. Cir. 1962).

<sup>161</sup> *Id.* at 801.

<sup>162</sup> 289 F.2d 766 (D.C. Cir. 1961).

<sup>163</sup> *Id.* at 768 (quoting *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 631 (1950)).

<sup>164</sup> *Chapman*, 338 U.S. at 625.

<sup>165</sup> *Id.* at 625.

<sup>166</sup> *Id.* at 631.

<sup>167</sup> *Id.* After sympathetically commenting that “[t]he declining market following the war and the growing use of oil may present difficult problems of survival for government lessees and of fair dealing for the Secretary,” the court nonetheless explained that “courts can intervene only where legal rights are invaded or the law violated.” *Id.*

courts' authority to review regulatory interpretations. By the mid-1960s, circuit courts articulated with greater force their view that *Seminole Rock* deference placed a limit on judicial authority.

In *Pancoastal Petroleum v. Udall*, the D.C. Circuit reviewed the Oil Import Appeals Board's refusal to allow a foreign oil producer an allocation to import crude oil to the United States.<sup>168</sup> The general embargo on importation stemmed from a 1959 Presidential Proclamation.<sup>169</sup> The Proclamation, however, allowed the Board to grant allocation of crude oil in "special circumstances to persons with importing histories."<sup>170</sup> Importantly, in considering the force of the deference owed to the agency, the court characterized *Seminole Rock* as giving rise to a presumption of validity to agency interpretations: "The administrative interpretation here challenged is supported by the general presumption of validity and in particular by the fact that the regulation is being interpreted and applied by a board which is an affiliate of, if not identical with, the officer who fashioned the wording."<sup>171</sup> The court went on to note other factors weighing in favor of deference, including the "certainty and clarity of administration provided by the rul[e]" and the great degree of discretion that Congress afforded the agency in the administration of the underlying statute.<sup>172</sup> On the last point, the court noted that the appellant faced an "even greater burden than customarily faces litigants since there is nothing about 'importing history' in the underlying enactment."<sup>173</sup> Notably, this was the second time in the opinion that the court discussed the burden faced by a party who "seeks to overturn the interpretation."<sup>174</sup> Predictably, the court deferred to the Board's interpretation.<sup>175</sup>

A few years later, in a case involving a dispute between the United States and a coal wholesaler, the Fourth Circuit announced that "[w]e are without authority to overturn an administrative interpretation of an act or regulations adopted thereunder unless it can be said that the construction of the act is

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<sup>168</sup> 348 F.2d 805, 805–06 (D.C. Cir. 1965).

<sup>169</sup> *Id.* at 806 (citing *Statement by the President Upon Signing Proclamation Governing Petroleum Imports*, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER, 1959, at 240 (1960)).

<sup>170</sup> *Id.* (quoting Proclamation No. 3279, 24 Fed. Reg. 1781 (Mar. 12, 1959)).

<sup>171</sup> *Id.* at 807.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

‘plainly erroneous or inconsistent with the regulation.’”<sup>176</sup> The court went on to emphasize that “we would not be authorized to substitute our views if it could be said that the administrative interpretation was a reasonable one.”<sup>177</sup>

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As these cases illustrate, in the course of a few short years, an increasing number of decisions strike out from the restrained origins of *Seminole Rock*. At first the move was tepid, shedding the requirement of official published interpretations and then only asking that an interpretation be long-standing. But once the restraints were loosened, there was a noticeable and relatively rapid move away from the original understanding and application of *Seminole Rock*. Indeed, the application was so different from *Seminole Rock*’s origins that it becomes common for courts to understand it as a doctrine intended to restrain judicial authority.

In the lower courts, the shift that occurred in the 1960s is most obvious if one compares the Sixth Circuit’s approach to *Seminole Rock* deference at the beginning and end of that decade. Recall that in 1957 the Sixth Circuit refused to give deference to agency interpretations unless they were published in the *Federal Register*.<sup>178</sup> In 1969, just over a decade later, the Sixth Circuit deferred to an agency interpretation that was provided in nothing more than a letter to the litigant.<sup>179</sup> Remarkably, the court did not even acknowledge its previous approach to deference or in any way suggest that the context of an agency interpretation would alter the deference that might be due to the interpretation. The court simply concluded that the agency interpretation was not “plainly erroneous.”<sup>180</sup>

### B. *Tying Seminole Rock to Broader Doctrines of Deference*

Although the dramatic expansion of *Seminole Rock* deference during the 1960s started before the Supreme Court’s 1965 decision in *Udall v. Tallman*<sup>181</sup>—the first Supreme Court case to cite to *Seminole Rock* in nearly

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<sup>176</sup> *JNO McCall Coal Co. v. United States*, 374 F.2d 689, 691 (4th Cir. 1967) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

<sup>177</sup> *Id.* at 692.

<sup>178</sup> *Clemons v. United States*, 245 F.2d 298, 301 (6th Cir. 1957).

<sup>179</sup> *Telerama, Inc. v. United States*, 419 F.2d 1047, 1050 (6th Cir. 1969).

<sup>180</sup> *Id.* at 1053 (citing *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965); *Seminole Rock*, 325 U.S. at 414).

<sup>181</sup> 380 U.S. 1.



two decades<sup>182</sup>—there is no doubt that *Tallman* fueled the lower courts expanding views of *Seminole Rock*. In particular, *Tallman* opened the door for expansion by tying *Seminole Rock* to a broader body of well-accepted statutory interpretation doctrines. And it did so without any discussion of *Seminole Rock*'s origins and with very little rationale.

*Udall v. Tallman* turned on the Secretary's authority to issue oil and gas leases.<sup>183</sup> The respondents had filed applications for oil and gas leases on approximately 25,000 acres of land in the Kenai National Moose Range in Alaska.<sup>184</sup> The Secretary had rejected respondents' leases on the ground that the lands had already "been leased to prior applicants."<sup>185</sup> The case was contingent upon whether the lands in controversy had been available for leasing under an Executive Order and various agency regulations before 1958.<sup>186</sup> If the lands were closed to leasing before the 1958 agency regulation, the respondents would have submitted the first valid leasing application, which under the Mineral Leasing Act of 1920 is enough to establish a leasing right.<sup>187</sup> If, on the other hand, the lands were open to leasing before 1958, it would preclude the respondents' applications because several other applicants would have already established a right to a lease.<sup>188</sup>

In its decision, the Court noted that the Secretary had issued "a total of 331 leases covering 696,680 acres on applications filed during the period" that respondents argued the lands had been closed to leasing.<sup>189</sup> In addition, "the Solicitor General further assures us that the lessees and their assignees had, in turn, expended tens of millions of dollars in the development of the leases."<sup>190</sup> The Court therefore concluded that the lands in question had, in fact, been open to leasing prior to 1958 and that the Secretary was justified in rejecting the respondents' lease applications.<sup>191</sup> In reaching this conclusion, the Court cited to *Seminole Rock* and deferred to the Secretary's interpretation of its own regulations and an accompanying Executive Order.<sup>192</sup>

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<sup>182</sup> The Court had previously limited *Seminole Rock*'s reach in *M. Kraus & Bros. v. United States*, 327 U.S. 614 (1946), which dealt with criminal sanctions.

<sup>183</sup> 380 U.S. at 11.

<sup>184</sup> *Id.* at 2.

<sup>185</sup> *Id.* at 2–3 (footnote omitted).

<sup>186</sup> *Id.* at 17.

<sup>187</sup> *Id.* at 2.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 15.

<sup>190</sup> *Id.* at 16.

<sup>191</sup> *Id.* at 18.

<sup>192</sup> *Id.* at 22–23.

In some ways, *Tallman* is an unremarkable case. Although the Court applied *Seminole Rock* outside the price control context, it nevertheless looked for the traditional indicia of deference that characterized *Seminole Rock* and its early progeny. To that end, the Court specifically remarked that “the Secretary’s interpretation had, long prior to respondents’ applications, been a matter of public record and discussion.”<sup>193</sup> In particular, the issue of whether to close the lands to leasing and the issuance of some prominent leases in that area had been debated before Congress in various committees, subcommittees, and public hearings for at least a decade.<sup>194</sup> In fact, agency representatives had testified twice before Congress about related issues and asserted without contradiction that the Kenai National Moose Range was open for oil and gas exploration.<sup>195</sup> Moreover, the agency interpretation was published in the *Federal Register* before litigation ensued.<sup>196</sup> As a result, even though the Court gave deference outside the price control context, the agency interpretation at issue emerged from a very public context with notice and an opportunity for input. In that way, the context of the agency interpretations in *Tallman* seems much closer to the notice provided in *Seminole Rock*.

In addition, the Court’s interpretive approach in *Tallman* is comparable to that of *Seminole Rock*. Rather than blessing the rebuttable presumption approach that was bubbling up in the D.C. Circuit at the time, the Court in *Tallman* considered at length the context and history of the agency’s proffered interpretation and gave deference only after considering the policy implications of failing to do so.<sup>197</sup>

Finally, in both cases the Court identified a public policy reason for accepting the agency’s interpretation. In *Seminole Rock*, the Court was trying to stabilize a wartime economy; in *Tallman*, the Court focused on the detrimental reliance of a few hundred existing leaseholders.<sup>198</sup> To that end, the Court made clear that “almost the entire area covered by the orders in issue has been developed, at very great expense, in reliance upon the Secretary’s

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<sup>193</sup> *Id.*; *see id.* at 4 (“Since their promulgation, the Secretary has consistently construed both orders not to bar oil and gas leases; moreover, this interpretation has been made a repeated matter of public record.”).

<sup>194</sup> *Id.* at 17.

<sup>195</sup> *Id.* at 10.

<sup>196</sup> *Id.* at 14.

