

LESSONS FROM THE LOST HISTORY OF *SEMINOLE ROCK*

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INTRODUCTION

Administrative law is full of questions about deference. Recently, quite a bit of attention has been focused on *Auer* deference, which is the deference afforded to agency interpretations of their own regulations.¹ First announced in *Bowles v. Seminole Rock & Sand Co.*,² the modern understanding of the doctrine is that an agency's interpretations of its own regulations receive deference unless "plainly erroneous or inconsistent with the regulation."³ This deference attaches to agency interpretations without much regard to the notice or process that accompanies the interpretation.⁴ Indeed, *Auer* itself afforded deference to an interpretation that was put forth for the first time in an amicus brief in litigation.⁵

Beginning in the mid-1990s, *Auer* deference has generated quite a bit of scholarly debate. Some argued that *Auer* deference violates the separation of powers between legislative, judicial, and executive functions.⁶ Others suggested that deferential interpretation of agency-created regulations circumvents traditional checks on administrative lawmaking.⁷ Within the last five years, several justices on the Supreme Court have expressed renewed interest in this issue and signaled an openness to reconsider *Auer* deference.⁸

Surprisingly, the debate over *Auer* deference has taken little notice of the peculiar circumstances surrounding *Seminole Rock* and its subsequent evolution into today's *Auer* doctrine. In a separate work, the authors con-

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¹ See *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (explaining *Auer* deference).

² 325 U.S. 410 (1945).

³ *Id.* at 414.

⁴ See Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 366 (2012) (identifying inadequacies in interpretive methods of agency regulations).

⁵ *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

⁶ John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 618 (1996).

⁷ Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN L.J. 1, 12 (1996).

⁸ See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring).

ducted an in-depth examination of the evolution of *Seminole Rock* from a restrained and unremarkable doctrine in the 1940s to a full-blown and widely applied “axiom of judicial review” in the 1970s.⁹ During this evolution, it appears that *Seminole Rock* shifted from its constrained origins as a result of the growth of the administrative state. This transformation, however, took place largely without explanation or acknowledgement from courts or commentators.

This Article informs the current debate over *Auer* deference by exploring the roots of the *Seminole Rock* decision and its subsequent reinterpretation through a creative approach. To do so, this Article offers a series of hypothetical opinions applying the various historical interpretations of *Seminole Rock* to a single set of facts. Part I places *Seminole Rock* in the constellation of deference doctrines in administrative law so that one can easily understand what the doctrine is and when it applies. Part II examines the transformation of *Seminole Rock* through a series of hypothetical D.C. Circuit opinions based on the facts of *Decker v. Northwest Environmental Defense Center* (“NEDC”).¹⁰ These opinions illustrate how courts have struggled to apply this expansive and untethered doctrine in the face of a growing administrative state. Part III offers observations from this exercise and urges reconsideration of *Auer* deference to reconcile the current doctrine with *Seminole Rock*’s historical roots.

I. THE MANY SHADES OF DEFERENCE

As any law student can attest, one of the trickiest questions to tackle is the proper deference to afford agency actions. Rather than reviewing agency actions de novo, courts often defer to agencies by engaging in only a limited review of the agency’s actions.¹¹ In general, application of deference standards means that “a court is not to substitute its judgment for that of the agency.”¹²

⁹ Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. (forthcoming 2015) (manuscript at 1, 5) (quoting *Allen M. Campbell Co. v. Lloyd Wood Constr. Co.*, 446 F.2d 261, 265 (5th Cir. 1971)) (internal quotation marks omitted), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2555718.

¹⁰ 133 S. Ct. 1326 (2013).

¹¹ See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations ‘has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.’” (footnote omitted) (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961))).

¹² *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

There are five general deference doctrines in administrative law. Two doctrines derive directly from the Administrative Procedure Act (“APA”) itself: (1) the arbitrary and capricious standard of § 706(2)(A),¹³ and (2) the substantial evidence doctrine found in § 706(2)(E).¹⁴ Both of these doctrines describe how courts must review the substantive work processes and outcomes of administrative agency proceedings. Each applies, however, in different circumstances.