<sup>197</sup> *Id.* at 4–16.

<sup>198</sup> *See id.* at 18; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413 (1945).

interpretation.”<sup>199</sup> Not deferring to the agency, the Court recognized, would have had substantial collateral consequences.<sup>200</sup> The same was true in *Seminole Rock* given the need for wartime stability.

Aside from applying *Seminole Rock* to long-standing and publicly-vetted agency interpretation, *Tallman* is unremarkable in a second way. The Court did very little to advance the jurisprudential understanding of *Seminole Rock* deference. Although the Court made clear why deferring to the Secretary’s interpretation in that case was appropriate (the interpretation was long-standing and a matter of public record) and even desirable (a few hundred leaseholders had detrimentally relied on the interpretation at issue), it did not set out any particular rationale as to why deferring to agency interpretations of their own regulations would be appropriate as a general matter.<sup>201</sup> Instead, the Court primarily established the propriety of deferring to agency interpretation of the statutes that they administer,<sup>202</sup> noting that particular respect is due when “the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion.”<sup>203</sup> Then, supported by nothing more than a quote to *Seminole Rock*, the Court announced that “[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.”<sup>204</sup>

Although it has much in common with *Seminole Rock*, *Tallman* opened the door to broader deference in important ways. First, it signaled that *Seminole Rock* deference was appropriate outside the price control context. Second, and most significantly, *Tallman* created a bridge between the worlds of statutory interpretation and regulatory interpretation. By directly linking these worlds, *Tallman* substantially expanded the body of jurisprudence that would support deference to agencies’ interpretations of their own regulations.

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<sup>199</sup> *Tallman*, 380 U.S. at 18; *see id.* at 4 (“While the Griffin leases and others located in the Moose Range have been developed in reliance upon the Secretary’s interpretation, respondents do not claim to have relied to their detriment upon a contrary construction.”).

<sup>200</sup> *Id.* at 18.

<sup>201</sup> *Id.* at 17–18.

<sup>202</sup> *Id.* at 16.

<sup>203</sup> *Id.* (quoting *Power Reactor Dev. Co. v. Int’l Union of Elec., Radio and Mach. Workers*, 367 U.S. 396 (1961)). Although the Court cited *Power Reactor Development Co.*, the language dates back to Justice Cardozo’s opinion in *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). *See* discussion *supra* note 141 and accompanying text.

<sup>204</sup> *Tallman*, 380 U.S. at 16.

*Tallman*'s influence in the lower courts became apparent fairly quickly. In the wake of *Tallman*, lower courts began citing it in combination with *Seminole Rock* and, in doing so, seemed comfortable taking a more expansive view of *Seminole Rock*. Indeed, after *Tallman*, the lower courts became more forceful in their characterization of the "burden" that must be "overcome" in order to defeat the presumption of deference.<sup>205</sup> In addition, after *Tallman* there was a greater range of agencies seeking *Seminole Rock* deference. As compared to the early 1960s, when *Seminole Rock* was mainly cited in oil and gas leasing cases arising out of the Department of Interior, after *Tallman* there were cases involving a variety of issues from the Department of Agriculture, Department of Labor, FCC, and Bureau of Indian Affairs.<sup>206</sup> Finally, after *Tallman* there was a noticeable surge of cases in which agencies were seeking and receiving deference for interpretations made during the course of the litigation.<sup>207</sup>

As the courts became more comfortable shedding the requirement that interpretations be officially published, they also began to shed the requirement that interpretations arise from long-standing administrative practice. Often courts deferred with little accompanying analysis. And despite the variety of agencies and interpretive contexts at issue, perhaps most remarkable is that not one court declined to give deference to a proffered agency interpretation in the

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<sup>205</sup> *JNO McCall Coal Co. v. United States*, 374 F.2d 689, 691 (4th Cir. 1967) (citing *Seminole Rock* and *Tallman* and noting that the court was "without authority to overturn an administrative interpretation of an act or regulations adopted thereunder unless it can be said that the construction of the act is 'plainly erroneous or inconsistent with the regulation'"); *Pancoastal Petrol. Ltd. v. Udall*, 348 F.2d 805, 807 (D.C. Cir. 1965) (citing *Seminole Rock* and *Tallman* and describing the administrative interpretation as "supported by the general presumption of validity").

<sup>206</sup> *See, e.g., Gray v. Johnson*, 395 F.2d 533, 536–37 (10th Cir. 1968) (citing *Seminole Rock* and upholding the Bureau of Indian Affairs' decision to cancel a lease on Indian land); *Cedar Rapids Television Co. v. FCC*, 387 F.2d 228, 230 (D.C. Cir. 1967) (citing *Seminole Rock* and *Tallman* and concluding that the FCC's interpretation is "entitled to 'controlling weight'"); *United States v. Davison Fuel and Dock Co.*, 371 F.2d 705, 714 (4th Cir. 1967) (citing *Seminole Rock* and *Tallman* and deferring to Department of Labor's officially published interpretation of fair wage regulations); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 650 (6th Cir. 1966) (citing *Seminole Rock* and *Tallman* and deferring to Department of Agriculture's interpretation of regulation regarding compensatory payments to unregulated milk handlers). Of course, Department of Interior oil and gas leasing cases continued to find their way on to the court dockets, though they were noticeably clustered in 1965. *See, e.g., Pan Am. Petrol. v. Udall*, 352 F.2d 32 (10th Cir. 1965) (Department of Interior oil and gas leasing case); *Pancoastal Petrol., Ltd.*, 348 F.2d 805 (Department of Interior oil importation case); *Robertson v. Udall*, 349 F.2d 195 (D.C. Cir. 1965) (Department of Interior oil and gas leasing case).

<sup>207</sup> *See Gray*, 395 F.2d at 536; *Cedar Rapids Television Co.*, 387 F.2d at 230; *Rust Broad. Co. v. FCC*, 379 F.2d 480, 482 (D.C. Cir. 1967); *JNO McCall Coal Co.*, 374 F.2d at 691; *Pan Am. Petrol.*, 352 F.2d at 36; *Robertson*, 349 F.2d at 198.

latter half of the 1960s.<sup>208</sup> In the already changing tides of the early 1960s, *Tallman* served as an important slingshot toward the modern view.

### C. *Influences Beyond Udall v. Tallman*

While the influence of *Tallman* on *Seminole Rock*'s expansion is certainly significant, it cannot fully explain the shift that occurred. Some lower courts, including the D.C. Circuit,<sup>209</sup> were headed toward a more expansive view in the first half of the 1960s. What factors might have been influencing this movement, albeit more subtly, in the early 1960s?

One observation to make here is that the original context of *Seminole Rock* deference began to fade as the United States moved away from wartime crisis. Because neither *Seminole Rock* nor its progeny expressly tied deference to special circumstances of war or to particular procedures under which OPA was operating, one might naturally expect judicial memory to fade even more quickly. Because the important language from *Seminole Rock* says little regarding its legitimacy and underlying rationale, it is particularly vulnerable to broad application once the particular circumstances of its birth are no longer contemporary.<sup>210</sup>

Another less obvious observation might involve the nature of the cases raising *Seminole Rock* issues in the 1960s. Perhaps not coincidentally, five out of the six cases citing to *Seminole Rock* in the D.C. Circuit from 1960 to 1965 involved oil and gas lease disputes out of the Department of the Interior.<sup>211</sup> The

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<sup>208</sup> In the Federal Courts of Appeals, there were ten post-*Tallman* cases citing *Seminole Rock* between 1965 and 1969; all gave deference to the agency interpretation. See *Ind. Broad. Corp. (WANE-TV) v. FCC*, 407 F.2d 681, 692 (D.C. Cir. 1968); *Gray*, 395 F.2d at 536; *Cedar Rapids Television Co.*, 387 F.2d at 231–32; *Rust Broad. Co.*, 379 F.2d at 482; *JNO McCall Coal Co.*, 374 F.2d at 692; *Davison Fuel and Dock Co.*, 371 F.2d at 714; *Lawson Milk Co.*, 358 F.2d at 650; *Pan Am. Petrol.*, 352 F.2d at 35; *Robertson*, 349 F.2d at 198; *Pancoastal Petrol., Ltd.*, 348 F.2d at 807. There were two more cases citing to *Seminole Rock* but in support of giving deference to an agency's statutory interpretation. *Freeman v. Seligson*, 405 F.2d 1326, 1345 (D.C. Cir. 1968); *FTC v. Cinderella Career & Finishing Sch., Inc.*, 404 F.2d 1308 (D.C. Cir. 1968).

<sup>209</sup> See, e.g., *Sw. Petrol. Corp.*, 325 F.2d 633; *Morgan v. Udall*, 306 F.2d 799 (D.C. Cir. 1962); *Boesche v. Udall*, 303 F.2d 204 (D.C. Cir. 1961), *aff'd*, 373 U.S. 472 (1963); see also *Robertson*, 349 F.2d 195. *Robertson* was decided post-*Tallman*, but the court does not cite to *Tallman* in concluding that “[o]ur duty to defer to the Secretary’s interpretation of his own regulations, so long as that interpretation is not plainly beyond the bounds of reason or authority, is well-defined.” *Id.* at 198.

<sup>210</sup> Cf. *Merrill & Watts*, *supra* note 124, at 540–45 (explaining that ignorance over time of the original convention on rulemaking was the cause of its loss).

<sup>211</sup> See, e.g., *Robertson*, 349 F.2d 195 (oil and gas leasing dispute; post-*Tallman* and does not cite to *Tallman*); *Sw. Petrol. Corp.*, 325 F.2d 633 (oil and gas leasing dispute); *Morgan*, 306 F.2d 799 (same); *Boesche*, 303 F.2d 204 (same); *Wright v. Paine*, 289 F.2d 766 (D.C. Cir. 1961) (same). The only D.C. Circuit non-oil-and-gas-lease case citing *Seminole Rock* during this time period involved agency adjudication by the

governing statute for each of those cases was the Mineral Leasing Act of 1920, which directed the Department of the Interior to grant oil and gas leases to first-in-time applicants.<sup>212</sup> To be first in time, naturally the application has to be valid. As one might suspect, the first-in-time rule gave rise to disputes over the validity of individual lease applications, and those were exactly the kind of cases that appeared on the D.C. Circuit's dockets in the early 1960s. Importantly, although the Mineral Leasing Act directs the Department of the Interior to grant leases to first-in-time applicants, and although the Act also provides certain terms that leases must contain, the Act gives the Department of the Interior broad authority to determine what lands are open to leasing and what constitutes a valid lease application.<sup>213</sup> In particular, the Department has authority to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of" the Act.<sup>214</sup>

This authority could explain why the D.C. Circuit was reluctant to second-guess agency adjudications regarding when lands had been opened to leasing or when particular application requirements had been met. In fact, in *Boesche v. Udall*, the Supreme Court hesitated to interfere with the day-to-day operations of the leasing program: "[T]he magnitude and complexity of the leasing program conducted by the Secretary make it likely that a seriously detrimental effect on the prompt and efficient administration of both the public domain and the federal courts might well be the consequence of a shift from the Secretary to the courts of the power to cancel such defective leases."<sup>215</sup>

The D.C. Circuit's hands-off approach to oil and gas leasing cases was also consistent with the traditional model of administrative law. That model, as Professor Richard Stewart explained, "conceives of the agency as a mere transmission belt for implementing legislative directives in particular cases. . . .

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Civil Aeronautics Board regarding the proper ordering of an airline pilot seniority list after two airlines merged. *See* *Outland v. Civil Aeronautics Bd.*, 284 F.2d 224 (D.C. Cir. 1960).

<sup>212</sup> *Wright*, 289 F.2d at 767 (citing Mineral Leasing Act of 1920, ch. 85, 41 Stat. 443 (1920) (current version at 30 U.S.C. § 226)).

<sup>213</sup> *Udall v. Tallman*, 380 U.S. 1, 5 (1965) ("The Mineral Leasing Act of 1920 gave the Secretary of the Interior broad power to issue oil and gas leases on public lands . . . . Although the Act directed that if a lease was issued on such a tract, it had to be issued to the first qualified applicant, it left the Secretary discretion to refuse to issue any lease at all on a given tract."); *see also* *Boesche v. Udall*, 373 U.S. 472, 476–77 (1963) (observing that the Department of the Interior has been delegated "general managerial powers over the public lands"). Courts today make similar observations. *See, e.g.*, *Arch Mineral Corp. v. Lujan*, 911 F.2d 408, 415 (10th Cir. 1990) (interpreting the Secretary's power to impose conditions in oil and gas leases as broad).

<sup>214</sup> *See Morgan*, 306 F.2d at 801 (taking note of, and quoting, 30 U.S.C. § 189 (1958)).

<sup>215</sup> 373 U.S. 472 at 484 (footnote omitted).

The court's function is one of containment; review is directed toward keeping the agency within the directives which Congress has issued."<sup>216</sup> Under this restrained model, the court reviews "only those matters as to which the statute provides ascertainable direction," and "all other issues of choice" are left to the agency.<sup>217</sup> As applied to judicial review of oil and gas leasing cases, the traditional model suggests that courts would be more deferential on issues when Congress provided broad authority, such as whether certain lands were open to leasing or what constitutes a valid lease application.

At the same time that the D.C. Circuit appeared to embrace this approach in oil and gas lease cases, the Supreme Court accepted this model of administrative law in *NLRB v. Brown*,<sup>218</sup> which was decided in 1965, the same year as *Tallman*. On matters that Congress left to the discretion of agencies, then, courts were careful to leave policymaking to agencies, even in cases where the issue of deference was not squarely raised. In fact, just a few years later, Professor Stewart would advocate for greater judicial restraint as the complexity of policy choices embedded in administrative decisions revealed itself: "[T]he more the question of agency choice comes to resemble a political process of weighing the claims of competing interest groups the less the apparent justification for judicial revision of Congress' delegation of choice to the agency."<sup>219</sup>

The underlying statutory context of the oil and gas cases is not the only potential influence on the courts' approach to deference. The agency interpretations at issue in these cases were all made through agency adjudications. Today, when notice and comment rulemaking dominates the administrative state, the setting of policy and rules through adjudication may seem significant, if not a bit odd. In the early 1960s, however, rules were made mainly through adjudication.<sup>220</sup> "Administrative law specialists had grown accustomed to agencies that used trial-like adjudications to define vague

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<sup>216</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

<sup>217</sup> *Id.* at 1675–76 (citing *NLRB v. Brown*, 380 U.S. 278 (1965)).

<sup>218</sup> 380 U.S. 278.

<sup>219</sup> Stewart, *supra* note 216, at 1787; cf. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009) (discussing various theories that attempt to justify giving deference).

<sup>220</sup> Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1140 (2001) ("Although rulemaking had been around for decades, it was only at the end of the 1960s that agencies turned to it as the primary staple of administrative action.").

statutory terms and develop policy.”<sup>221</sup> Some agencies like the NLRB were known for using adjudications to set generally applicable rules<sup>222</sup> and scholars clamored for some limits to adjudication.<sup>223</sup> In 1965, Professor David Shapiro wrote that “on the question whether agencies should proceed by rulemaking or adjudication, observers from the 1930’s to the present have argued that the rulemaking power has been inadequately used and on occasion have urged legislation commanding resort to rulemaking early and often.”<sup>224</sup> Despite criticisms, this method was still common in the early 1960s.

The fact that so many of these cases arose in the adjudication context may have had some influence on judicial attitudes towards agency deference. These proceedings require formal, trial-like procedures, including witness testimony and cross-examinations.<sup>225</sup> Courts understood that they only upset decisions from this context if they were “unsupported by substantial evidence” as required by the APA.<sup>226</sup> As a result, because regulatory interpretations offered by agencies in the adjudication context are so steeped in fact-finding and the particulars of a given case, courts that were accustomed to deferring to the agency’s conclusions may have been more reluctant to disrupt the outcome of the particular case. In addition, standards between reviewing agency fact-finding and deferring to agency interpretations may not be entirely clear when interpretations are made in the adjudication context. As an example of this, one of the oil and gas leasing cases decided by the D.C. Circuit in 1962 set out the *Seminole Rock* standard, and then, almost in the same breath, recounted the

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<sup>221</sup> *Id.*

<sup>222</sup> See Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961).

<sup>223</sup> See, e.g., David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922 (1965) (describing the frequent criticisms of agency reliance on adjudication and the “continuing disparity between what agencies do and what many of their critics would have them do”); see also NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (placing limits on agency’s choice to proceed through adjudication rather than rulemaking to adopt rules of general applicability); Schiller, *supra* note 220, at 1149–51 (describing the rise of critiques of the administrative state and the increasing calls for rulemaking as a substitute for ad hoc adjudication in this era); Stewart, *supra* note 216, at 1698 (“Substituting general rules for ad hoc decision also tends to ensure that officials will act on the basis of societal considerations embodied in those rules rather than on their own preferences or prejudices. . .”).

<sup>224</sup> Shapiro, *supra* note 223, at 922.

<sup>225</sup> See Schiller, *supra* note 220, at 1140 (“[A]djudications themselves came with a whole host of procedural requirements—cross-examinations, trial transcripts, and evidentiary rulings.”); *id.* at 1145 (“Administrative proceedings looked like mini-trials, where the rights of individual actors were adjudicated. Indeed, in the initial conflicts between courts and the emerging administrative state at the beginning of the century, the judiciary reprimanded agencies for behaving too much like courts, for trespassing on judicial prerogatives, or usurping judicial functions.”).

<sup>226</sup> 5 U.S.C. § 706(2)(E) (2012).



limited standards of review for agency fact-finding: “It has long been established that the determination by the Secretary of a question of fact on a matter within his jurisdiction is well-nigh conclusive.”<sup>227</sup>

Consistent with this, Stewart observed in 1975 that “where an agency has chosen to proceed through case-by-case adjudication, the courts have been far more reluctant to restrain agency flexibility by even minimal standards of decisional consistency.”<sup>228</sup> Shapiro also notes a difference in the courts’ treatment of administrative decisions made through adjudication: “Administrative agencies appear to be freer to disregard their own prior decisions than they are to depart from their regulations.”<sup>229</sup> It is therefore possible that the context in which these disputes arose may have impacted the court’s inclination to defer.

In the end, the fading memories of *Seminole Rock’s* origins, the unique underlying statutory context of oil and gas cases, and the adjudication setting in which these interpretations were made appear to have combined to create just the right circumstances for the expansion of the *Seminole Rock* doctrine.

### III. *SEMINOLE ROCK’S* FINAL TRANSFORMATION IN THE COURTS

As the late 1960s gave way to the 1970s, the final transformation of *Seminole Rock* was on full display in both the lower courts and the Supreme Court. As before, courts continued to expand the doctrine without providing guiding principles or a rationale. Notably, the continued expansion of *Seminole Rock* was consistent with the judicial restraint that emerged in the late 1970s and 1980s when courts reviewed administrative actions.<sup>230</sup>

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<sup>227</sup> Morgan v. Udall, 306 F.2d 799, 801 (D.C. Cir. 1962).