Arbitrary and capricious review is the general backstop provision of review that applies to all agency actions unless a more specific provision applies.¹⁵ As a result, it applies to informal proceedings, like informal rule-making.¹⁶ The scope of judicial review is described as “narrow.”¹⁷ It only requires a court to find that an “agency [has] examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”¹⁸

Similarly, the substantial evidence standard, which applies to formal agency proceedings,¹⁹ is also highly deferential.²⁰ Under the substantial evidence standard, a court must uphold the agency’s action if the record has “such relevant evidence as a reasonable mind might accept as adequate to support” the agency’s conclusion.²¹ In other words, the agency’s action must be reasonable.²²

Most courts and commentators conclude that there is no difference between the substantial evidence and arbitrary and capricious standards.²³ Moreover, both of these standards are considered *more* deferential than the “clearly erroneous standard of review” employed by appellate courts when reviewing the factual findings of trial courts.²⁴

¹³ 5 U.S.C. § 706(2)(A) (2012).

¹⁴ *Id.* § 706(2)(E). See also Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1733 n.41 (2011) (explaining the two doctrines).

¹⁵ WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 162-63 (5th ed. 2014).

¹⁶ *Id.* at 162.

¹⁷ *State Farm*, 463 U.S. at 43.

¹⁸ *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Similar to Justice Rehnquist’s suggestion in his separate opinion in *State Farm*, Professor Kathryn Watts has argued that courts should recognize the role of presidential or congressional policy preferences under the arbitrary and capricious standard of review. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 12-13 (2009).

¹⁹ 5 U.S.C. § 706(2)(E); see also Meazell, *supra* note 14, at 1733 n.41 (noting that the substantial evidence standard is used in formal proceedings that utilize the procedures articulated in §§ 556 and 557 of the APA).

²⁰ FUNK ET AL., *supra* note 15, at 279.

²¹ *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

²² FUNK ET AL., *supra* note 15, at 163.

²³ *Id.* at 163-64.

²⁴ *Id.* at 279-80 (citing *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999)).

Outside of the APA, three additional deference standards focus on how courts should review agency interpretations of the statutes that they administer and the regulations that they promulgate. Although all three have roots in the 1940s,²⁵ these standards are known by the cases in which they were most recently articulated.

The first is the well-known *Chevron* doctrine from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²⁶ Until the *Christensen v. Harris County*²⁷ decision discussed below, in order to understand statutory interpretation in the administrative context, one only needed to know the two-step process. First, has “Congress [] directly spoken to the precise question at issue?”²⁸ To answer this question, a court used the “traditional tools of statutory construction.”²⁹ If Congress has spoken directly, the court “must give effect to the unambiguously expressed intent of Congress.”³⁰ If, instead, “the statute is silent or ambiguous with respect to the specific issue,”³¹ the court must determine whether the agency’s interpretation is “permissible”³² or a “reasonable interpretation.”³³ If so, the court must defer to the agency’s interpretation, even if the court would have reached a different interpretation in the first instance.³⁴ If the agency’s interpretation is unreasonable, the court does not defer.³⁵

Featured as *the* watershed statutory interpretation case in administrative law casebooks,³⁶ *Chevron* marked an innovation by clearly articulating a two-step analytical process. But on closer examination, *Chevron* has much deeper roots than its 1984 decision date suggests.³⁷ Several earlier

²⁵ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (*Auer* deference); *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944) (*Chevron* deference); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

²⁶ 467 U.S. 837 (1984).

²⁷ 529 U.S. 576 (2000).

²⁸ *Chevron*, 467 U.S. at 842.

²⁹ *Id.* at 843 n.9.

³⁰ *Id.* at 843.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 844.

³⁴ *Chevron*, 467 U.S. at 843 n.11.

³⁵ *Id.* at 843 n.9.

³⁶ See WILLIAM F. FUNK & RICHARD H. SEAMON, *EXAMPLES AND EXPLANATIONS: ADMINISTRATIVE LAW* 275 (4th ed. 2012) (noting that *Chevron* “has become the most cited (and perhaps debated) administrative law decision of all time”).