<sup>228</sup> Stewart, *supra* note 216, at 1680 n.44 (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 292–95 (1974)). Stewart relatedly observed that courts had generally “refused to require agencies to develop general policy through rules rather than through case-by-case adjudication.” *Id.* at 1698 n.143 (citing SEC v. Chenery, 332 U.S. 194, 202–03 (1947) (establishing that an agency’s decision to set policy through adjudication should go undisturbed)); *see also* Schiller, *supra* note 220, at 1153 (“When a court’s review of a rule was merely ancillary to a particular enforcement action, its attention was focused less on the process by which the rule was created and more on the application of the rule to the particular facts of the case before it.”).

<sup>229</sup> Shapiro, *supra* note 223, at 947; *see id.* at 951 (“It seems fair to conclude that by eschewing regulations in favor of the declaration of rules by adjudication, an agency is likely to regard itself as freer, and will in fact be given greater freedom by the courts, to ignore or depart from those rules in specific instances without giving sufficient reasons.”).

<sup>230</sup> *See* Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. REV. 447, 456–57 (2013).

### A. *The Supreme Court Signals an Open Embrace*

In a dramatic close to the decade, the Supreme Court decided two cases in 1969 that highlight just how far the courts had come from the origins of *Seminole Rock*. In both cases—*Thorpe v. Housing Authority of Durham*<sup>231</sup> and *INS v. Stanisic*<sup>232</sup>—the Court extended *Seminole Rock* deference without much explanation or rationale.

In *Thorpe*, the petitioner was evicted from a federal housing project without being notified as to the grounds for eviction and without a hearing.<sup>233</sup> After the eviction proceedings had been initiated by the local housing authority, the Department of Housing and Urban Development (HUD) issued a circular to all local housing authorities directing the authorities to provide tenants a reason for their eviction and an opportunity to respond to the contentions.<sup>234</sup> One of the questions before the Court was whether HUD intended the circular to be mandatory.<sup>235</sup> In concluding it was, the Court looked to HUD’s interpretation of the circular in letters written by HUD’s Assistant Secretary for Renewal and Housing Assistance and its Chief Counsel.<sup>236</sup> Those letters, written to people other than the litigants, unequivocally stated that “[t]he circular is as binding in its present form as it will be after incorporation in the manual. . . . HUD intends to enforce the circular to the fullest extent of its ability.”<sup>237</sup> The Court gave effect to those letters. In support, the Court cited to *Seminole Rock* and *Tallman*, stating that “when construing an administrative regulation ‘a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation . . . .”<sup>238</sup>

*Thorpe* was the first Supreme Court case to apply *Seminole Rock* to an interpretation made outside the public eye. *Seminole Rock* involved an official interpretation widely available in OPA’s Bulletin.<sup>239</sup> *Tallman* involved an interpretation that was published, had been on record for several years, and

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<sup>231</sup> 393 U.S. 268 (1969).

<sup>232</sup> 395 U.S. 62 (1969).

<sup>233</sup> *Thorpe*, 393 U.S. at 269–70.

<sup>234</sup> *Id.* at 272.

<sup>235</sup> *Id.* at 274–75.

<sup>236</sup> *Id.* at 276.

<sup>237</sup> *Id.* at 276 nn.22–23.

<sup>238</sup> *Id.* at 276 (ellipses in original).

<sup>239</sup> See discussion *supra* notes 79–89 and accompanying text.

was the subject of congressional testimony.<sup>240</sup> By 1969, *Thorpe* capped off the remarkable transformation by giving deference to a statement in a private letter to a non-litigant. *Thorpe* thus marked an important departure from the historical restraints of *Seminole Rock*.

It would be a mistake, however, to assume that issues of agency deference were central concerns for the Court in that case. A more likely driver in the *Thorpe* decision was the Court's concern for procedural safeguards in agency decision-making.<sup>241</sup> Not only does the text of the opinion evidence that concern,<sup>242</sup> but courts of that era also increasingly sought ways to reign in the administrative state through procedure.<sup>243</sup> In particular, *Thorpe* was decided at a time when there was a general consensus that agencies were captured by industry,<sup>244</sup> and when courts were looking to provide greater public access to administrative decision-making.<sup>245</sup> Courts were doing this in a variety of ways, including through expansion in the standing doctrine, and by requiring that agency decisions be backed by opportunity for comment.<sup>246</sup>

The procedural concerns raised in *Thorpe* tied directly into those broader concerns. In that way, *Thorpe*'s citation to *Seminole Rock* deference may have been ancillary to what the Court was otherwise focused on achieving—greater procedural protection for public housing tenants. In other words, it may not have been intended to be as path-breaking as it appears in hindsight to have been.

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<sup>240</sup> See *infra* Part III.B.

<sup>241</sup> *Thorpe* is at the front end of a number of Supreme Court cases considering the extent to which due process requires a hearing before governmental benefits are terminated. See Stewart, *supra* note 216, at 1718–19 (citing *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

<sup>242</sup> *Thorpe*, 393 U.S. at 283 (“[T]he circular should be applied to all tenants still residing in McDougald Terrace, including petitioner, not only because it is designed to insure a fairer eviction procedure in general, but also because the prescribed notification is essential to remove a serious impediment to the successful protection of constitutional rights.”).

<sup>243</sup> Stewart, *supra* note 216, at 1711–12 (explaining why courts have turned to the “expanding and transforming traditional procedural devices” in response to criticism of agency capture).

<sup>244</sup> *Id.* at 1685 (“[M]any legislators, judges, and legal and economic commentators have accepted the thesis of persistent bias in agency policies.”); *id.* at 1686 (describing agency bias for industry and agency capture); *id.* at 1687 (“[T]he critique of agency discretion as unduly favorable to organized interests—particularly regulated or client firms—has sufficient power and verisimilitude to have achieved widespread contemporary acceptance.”); *id.* at 1713–14 (“diagnosi[ng]” the problem of agency capture).

<sup>245</sup> *Id.* at 1712 (“Faced with the seemingly intractable problem of agency discretion, courts have changed the focus of judicial review . . . so that its dominant purpose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies.”).

<sup>246</sup> *Id.* at 1716.

The importance of *Thorpe* to administrative law has been highlighted by other legal scholars as well. Most significantly, in their examination of the original convention, Professors Merrill and Watts pointed to *Thorpe* as a departure in the Court's treatment of agency rules that have the force of law.<sup>247</sup> While Merrill and Watts focused on the binding effect given to HUD's circular, *Thorpe* is also important because of the context in which the interpretation arose—unpublished letters to non-litigants.<sup>248</sup>

Just six months after *Thorpe* was issued, the Supreme Court turned to *Seminole Rock* again. *Stanisic* involved an interpretation by the Immigration and Naturalization Service (INS) of its own regulations.<sup>249</sup> With relatively little fanfare, the Court deferred to the agency interpretation, finding it “dispositive that the agency responsible for promulgating and administering the regulation” had interpreted it in a consistent manner in other cases.<sup>250</sup> Compared to *Thorpe*, *Stanisic* is not particularly noteworthy in terms of the context in which the agency interpretation arose. At the same time, *Stanisic* illustrates the relative lack of consideration the Court gave to deference before deploying it.<sup>251</sup>

Like cases that came before, two Supreme Court cases decided in 1970—*United States v. City of Chicago*<sup>252</sup> and *Ehlert v. United States*<sup>253</sup>—again demonstrated that the dramatic shift in the *Seminole Rock* doctrine was the result of inadvertence more than design. In *City of Chicago*, the Court cited *Seminole Rock* and *Tallman* to support deference for an agency interpretation of statutory ambiguity.<sup>254</sup> Setting aside the error of applying *Seminole Rock* in this context—an error also made by a few lower courts in the late 1960s<sup>255</sup>—the decisiveness of citing *Seminole Rock* was clear when the Court made its point in a single sentence: “We defer on this issue to the definition of ‘train’ given by the administrative agency which has oversight of the problem.”<sup>256</sup> It is unclear from the case in what context the agency made this interpretation or

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<sup>247</sup> Merrill & Watts, *supra* note 124, at 534–37.

<sup>248</sup> See *supra* note 237.

<sup>249</sup> 395 U.S. 62 (1969).

<sup>250</sup> *Id.* at 72.

<sup>251</sup> Cf. Leske, *supra* note 21, at 251 (describing these two cases as instances in which the Court “merely cited to [*Seminole Rock*] a handful of times with no real inquiry”).

<sup>252</sup> 400 U.S. 8 (1970).

<sup>253</sup> 402 U.S. 99 (1971).

<sup>254</sup> *City of Chicago*, 400 U.S. at 9–10.

<sup>255</sup> See, e.g., *D.C. Transit Sys., Inc. v. Wash. Metro. Area Transit Comm.*, 466 F.2d 394 (D.C. Cir. 1972); *United States v. Munns*, 457 F.2d 271 (9th Cir. 1972).

<sup>256</sup> *City of Chicago*, 400 U.S. at 10.

when it did so; what is clear is that the issue did not matter for the purposes of the decision.

In *Ehlert*, unlike in *City of Chicago*, the Court explained its deference in a bit more detail: “[S]ince the meaning of the language is not free from doubt, we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government’s be such.”<sup>257</sup> It then specifically noted that the interpretation being offered was a “plausible construction of the language of the actual regulation, though admittedly not the only possible one.”<sup>258</sup> Finally, the Court noted that “this position has been consistently urged by the Government in litigation when it was not foreclosed by adverse local precedent.”<sup>259</sup> The Court therefore seemed to imitate the early 1960s *Skidmore*-like approach of the D.C. Circuit to consider whether the interpretation had been long-standing. It is unclear, however, how much weight this point was given.