³⁷ Cf. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Miscalculates the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 682 (2007) (arguing that *Chevron* is the tipping point for a major change in review of agency action: “[C]ourts treated a broader range of issues on review in the pre-*Chevron* world—even some that in a sense are administrative interpretations of statutes as administrative implementation—and courts subjected them to the standard of the APA that ensures rational administrative decision-making. Courts did not cabin those typical administrative actions into a special realm of so-called questions of law or statutory construction.”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 247 (2006) (“In 1984, it was not

cases, cited in *Chevron*,³⁸ approved of deference to reasonable agency interpretations of the statute the agency administered.³⁹ In particular, the 1944 case of *NLRB v. Hearst*⁴⁰ has many similarities to *Chevron*, including its core idea that a court's review is "limited" when an agency is interpreting a term that is within its expertise in administering the statute.⁴¹

The second doctrine, which was recently revived in a series of decisions in the early 2000s,⁴² is the *Skidmore* doctrine from the 1944 case of *Skidmore v. Swift & Co.*⁴³ The *Skidmore* doctrine provides for deference on a sliding scale from "great respect at one end . . . to near indifference at the other."⁴⁴ Courts determine the appropriate amount of deference on this scale based on a number of factors.⁴⁵ These factors include "the 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, if lacking power to control."⁴⁶

What is tricky is that both *Chevron* and *Skidmore* apply when an agency interprets its organic statute.⁴⁷ That is, they apply to agencies' statutory interpretations. But both cannot apply at the same time. So when does each apply?

After some initial confusion,⁴⁸ the Supreme Court clarified in *Christensen v. Harris County*⁴⁹ that *Chevron* applies to agency interpretations of

entirely clear whether *Chevron* was a synthesis of existing law, as the Court appeared to believe at the time, or instead a genuine revolution, signaling a new era in the relationship between courts and regulatory agencies." (footnote omitted).

³⁸ See *Chevron*, 467 U.S. at 843 n.11, 844 n.14.

³⁹ See, e.g., *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.").

⁴⁰ 322 U.S. 111 (1944). See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1120 (1987). Interestingly, the justice who authored *Chevron*, Justice Stevens, clerked for Justice Rutledge, the author of *Hearst*.

⁴¹ *Hearst*, 322 U.S. at 130-31.

⁴² See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

⁴³ 323 U.S. 134 (1944).

⁴⁴ *Mead*, 533 U.S. at 228 (citation omitted).

⁴⁵ *Skidmore*, 323 U.S. at 140.

⁴⁶ *Id.*

⁴⁷ 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, 452-53 (2013).

⁴⁸ See *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (articulating the factors for applying *Chevron* as "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time").

⁴⁹ 529 U.S. 576 (2000).

their organic statutes when that interpretation has the force of law.⁵⁰ This test focuses on whether the agency has engaged in an APA process such as informal rulemaking or formal procedures under §§ 556 and 557, as well as whether the result of the process is legally binding.⁵¹ If, instead, the agency's statutory interpretation arises from something other than rulemaking or a decision resulting from a formal process, the interpretation receives *Skidmore* deference.⁵²

Commentators and courts typically describe *Chevron* as a stronger form of deference than the standard in *Skidmore*.⁵³ Despite this characterization, studies have found that courts defer to agencies' interpretations at roughly identical rates, regardless of whether *Chevron* or *Skidmore* deference applies.⁵⁴

The third and final interpretive deference doctrine, and the focus of this Article, is what is now known as *Auer* deference from *Auer v. Robbins*.⁵⁵ That case relied on the language of the 1945 decision of *Bowles v. Seminole Rock & Sand Co.*⁵⁶ *Seminole Rock* announced the deference owed to agency interpretations of their own regulations: "[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."⁵⁷

Like *Chevron* deference, *Auer* deference is viewed as strong deference, and courts uphold agency interpretations under *Auer* at a higher rate than either *Chevron* or *Skidmore* deference.⁵⁸ Unlike *Chevron* deference, *Auer* applies to a wide range of regulatory interpretations, including interpretations that appear for the first time in a brief in litigation.⁵⁹ Not limited

⁵⁰ *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007).

⁵¹ *Id.* (describing the factors for applying *Chevron* as "[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, [and] where the resulting rule falls within the statutory grant of authority").

⁵² These decisions may include "opinion letters[,] . . . policy statements, agency manuals, and enforcement guidelines . . ." *Christensen*, 529 U.S. at 587.

⁵³ FUNK ET AL., *supra* note 15, at 386.

⁵⁴ This rate of deference, for both cases applying *Chevron* and *Skidmore*, is somewhere between 60 and 70 percent. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 83-85 (2011).

⁵⁵ 519 U.S. 452 (1997).

⁵⁶ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

⁵⁷ *Id.*

⁵⁸ See Pierce, *supra* note 54, at 84 (citing a 91 percent affirmance rate of agencies in *Auer* cases at the Supreme Court); 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) (finding a 76 percent affirmance rate under *Auer* in district and circuit court cases).

⁵⁹ *Auer*, 519 U.S. at 462. Such was the case in *Auer* itself.

to a particular regulation, *Auer* deference has even been applied to an entire regulatory scheme.⁶⁰

After surveying these deference doctrines, most students (and many practitioners) are left more than a little confused. Many have proposed to simplify this complex scheme. For example, Professor David Zaring has argued that because courts uphold the agency's position in roughly 70 percent of cases regardless of the type of deference that applies, courts should replace the current doctrines with a uniform rule of reasonableness.⁶¹

Others have questioned whether deference to agency interpretations of law is appropriate at all.⁶² After all, as Chief Justice John Marshall announced in *Marbury v. Madison*,⁶³ "It is emphatically the province and duty of the judicial department to say what the law is."⁶⁴ Many students, fresh from their first course in constitutional law, have fairly wondered how courts can justify doctrines like *Chevron* in which Article III courts defer to an executive agency's interpretation of law.

The problem is even more acute with respect to *Auer* deference. Almost twenty years ago, Professor John Manning warned that *Auer* deference raises a separation of powers problem: "*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."⁶⁵ Because "administrative agencies exercis[e] delegated lawmaking authority, as well as perform[] executive and adjudicative functions," Manning argued that "it is crucial to have some meaningful external check upon the power of the agency to determine the meaning of the laws that it writes."⁶⁶ Manning therefore urged the Supreme Court to "replace *Seminole Rock* with a stand-

⁶⁰ *Coeur Alaska, Inc. v. Se. Alaska Conservation 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].'" (alteration in original) (quoting *Auer*, 519 U.S. at 461)).

⁶¹ David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 526 (2011); see also Pierce, *supra* note 54, at 98 (concluding that scholars should stop worrying about each individual deference doctrine and "focus instead on the three common elements of the doctrines: consistency with applicable statutes, consistency with available evidence, and quality of agency reasoning").

⁶² See, e.g., Anthony, *supra* note 7, at 11-12; 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, 782 (2010); Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 562 (2009); Manning, *supra* note 6, at 613-14 & nn.9-10. On the current Court, Justice Scalia has been the most skeptical in deference cases. See *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); see also *Coeur Alaska*, 557 U.S. at 295 (Scalia, J., concurring in part and concurring in the judgment) (criticizing the articulation of deference in that case for being too complicated).

⁶³ 5 U.S. (1 Cranch) 137 (1803).

⁶⁴ *Id.* at 177.

⁶⁵ Manning, *supra* note 6, at 618.

⁶⁶ *Id.* at 682.

ard that imposes an independent judicial check on the agency's determination of regulatory meaning."⁶⁷

Professor Robert Anthony likewise argued that *Seminole Rock* deference should be abandoned in favor of respectful consideration of the agency's position:

Agencies will realize that they can issue such documents—creating tangible meaning where the regulations did not—with a high degree of confidence that their interpretations, issued without notice and comment, will be upheld because they are not inconsistent with the regulation. This prospect 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.⁶⁸

The Supreme Court has repeatedly voiced skepticism of *Auer* deference,⁶⁹ especially in the last few terms.⁷⁰ In *Decker v. NEDC*, Chief Justice John Roberts announced, “The bar is now aware that there is some interest in reconsidering [*Seminole Rock* and *Auer*].”⁷¹ Roberts's statement has led Court-watchers to conclude that the Supreme Court is likely to reexamine *Auer* deference when it finds “a case in which the issue is properly raised and argued.”⁷²

Much of the scholarly commentary on *Auer* expresses similar concerns about the current application of the doctrine in *Decker*. This is perhaps best captured by this statement from an amicus brief from law professors in the *Decker* litigation:

[*Auer*] 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 determina-

⁶⁷ *Id.* at 617.