Although by the mid-1970s the Court had embraced a version of *Seminole Rock* that was much broader than its origins, it is notable that the Court articulated a more *Skidmore*-like standard when describing *Seminole Rock* in 1975. In *Northern Indiana Public Service Co. v. Porter County Chapter of the Izaak Walton League of America, Inc.*,<sup>260</sup> the Court had to determine whether the siting of a nuclear plant violated regulations on proximity to population centers. Although it found that the language of the regulation was likely clear, the Court nevertheless concluded that, even if the regulation was ambiguous, the agency’s interpretation was reasonable and consistently applied and thus controlling.<sup>261</sup> The reliance on a more *Skidmore*-like standard may illustrate a certain level of discomfort with an expansive view of *Seminole Rock*, as we discuss below.

### B. *The Lower Courts Follow Suit*

When the Supreme Court signaled an open embrace of an expanded *Seminole Rock* doctrine, the lower courts followed suit in two ways. First, the courts described the doctrine in expansive language. For example, when

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<sup>257</sup> 402 U.S. at 105.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> 423 U.S. 12 (1975) (per curiam).

<sup>261</sup> *Id.* at 15.

deferring to the Secretary of Labor's interpretation of regulations under the Occupation Health and Safety Act, the Fifth Circuit stated:

Since, as was noted earlier, the Secretary is authorized to promulgate regulations, his interpretation is entitled to great weight. We have held that the promulgator's interpretation is controlling as long as it is one of several reasonable interpretations, although it may not appear as reasonable as some other.<sup>262</sup>

Likewise, the Ninth Circuit held in a Selective Services draft case that “the government's interpretation is reasonable in light of the regulation's purposes and *must*, therefore, be adopted.”<sup>263</sup> The Fifth Circuit even went so far as to refer to *Seminole Rock* deference as “an axiom of judicial review.”<sup>264</sup> As a sign of its expanded reach, by 1972 the D.C. Circuit cited Davis's *Administrative Law Treatise* alongside *Seminole Rock* in support of general deference to an agency interpretation of its own regulations.<sup>265</sup>

Not only did lower courts describe *Seminole Rock* deference in expansive language, but the contexts in which courts were comfortable invoking *Seminole Rock* deference were also growing. One particularly striking example is the Sixth Circuit's decision in *Jones v. Board of Education Cleveland City School District*, which permitted deference to be accorded to an agency interpretation provided through deposition testimony of an agency official.<sup>266</sup>

In short, by the mid-1970s, courts largely adopted what we understand as the modern *Seminole Rock* doctrine: Courts overwhelmingly afforded deference unless the agency's interpretations were flatly inconsistent with the language of the regulation.<sup>267</sup> Few courts paused to assess the context of the interpretation; long gone were the OPA roots. And few decisions considered the form and timing of the interpretation; long gone was any requirement of

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<sup>262</sup> *Brennan v. S. Contractors Serv.*, 492 F.2d 498, 501 (5th Cir. 1974) (citations omitted).

<sup>263</sup> *United States v. Shockley*, 492 F.2d 353, 357 (9th Cir. 1974) (emphasis added); *see also* *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1328 (Temp. Emer. Ct. App. 1974) (explaining that “a de novo analysis by the courts is both unnecessary and improper” when *Seminole Rock* deference is otherwise owed).

<sup>264</sup> *Allen M. Campbell Co. Gen. Contractors v. Lloyd Wood Constr. Co.*, 446 F.2d 261, 265 (5th Cir. 1971).

<sup>265</sup> *Mobil Oil Corp. v. Fed. Power Comm'n*, 469 F.2d 130, 138 n.8 (D.C. Cir. 1972).

<sup>266</sup> 474 F.2d 1232, 1233 (6th Cir. 1973).

<sup>267</sup> *See* *Brennan v. Occupational Safety & Health Review Comm'n*, 491 F.2d 1340, 1344 (2d Cir. 1974) (refusing deference where the proffered interpretation would be inconsistent with the plain language of the regulation and inconsistent with underlying Congressional intent); *Associated Gen. Contractors of Am., Inc., Okla. Chapter Builder's Div. v. Laborers Int'l Union of N. Am., Local 612*, 476 F.2d 1388, 1400 (Temp. Emer. Ct. App. 1973) (declining deference when the agency interpretation would clearly have exceeded the scope of authority under the regulations).

true notice.<sup>268</sup> Whether the result of convenience, judicial restraint, or both, any memory of *Seminole Rock*'s roots seems to have largely faded.

#### IV. THE TRANSFORMATION OF *SEMINOLE ROCK* IN CONTEXT

In addition to its emergence without any clear rationale, two other aspects of *Seminole Rock*'s transformation are worth considering. First, the relationship between *Seminole Rock*'s transformation and broader trends in administrative law during the 1960s and 1970s. Second, *Seminole Rock* has often been tied to *Skidmore* when courts appear to be concerned with the deference to be afforded in a given case. These moments, which seemed to appear mostly in the early stages of *Seminole Rock*, again in the 1970s, and then finally more recently, illustrate a certain discomfort with the broader version of *Seminole Rock*.

##### A. *The Expansion of Seminole Rock During the Rise of Rulemaking*

As we recount the lost understanding of *Seminole Rock* it is worth remembering that the rise of the modern version of *Seminole Rock* deference coincides with the period of administrative law when rulemaking experienced dramatic growth. Not surprisingly, during this period of rapid growth, *Seminole Rock*'s origins were not the only overlooked history of the time. The doctrine's roots were erased at the same time that courts erased the original convention, which Merrill and Watts have described as the congressional drafting convention that indicated whether agencies had the ability to make rules with the force of law.<sup>269</sup> This convention had its heyday in the 1940s but would fall from memory alongside the rise of rulemaking.<sup>270</sup> When the loss of the original convention and *Seminole Rock*'s roots were combined, the result was to give greater effect to agency regulations at the very time rulemaking efforts were exploding.<sup>271</sup>

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<sup>268</sup> Cf. *United States v. Harstad*, 487 F.2d 565, 566 (9th Cir. 1973) (refusing to give deference and bind the agency to an opinion provided in a letter by the secretary of the local draft board).

<sup>269</sup> Merrill & Watts, *supra* note 124, at 472.

<sup>270</sup> *Id.*

<sup>271</sup> See *id.* at 545. We cannot help but observe that *Skidmore* also experienced a period of lost understanding, but it came later, largely after the *Chevron* decision in 1984. See Hickman & Krueger, *supra* note 21, at 1241–45. Given the great debates about the origins of *Chevron*, we will not venture to use the label of lost history but rather simply note the work of Peter Strauss in identifying *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), one of the leading pre-*Chevron* cases as yet another mid-1940s decision. See also Manning, *supra* note 22, at 623–24; Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of*

As Merrill and Watts have explained, at least up through the New Deal and the passage of the APA, but even as late as 1967, “Congress followed a drafting convention that signaled to agencies whether particular rulemaking grants conferred authority to make rules with the force of law as opposed to mere housekeeping rules.”<sup>272</sup> The convention was simple to apply:

If Congress specified in the statute that a violation of agency rules would subject the offending party to some sanction—for example, a civil or criminal penalty; loss of a permit, license, or benefits; or other adverse legal consequences—then the grant conferred power to make rules with the force of law. Conversely, if Congress made no provision for sanctions for rule violations, the grant authorized only procedural or interpretive rules.<sup>273</sup>

This convention emerged, as Merrill and Watts explain, in the early 1910s.<sup>274</sup> It was reflected in the New Deal era legislation<sup>275</sup> and was well understood during the drafting of the APA in 1946.<sup>276</sup> What is remarkable, as they note, is the “collective amnesia” regarding its existence when agencies began to push for more rulemaking abilities in the 1960s and 1970s.<sup>277</sup>

Important to both the fall of the original convention and the rise of *Seminole Rock* deference, rulemaking was the talk of the town in the late 1950s and early 1960s. The argument then was very similar to that heard now: “Making policy through adjudication can lead to inconsistent outcomes and frustrates expectations when policy changes retroactively. Making policy through rulemaking is much more likely to result in standards that apply prospectively, providing clear notice of the law’s requirements to all concerned.”<sup>278</sup>

As an increasing number of influential legal thinkers threw their weight behind the cause, agencies became more interested in legislative rulemaking.<sup>279</sup> Notably, scholars advocating for the expanded use of rulemaking did not

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*the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1120–22 (1987).

<sup>272</sup> Merrill & Watts, *supra* note 124, at 472.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 503–04.

<sup>275</sup> *Id.* at 509–19.

<sup>276</sup> *Id.* at 523–26.

<sup>277</sup> *Id.* at 472.

<sup>278</sup> *Id.* at 546 (footnote omitted).

<sup>279</sup> *Id.* at 548–49.



acknowledge the convention's existence.<sup>280</sup> Eventually three major agencies were permitted to exercise legislative rulemaking power that was inconsistent with the original convention.<sup>281</sup> That is, they were allowed to exercise powers that they had not been granted.<sup>282</sup>

Although this particular moment profoundly illustrates the loss of the original convention, it also serves as an important moment in the life of *Seminole Rock*. When agencies began to use rulemaking more often, including instances in which they would not have originally been permitted, the number of regulations produced by these agencies, not surprisingly, increased dramatically. When there are more regulations, agencies have more to interpret. As a result, we would expect that there would be more requests from agencies to defer to their interpretations of these new regulations. As documented above, courts indeed faced more requests for *Seminole Rock* deference in this period.<sup>283</sup> One explanation, then, for the new clamor for deference was the result of the new clamor for more rulemaking—there were now many more regulations to interpret.

When faced with agencies' requests for *Seminole Rock* deference, there was not much to find in Supreme Court or appellate court opinions to guide *Seminole Rock*'s application, much like the forgotten convention regarding force of law.<sup>284</sup> Memories had faded; any understanding of its context was gone. In the fervor for rulemaking, the original convention was not the only thing lost. Also lost were the roots of *Seminole Rock*.