⁶⁸ Anthony, *supra* note 7, at 12.

⁶⁹ 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.”); cf. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (finding *Auer* deference inappropriate because “[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language”). See also *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (refusing to afford *Auer* deference based on lack of notice); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (“[Although] I have in the past uncritically accepted [the *Auer*] rule, I have become increasingly doubtful of its validity.”).

⁷⁰ See *infra* notes 71-73.

⁷¹ *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring).

⁷² *Id.*

tions, agencies could create de facto new regulation through litigation without ever providing adequate notice of those expectations prior to the litigation.⁷³

Given these concerns, one might reasonably ask how the *Auer* doctrine has come to be. Scholarly work before *Decker*, however, surprisingly lacked awareness of the history of the doctrine.⁷⁴ Although scholars generally acknowledged that *Seminole Rock* was a price control case during World War II, no scholarship examined how and why the case transformed from this unique context into an “axiom of judicial review” over time.⁷⁵

Recognizing this gap, the authors of this Article began a project to more deeply examine the roots of *Seminole Rock*. In another article, the authors examined the background of *Seminole Rock* and the subsequent history of lower courts applying the case as it transformed into today’s *Auer* doctrine.⁷⁶ In short, that work revealed that the original context and understanding of *Seminole Rock* has been lost, and no court has ever explained why.⁷⁷

This Article takes a slightly different approach to the evolution of *Seminole Rock*. In order to understand the transformation of *Seminole Rock*, this Article applies the basic facts of *Decker* to a series of hypothetical opinions from the U.S. Court of Appeals for the D.C. Circuit at different periods in the evolution of the *Auer* doctrine. As the court in closest proximity to federal agencies and with the highest percentage of administrative law cases, the D.C. Circuit is viewed as the expert and trendsetter in administrative law.⁷⁸ Consistent with this, the D.C. Circuit hears “more cases involving judicial review of agency action than any other circuit.”⁷⁹ As a result, the D.C. Circuit was a natural choice for this exercise because it offered more access to relevant precedent against which to contextualize the facts of the hypothetical case.

⁷³ Brief for Law Professors as Amici Curiae on the Propriety of Administrative Deference in Support of Respondent at 35, *Decker*, 133 S. Ct. 1326 (Nos. 11-338 & 11-347) [hereinafter Brief for Law Professors]; see also Kevin O. Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 230 (2013) (citing Lars Noah, *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules*, 51 HASTINGS L.J. 255, 290 (2000); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1309 (2007)); Robert A. Anthony & Michael Asimow, *The Court’s Deferences—A Foolish Inconsistency*, 26 ADMIN. & REG. L. NEWS, no. 1, Fall 2000, at 10, 10-11.

⁷⁴ Knudsen & Wildermuth, *supra* note 9, at 1.

⁷⁵ *Id.* at 5 (quoting *Allen M. Campbell Co. v. Lloyd Wood Constr. Co.*, 446 F.2d 261, 265 (5th Cir. 1971)) (internal quotation marks omitted).

⁷⁶ *Id.* at 1.

⁷⁷ *Id.*

⁷⁸ Given its location, one would expect that the members of the D.C. Circuit would be more “in the know” regarding current agency business than a court operating far from the nation’s capital. See FUNK ET AL., *supra* note 165, at 66; Pierce, *supra* note 54, at 90.

⁷⁹ Pierce, *supra* note 54, at 90.

As an illustrative exercise, this Article takes a certain amount of creative license in the hypothetical response of the D.C. Circuit to the facts of *Decker* during the stages in the evolution of *Seminole Rock*. Nevertheless, these hypothetical opinions capture a central concern: a transformation without explanation—as occurred with *Seminole Rock*—results in something that is itself unexplainable: the *Auer* doctrine. Accordingly, the inexplicable evolution of *Seminole Rock* lies at the heart of current judicial and scholarly concerns about the *Auer* doctrine.

II. FACTS OF THE *DECKER* CASE FOR THE HYPOTHETICAL OPINIONS THAT FOLLOW

Before proceeding to the hypothetical opinions that illustrate the evolution of *Seminole Rock*, this Part provides the factual background for a single recent case—*Decker v. NEDC*—that serves as the basis for the opinions that follow.