### B. *The Relationship of Seminole Rock to Skidmore*

One final connection between *Seminole Rock*'s evolution and other administrative law doctrines merits comment. Today *Seminole Rock* is often discussed as simply a version of *Chevron* applied to interpretation of regulations,<sup>285</sup> however, the early cases connected *Seminole Rock* more closely

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<sup>280</sup> *Id.* at 546–49.

<sup>281</sup> *Id.* at 549.

<sup>282</sup> *Id.*

<sup>283</sup> *See supra* Part III.B.

<sup>284</sup> Merrill & Watts, *supra* note 124, at 472.

<sup>285</sup> *See, e.g.,* Stephenson & Pogoriler, *supra* note 31, at 1458 (“But as a general matter, it seems fair to say that the *Chevron*-like rationale for *Seminole Rock*—a pragmatic concern about institutional competence, coupled with a legal fiction about implied congressional delegation—is the dominant modern account of *Seminole Rock* deference.”) Relatedly, Professor Kevin Stack advocates the adoption of an approach to regulatory interpretation that would parallel that of statutory interpretation under *Chevron*. *See* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 410–12 (2012).

with the deference framework for an agency's statutory interpretations under *Skidmore*. Under that framework—now reserved for agency statutory interpretations of statutes that do not carry the force of law—courts look to multiple factors in deciding whether deference is appropriate, including the thoroughness of the agency's consideration, the validity of its reasoning, the consistency of its interpretation over time, and other factors making the interpretation persuasive.<sup>286</sup>

The pairing of *Seminole Rock* and *Skidmore* may have arisen for a few reasons. First, in the early period, *Seminole Rock* was sometimes incorrectly applied in *statutory* interpretation cases.<sup>287</sup> Were it to arise today, the proper deference to be applied in a statutory interpretation case is *Skidmore* for interpretations that are without the force of law and *Chevron* for those that have the force of law.<sup>288</sup> This kind of error is less frequent in modern cases after the *Mead* revolution, which has required lawyers and courts to be much more careful in articulating what deference standard applies in a particular circumstance.<sup>289</sup>

Even in the context of regulatory interpretation, however, much has changed since 1945. In the early days, judicial restraint was not yet the concern it would become in the era of the *Chevron* decision.<sup>290</sup> Courts instead viewed their role as providing a check on agency action. As a result, outside the context of official published interpretations, lower courts often engaged in an independent examination of the regulatory text to satisfy themselves that the interpretation was in fact correct,<sup>291</sup> a process much more consistent with *Skidmore*'s approach.

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<sup>286</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>287</sup> See *United States v. Munns*, 457 F.2d 271, 273 (9th Cir. 1972) (“[T]he legitimate needs of the local board, as well as deference to the administrative interpretation of the authorizing legislation, militate against the narrow reading of the statute.” (citing *Udall v. Tallman*, 380 U.S. 1 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945))); *supra* text accompanying notes 222–23.

<sup>288</sup> See, e.g., *D.C. Transit Sys., Inc. v. Wash. Metro. Area Transit Comm'n*, 466 F.2d 394 (D.C. Cir. 1972) (citing *Seminole Rock* for deference to an interpretation of a statutory provision provided in a formal adjudication); *United States v. Munns*, 457 F.2d 271 (9th Cir. 1972) (citing *Seminole Rock* for the administrative interpretation of a statute found in a regulation).

<sup>289</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>290</sup> See Hubbard, *supra* note 230, at 456–57 (2013).

<sup>291</sup> See, e.g., *W. Union Tel. Co. v. United States*, 217 F.2d 579 (2d Cir. 1954) (adopting agency interpretation after independently examining the regulation); *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 332 (D.C. Cir. 1952) (discussing deference only in dicta, because the trial court independently reached the same conclusion as the agency); *Armstrong Co. v. Walling*, 161 F.2d 515 (1st Cir. 1947) (holding that although the interpretation adopted was the same as the one proffered by the agency, the same conclusion was merited by strictly construing the regulation).

For example, in a 1952 case from the U.S. Emergency Court of Appeals,<sup>292</sup> the court accepted an interpretation of price regulations that had been consistently applied by the agency in processing claims for the cattle subsidy in question.<sup>293</sup> The court accepted the interpretation only after engaging in a detailed historical and regulatory analysis; it then refused to concede that a contrary interpretation was plausible.<sup>294</sup> The court cited to *Seminole Rock* and mentioned deference but only at the tail end of a lengthy discussion of why the proffered interpretation was indeed the correct one.<sup>295</sup>

In a later case from 1954, the Second Circuit appeared to give deference to an interpretation proffered by the Federal Communications Commission (FCC) for the first time in litigation.<sup>296</sup> Upon closer inspection, however, the court accepted the agency's interpretation only after independently examining the regulation and concluding that the agency interpretation was sound.<sup>297</sup> It is not clear that the court deferred to the agency's interpretation so much as decided it was the correct interpretation based on the text of the regulation.

Not only did some courts functionally approach *Seminole Rock* deference from a more cautious starting point, at least a few courts in the 1940s and 1950s clearly had both *Seminole Rock* and *Skidmore* in mind when discussing deference owed to agency interpretations.<sup>298</sup> This early pairing of *Seminole Rock* and *Skidmore* is not entirely surprising given those two cases were decided by the Supreme Court in the same year.

In one such case, the D.C. Circuit was asked to give deference to the Internal Revenue Service (IRS) on its interpretation of a wine-labeling

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<sup>292</sup> The Emergency Court of Appeals was a temporary federal court created by the Emergency Price Control Act of 1942. It had exclusive jurisdiction to hear cases arising under that Act. *See* Lockerty v. Phillips, 319 U.S. 182 (1943).

<sup>293</sup> *Danz v. Reconstruction Fin. Corp.*, 193 F.2d 1010, 1016 (Emer. Ct. App. 1952) (deferring to the Reconstruction Finance Corporation's consistent course of usage).

<sup>294</sup> *Id.* at 1014–16.

<sup>295</sup> *Id.* at 1016.

<sup>296</sup> *W. Union Tel. Co.*, 217 F.2d 579.

<sup>297</sup> *Id.* at 582.

<sup>298</sup> *See, e.g.*, *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 332 (D.C. Cir. 1952) (citing to both *Skidmore* and *Seminole Rock* after remarking that an unpublished interpretation would be given less weight because it is not backed by certain procedural safeguards); *Fleming v. Campbell*, 160 F.2d 315, 317–18 (6th Cir. 1947) (citing *Skidmore* and ultimately rejecting deference); *S. Goods Corp. v. Bowles*, 158 F.2d 587, 590 (4th Cir. 1946) (citing both *Skidmore* and *Seminole Rock* after remarking that “[s]ince, however, the interpretation in question received the sanction of the Administrator as an official interpretation, it is entitled to respectful consideration by us in interpreting the regulations”).

regulation.<sup>299</sup> The IRS interpretation was consistent with the factual findings made in the lower court regarding the distinctions between boysenberries and blackberries, which meant that the D.C. Circuit did not have to rule on the particulars of deference.<sup>300</sup> In dicta, however, the D.C. Circuit noted that the agency's interpretation was "not subject to the requirements of approval by the Secretary [of the Treasury], of a hearing prior to promulgation, or of the rule-making procedure of the Administrative Procedure Act."<sup>301</sup> Citing *Skidmore*, the court further remarked that "[s]uch exemptions have effect on the weight which the courts will accord to the administrative view."<sup>302</sup>

Other courts also cited *Skidmore* in their discussion of agency deference but typically with less explanation.<sup>303</sup> Later scholars studying the history of pre-*Chevron* statutory interpretations would similarly observe that courts did not embrace a consistent approach to *Skidmore* deference.<sup>304</sup> Notably, however, courts did pay close attention to whether an agency's interpretation matched the court's view of what the interpretation should be.<sup>305</sup>

By the 1970s, *Seminole Rock* deference had almost entirely transformed into the broad doctrine that would be referred to as "an axiom of judicial review."<sup>306</sup> Although recitations of *Seminole Rock* deference in this period certainly varied as the doctrine was developing, there are a certain subset of cases that, like the cases noted above from the 1940s and 1950s, sound like the test for *Skidmore* deference. In particular, the emphasis on the long-standing nature of the interpretation and the reasonableness of that interpretation—found in *Ehlert*, in *Northern Indiana Public Service*, and in circuit court opinions<sup>307</sup>—mimicked the *Skidmore* requirements of "the thoroughness

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<sup>299</sup> *Gibson Wine Co.*, 194 F.2d at 329.

<sup>300</sup> *Id.* at 332.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> See *Fleming v. Campbell*, 160 F.2d 315, 317–18 (6th Cir. 1947).

<sup>304</sup> Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1129 (2001) ("Skidmore had little grip on the mind of the administrative lawyer of the 1950s or 1960s.").

<sup>305</sup> See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 40–63 (1990) (describing courts' independent resolution of the proper interpretation).

<sup>306</sup> *Allen M. Campbell Co. Gen. Contractors v. Lloyd Wood Constr. Co.*, 446 F.2d 261, 265 (5th Cir. 1971).

<sup>307</sup> See, e.g., *Allen M. Campbell Co. Gen. Contractors*, 446 F.2d at 265 (explaining that judges should give particular deference "[w]hen, as here, that interpretation obviously incorporates quasi-technical administrative expertise and a familiarity with the situation acquired by long experience with the intricacies inherent in a comprehensive regulatory scheme").

evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.”<sup>308</sup>

The intertwining of the two doctrines, even in this later period, may have been a result of their close early history and the early cases that put the two doctrines together.<sup>309</sup> It also might illustrate the point that several scholars have made that deference doctrines are not all that dissimilar.<sup>310</sup> We think, however, that it reflects a certain mindfulness or caution with respect to the more expansive approach to *Seminole Rock* that was being embraced. That is, without explicitly articulating discomfort with the doctrine, courts imported ideas from a similar deference doctrine that provided the kind of check on an agency’s power that Manning has argued is necessary.<sup>311</sup>

As time progressed, *Seminole Rock*’s relationship with *Skidmore* would again wane. After the 1970s, there was less emphasis on any *Skidmore*-like factors. Scholars have observed that, at least by the 1980s, the formulation of *Seminole Rock* lacked the kind of *Skidmore*-type factors that were embraced in *Ehlert* and again in *Northern Indiana Public Service*.<sup>312</sup> No matter what the context or form of the interpretation, courts regularly found it necessary to quote only a single line from *Seminole Rock*: “[T]he ultimate criterion is the

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<sup>308</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>309</sup> See *supra* Part II.B.

<sup>310</sup> See Pierce, *supra* note 3, at 98 (“[Scholars] should spend less time engaging in debates about the alleged differences among the remarkably similar judicial review doctrines and about the circumstances in which each should be applied. We should focus instead on the three common elements of the doctrines: consistency with applicable statutes, consistency with available evidence, and quality of agency reasoning.”); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 169 (2010) (concluding that courts uphold the agency’s position in roughly 70% of cases regardless of the type of deference applied); David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525 (2011) (contending that the court ought to adopt a uniform rule of reasonableness in place of specific review doctrines of agency action).

<sup>311</sup> See Manning, *supra* note 16, at 681–85.

<sup>312</sup> Professor Leske has argued that “[a] significant change to the *Seminole Rock* standard emerged in 1988” after the Court decided *Gardebring v. Jenkins*; that standard, he has contended, was confirmed in *Shalala* six years later. Leske, *supra* note 21, at 253–57 (citing *Gardebring v. Jenkins*, 485 U.S. 415 (1988); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994)). The post-*Gardebring* analysis “required consideration of the original intent of the agency when it promulgated the regulation at issue.” *Id.* By 1997, however, the Court no longer mentioned the original intent of the agency as part of the *Seminole Rock* inquiry. See *Auer v. Robbins*, 519 U.S. 452 (1997); Leske, *supra* note 21, at 257.

It is clear that considering original intent is more consistent with *Seminole Rock*’s origins, which relied on a published interpretation that was issued simultaneously with the regulation. It is unclear, however, if the Court decided to consider the original intent during this brief period so that it would better align with *Seminole Rock*’s original context. Manning suggested that the intent of an agency when the regulation is promulgated—and more specifically the statement of basis and purpose—ought to be one of the factors considered if *Skidmore* were to replace *Seminole Rock*. Manning, *supra* note 22, at 689–90.

administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”<sup>313</sup> By 1996, Manning explained that “*Seminole Rock* deference is literally a result-oriented doctrine; judicial affirmance of an agency’s position depends only on the conclusion that the agency’s bottom line is not plainly erroneous.”<sup>314</sup>

Lending support to our theory that discomfort with the *Seminole Rock* doctrine might lead courts to incorporate more *Skidmore*-like factors, the Supreme Court recently signaled a possible return to this formulation of the doctrine. As noted above, in *Christopher*, the Court refused to afford deference to the Department of Labor when it changed a long-standing interpretation of whether pharmaceutical sales representatives were exempt from Fair Labor Standards Act wage and hour requirements.<sup>315</sup> In so holding, the Court stated that *Auer* deference should not be accorded when “there is reason to suspect that the agency’s interpretation ‘does not reflect the agency’s fair and considered judgment on the matter in question,’”<sup>316</sup> which includes the following circumstances: (a) a new agency interpretation that conflicts with an earlier one; (b) signals that the agency interpretation is merely a “convenient litigating position”; and (c) signals that the agency interpretation is merely a “post hoc rationalization” designed to defend past agency action from attack.<sup>317</sup> Interestingly, the Court then analyzed whether the agency’s interpretation warranted deference under *Skidmore* and concluded that it did not.<sup>318</sup> Not surprisingly, the section of the Court’s opinion that analyzes the Department of Labor’s interpretation under *Skidmore* was very similar in reasoning to the analysis that led to the refusal to apply *Auer* deference. Both relied principally on the sudden appearance in amicus briefs of an interpretation<sup>319</sup> that was inconsistent with many years of practice and the statute.<sup>320</sup>

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<sup>313</sup> *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

<sup>314</sup> Manning, *supra* note 22, at 687.

<sup>315</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

<sup>316</sup> *Id.* at 2166 (quoting *Auer*, 519 U.S. at 462).

<sup>317</sup> KOCH, *supra* note 2, § 10:26.

<sup>318</sup> *Christopher*, 132 S. Ct. at 2168–69.

<sup>319</sup> Compare *id.* at 2167–68 (analyzing *Auer*), with *id.* at 2169 (analyzing *Skidmore*). In *Perez*, the Court recently reiterated that *Auer* deference is limited: “Even in cases where an agency’s interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, *Auer* deference is not an inexorable command in all cases.” *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1208 n.4 (2015) (citing *Christopher*, 123 S. Ct. at 2166; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

<sup>320</sup> *Perez*, 135 S. Ct. 1199.

## V. TAKING *SEMINOLE ROCK*'S ROOTS INTO ACCOUNT TODAY

The unthinking expansion of *Seminole Rock*, as described in this Article, might seem a bit incredible at first. But when the expansion is considered alongside the broader transformation occurring within administrative law from the 1940s to the 1970s, one can understand how it occurred. Indeed, *Seminole Rock*'s evolution coincided with other significant moments in administrative law.

*Seminole Rock* was decided in 1945 just as the modern administrative state was on the rise. This was a period in which formal processes dominated the scene; informal rulemaking and interpretations of rules were relatively rare.<sup>321</sup> This meant that the number of cases in which *Seminole Rock* deference was requested were few and far between.

Later *Seminole Rock* experienced its most unrestrained expansion during the 1960s and 1970s, another important era in administrative law. This period is remarkable for a few reasons: the administrative state again expanded, informal rulemaking was on the rise, and, facing concerns about judicial activism, courts became more restrained in their review of administrative action.<sup>322</sup> The broader context of administrative law influenced the lack of deep examination as *Seminole Rock* was transformed.

At the end of *Seminole Rock*'s expansion, we are left with a doctrine that is untethered from its origins without any meaningful explanation as to why. And we are now at a moment when significant questions have been raised about the doctrine and its continued viability. Is there anything in this narrative that the Court might consider when it reexamines the deference that ought to be due to an agency's interpretation of its own regulations? Although the principle aim of this work is to lay out the lost history, some prescriptions naturally emerge.

### A. *Jettisoning Seminole Rock*

The first question that the Court must wrestle with is whether, given this history, *Seminole Rock* should remain generally applicable in all contexts. Because the doctrine emerged from a very specific period in history, some might suggest that it does not fit in today's landscape. There is no equivalent to

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<sup>321</sup> See *supra* Part I.A.

<sup>322</sup> See *supra* Part I.C.

World War II being waged; there is no concern regarding inflation equivalent to the scale of the concern during that period.

One might therefore conclude that we should jettison the old language of *Seminole Rock* deference and, as several Justices have suggested, start from scratch to determine whether deference is appropriate in this context.<sup>323</sup> In doing so, the Court could return to a *de novo* standard of review, or it might adopt a modified, perhaps more *Skidmore*-like, independent judicial check standard as Manning has suggested.

Short of jettisoning the doctrine, another option might be limiting it to the price-control context of *Seminole Rock*. Given there is very little price control that occurs today, this option would result in very little application of *Seminole Rock* deference. One might go a small step further and apply the doctrine to some combination of the price control and oil and gas leasing contexts, as in the early years. Because these contexts center on contractual or economic regulations, there is a broader possibility of a certain combination of contractual and economic circumstances that might be appropriate for *Seminole Rock* application. Although this approach is defensible given *Seminole Rock*'s roots, no other deference doctrine is tied to the context in which it would be applied.<sup>324</sup> It would therefore seem odd to adopt a doctrine that would not have uniform application in all administrative contexts.

Finally, one might take a different tack and afford *Seminole Rock* deference only in urgent, time-sensitive circumstances that require quick, reliable action. In other words, the Court could decide that *Seminole Rock* deference should continue to exist but only be applied in the rare cases in which agencies can demonstrate that emergency circumstances require a quick interpretation and that interpretation needs to have certainty in order to be effective.

This appears to us to be the weakest of the options, largely because in these circumstances an agency could amend its regulation under the “good cause”

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<sup>323</sup> See *Perez*, 135 S. Ct. at 1211–13 (Scalia, J., concurring in judgment); *id.* at 1213–25 (Thomas, J., concurring in judgment); *cf.* Stack, *supra* note 285, at 371–74 (describing the shortcomings of *Seminole Rock* and arguing that a regulatory interpretive approach is needed whether it is retained or abandoned).

<sup>324</sup> *Cf.* Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1542 (2006) (“[T]ax does not have, has never had, and should not have its own unique deference tradition.”).



exception of the APA.<sup>325</sup> The interpretation would then have the force of law and would be entitled to *Chevron* deference.

Although these approaches are defensible in light of the doctrine's origins, they would be a fairly dramatic shift from present practice, perhaps too dramatic to be adopted, particularly if they require overturning prior precedent. The question then is whether there is any approach that would allow *Seminole Rock* to remain but in a manner that is more consistent with its origins. We think so.

### B. *Rethinking the Application of Seminole Rock*

As the Court rethinks how modern *Seminole Rock* deference might bear a closer relationship to its earlier roots, two potential approaches emerge. First, one might consider the procedural requirements that should be in place before an interpretation would be considered for deference—a “Step Zero” for the application of *Seminole Rock* deference. Second, the Court might consider a modified interpretive approach when *Seminole Rock* deference applies.

#### 1. *Seminole Rock's Step Zero*

Several years ago, Professor Cass Sunstein coined the term *Chevron's Step Zero* to refer to “the initial inquiry into whether the *Chevron* framework applies at all.”<sup>326</sup> In a similar vein, we can imagine a threshold test for applying *Seminole Rock*. Such a test would give meaning to the Court's most recent pronouncement that “*Auer* deference is not an inexorable command in all cases”<sup>327</sup> by allowing a court to examine the context of the interpretation before mechanically applying *Seminole Rock* (*Auer*) deference.

As the history we have detailed about *Seminole Rock* above suggests, we need not look far in order to articulate such a test. *Seminole Rock* itself provides the answer: We can look to the procedural protections of both notice and timing that were present for the interpretation at issue in the case.

One might see a similarity here with the test for force of law under *Mead*, which largely turns on the formality of the process involved in adopting a

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<sup>325</sup> Cf. 5 U.S.C.A. § 553(b)(3), (d)(3) (2014) (allowing agencies to promulgate a new rule, when they have “good cause,” without the usual procedures required for notice and comment rulemaking).

<sup>326</sup> Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006); see also Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273 (2011).

<sup>327</sup> *Perez*, 135 S. Ct. at 1208 n.4.

statutory interpretation.<sup>328</sup> Unlike *Mead*, however, we are not suggesting different deference standards should apply. Instead, we are suggesting that the application of any deference will turn on the process used to adopt the regulatory interpretation. This focus on process and formality in exchange for affording deference is what Professors Matthew Stephenson and Miri Pogoriler call “pay me now” as opposed to “pay me later” in the form of heightened judicial review.<sup>329</sup>

First, as in *Seminole Rock*, the Court should require that the interpretation appear in a public and widely available document. The easiest way to ensure this would be to publish the interpretation in the *Federal Register*, which is consistent with the APA requirement that “interpretations of general applicability formulated and adopted by the agency” be so published.<sup>330</sup>

Courts have already confronted this problem: There is currently a circuit split emerging in immigration cases on the question of whether the lack of formality generally might be a factor in determining the appropriateness of *Seminole Rock* (*Auer*) deference.<sup>331</sup> In *Joseph v. Holder*, the Seventh Circuit suggested that “[a]n off-the-cuff response to an interpretive question from the first person who answers the telephone” might not be afforded deference.<sup>332</sup> The court went on to conclude that less deference should be afforded to a non-precedential, one-member decision of the Board.<sup>333</sup> The Ninth Circuit has gone even further and suggested that no *Auer* deference should be given to a non-precedential, one-member decision of the Board even if published.<sup>334</sup> Regardless of which court has the better of this argument, these opinions suggests that a requirement of the bare minimum of formality in the form of publication would not be difficult or even surprising to courts.

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<sup>328</sup> United States v. Mead Corp., 533 U.S. 218, 228 (2001).

<sup>329</sup> Stephenson & Pogoriler, *supra* note 31, at 1491.

<sup>330</sup> 5 U.S.C.A. § 552(a)(1)(D) (2014).

<sup>331</sup> Compare *Lezama-Garcia v. Holder*, 666 F.3d 518, 532 (9th Cir. 2011) (giving “no deference” to decision by one member of the Board), and *Joseph v. Holder*, 579 F.3d 827, 832–33 (7th Cir. 2009) (deciding to afford lesser deference to a non-precedential, one-member decision of the Board), with *Mansour v. Holder*, 739 F.3d 412, 414–15 (8th Cir. 2014) (“To the extent the [unpublished Board] decision interprets its own regulations, the interpretation is controlling unless ‘plainly erroneous or inconsistent with the regulation.’” (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997))), and *Linares Huarcaya v. Mukasey*, 550 F.3d 224, 228–30 (2d Cir. 2008) (giving “substantial deference” under *Auer* to a non-precedential Board decision).

<sup>332</sup> 579 F.3d 827, 832–33 (7th Cir. 2009).

<sup>333</sup> *Id.* at 833.

<sup>334</sup> *Lezama-Garcia*, 666 F.3d at 532.

With respect to timing, as in *Seminole Rock*, a court should defer when the interpretation is published near in time to the regulation. For those interpretations that are provided after the regulation goes into effect, deference might be appropriate if the interpretation is one that has been consistently held over a long period of time. Because this latter requirement was the basis of the recent decision in *Christopher*,<sup>335</sup> we imagine that it would not meet much objection.

Because an agency would not get *Seminole Rock* deference for new interpretations that deviate from past practice until they have been in place for a reasonable period of time to be viewed as consistent and long-held, an agency's ability to change its regulatory interpretation is somewhat restricted. One way to manage this is for agencies to notify regulated entities of shifts in regulatory interpretations before they begin to apply them. This is more consistent with the restrained origins of *Seminole Rock*. Moreover, it would be responsive to the concerns expressed in *Perez* about agencies suddenly changing interpretations and requiring immediate compliance, particularly when the interpretation appears to change with presidential elections.<sup>336</sup> By not permitting deference until an interpretation has had time to permeate, agencies will have an incentive to embrace approaches that allow interpretation to be more fully and fairly vetted.

## 2. *Embracing Seminole Rock's Original Interpretive Approach*

Once the Court has determined when it is appropriate to apply *Seminole Rock* deference based on notice and timing of the interpretation, we suggest one final step to better align the doctrine with its roots. Consistent with *Seminole Rock* and the early cases applying it,<sup>337</sup> the Court should no longer view *Seminole Rock* deference as a rebuttable presumption that affirmatively constrains the Court's role in interpretation. Instead, it should embrace an approach that requires courts to more closely examine the regulatory text before affording deference and to adopt clear interpretive techniques when faced with regulatory provisions.<sup>338</sup>

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<sup>335</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (2012).

<sup>336</sup> *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015).

<sup>337</sup> *See supra* Part I.C.

<sup>338</sup> *Perez*, 135 S. Ct. at 1208.

One way to do this is to adopt Professor Stack's suggestion to make regulatory interpretation more *Chevron*-like.<sup>339</sup> Just as it announced it would do in *Christensen v. Harris County*,<sup>340</sup> the Court would begin with an analysis of the regulatory language to determine if it is genuinely ambiguous. Stack suggested that this inquiry would proceed in two parts: “[I]s the agency’s interpretation both (1) permissible under the regulation’s text, and (2) consistent with the regulation’s purposes as authoritatively established in the regulatory text and statement of basis and purpose?”<sup>341</sup> Only after answering both of these questions in the affirmative would a court be permitted to consider affording some weight to the agency’s interpretation. As Stack noted, this preserves “the basic deferential rationale for *Seminole Rock* in that it allows the agency to determine how to best interpret the regulation within the set of textually permissible constructions.”<sup>342</sup>

In combination with timing and notice requirements, this type of interpretive approach is consistent with the judicial check many scholars have argued is necessary.<sup>343</sup> More importantly, as this Article has revealed, such an approach would simply reincorporate what went missing from *Seminole Rock* so many years ago.

## CONCLUSION

We have shown in this Article that the current *Auer* doctrine is untethered from the roots of *Seminole Rock*. In particular, we have traced how the doctrine associated with *Seminole Rock* developed, beginning with the *Seminole Rock* case itself and ending in the early 1970s, a time that is particularly important and transformational in administrative law.<sup>344</sup> The current *Seminole Rock* (*Auer*) doctrine pays no attention to the facts and context of the case on which it was built: It ignores the unique wartime and economic circumstances; the

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<sup>339</sup> See Stack, *supra* note 285, at 412 (arguing that an approach to the interpretation of regulations that parallels *Chevron* “remains consistent with the basic deferential rationale for *Seminole Rock* in that it allows the agency to determine how to best interpret the regulation within the set of textually permissible constructions”).

<sup>340</sup> 529 U.S. 576, 588 (2000).

<sup>341</sup> Stack, *supra* note 285, at 412.

<sup>342</sup> *Id.*

<sup>343</sup> See, e.g., Leske, *supra* note 31, at 273 (responding to the Court’s invitation in *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326 (2013), to rethink *Seminole Rock*, and proposing a new approach to *Seminole Rock* deference that would “essentially combine[] features of the current controlling deference standards, including *Seminole Rock* and *Chevron*, with the less deferential standard of *Skidmore*”); Manning, *supra* note 16, at 687 (suggesting the use of *Skidmore*-like factors).

<sup>344</sup> See FUNK & SEAMON, *supra* note 158, at 3–4.

atypical agency structure and role; the wide availability of an interpretation issued contemporaneously with the regulation; and the independent judicial check on the interpretation found in the opinion before deference is afforded. And at no step along the way do courts explain or even acknowledge the transformation.

After carefully retracing the steps in this transformation, history suggests that the resulting doctrine was not a product of deliberate and careful consideration of the appropriateness of deference to an agency's interpretation of its own regulations. Instead, the expansion of *Seminole Rock* beyond its modest origins corresponds neatly to the rise in rulemaking that was responsible for more rules, which in turn meant agencies provided more interpretations of those rules. In addition, the broad deference that came to be associated with *Seminole Rock* was solidified at a time during which courts came to embrace, as a general matter, judicial restraint when reviewing agency action. In short, the transformation of *Seminole Rock* into a broad and highly deferential doctrine that is mechanically applied as a rebuttable presumption appears to be consistent with, and perhaps even the result of, a perfect storm of more general administrative law changes. But this dramatic change occurred in ignorance of *Seminole Rock*'s unique context and origins. A reconsideration of the modern day *Seminole Rock* (*Auer*) doctrine that recalls the origins and context of *Seminole Rock* is therefore not only appropriate, but needed.