Decker concerned the Environmental Protection Agency’s (“EPA”) interpretation of “industrial activity” in its water pollution regulations not to include commercial logging.⁸⁰ In order to control water pollution, the Clean Water Act requires a permit for any discharge into navigable waters from a “point source.”⁸¹ Permits do not eliminate discharges.⁸² Instead, they set national limits on how much polluted water may be added to a larger body of water such as a river or lake.⁸³

In *Decker*, an environmental group, the NEDC, filed suit alleging that private logging corporations harvesting timber in the Tillamook State Forest violated the Clean Water Act by discharging storm water into navigable waters without a permit.⁸⁴ The NEDC’s central concern stemmed from a man-made water collection and drainage network along logging roads used to collect storm water generated by logging operations.⁸⁵ The storm water contained “large amounts of sediment, in the form of dirt and crushed gravel from the [logging] roads.”⁸⁶ The water in the culverts, ditches, and pipes of the system eventually flows into rivers and their tributary streams.⁸⁷

The Clean Water Act defines the term “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or

⁸⁰ *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1331 (2013).

⁸¹ *See* 33 U.S.C. §§1311(a), 1342(a) (2012).

⁸² *Decker*, 133 S. Ct. at 1331.

⁸³ *Id.*

⁸⁴ *Id.* at 1333.

⁸⁵ *See id.*

⁸⁶ *Id.*

⁸⁷ *See id.*

may be discharged.”⁸⁸ In addition to other discharges, the Clean Water Act requires a specific permit for storm water discharges “associated with industrial activity.”⁸⁹ The NEDC contended that, based on the plain language of the statute, the loggers’ storm water networks resulted in discharges from a point source that required permits.⁹⁰

The EPA, however, argued that certain storm water discharges are exempt from permit requirements under the statute.⁹¹ Before *Decker*, the EPA enacted a rule defining “storm water discharge associated with industrial activity” as

the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from . . . immediate access roads . . . used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility . . .⁹²

To identify the categories of “facilities” engaged in “industrial activity,” the EPA’s rule incorporates by reference Standard Industrial Classification (“SIC”) codes.⁹³ SIC code 24 identifies “logging” as industrial activity.⁹⁴

Despite this language—which appears to make logging an industrial activity and therefore subject to storm water permitting requirements—the EPA submitted an amicus brief in the litigation.⁹⁵ In that brief, the EPA interpreted logging not to constitute “industrial activity.”⁹⁶ Therefore, the EPA argued, precipitation-driven runoff from logging roads did not require a permit, even if storm water flowed through a ditch, channel, or culvert and into navigable waters of the United States.⁹⁷

This interpretation, the EPA explained, is more consistent with a common understanding of “industrial activity.”⁹⁸ As for why the regulation referenced the SIC code, the EPA contended that it only meant to signal its intent to regulate traditional industrial sources.⁹⁹ These sources include the

⁸⁸ 33 U.S.C. § 1362(14) (2012).

⁸⁹ *Id.* § 1342(p)(2)(B).

⁹⁰ *Decker*, 133 S. Ct. at 1336.

⁹¹ *Id.* at 1336-37.

⁹² 40 C.F.R. § 122.26(b)(14) (2013).

⁹³ *Id.* § 122.26(b)(14)(ii).

⁹⁴ *Decker*, 133 S. Ct. at 1332.

⁹⁵ Brief for the United States as Amicus Curiae, *Decker*, 133 S. Ct. 1326 (Nos. 11-338 & 11-347).

⁹⁶ *Id.* at 11.

⁹⁷ *Id.* at 2.

⁹⁸ *Id.* at 3 (“The CWA does not define the term ‘storm water discharge associated with industrial activity.’”).

⁹⁹ *Id.* at 13 (explaining that “EPA primarily referenced this SIC code to regulate traditional *industrial* sources such as sawmills” (quoting another source) (internal quotation marks omitted)).

four subcategories of silvicultural activities that the EPA had already defined as point sources in its rule: rock crushing, gravel washing, log sorting, and log storage.¹⁰⁰ Because those operations were more closely associated with traditional industrial activities than logging, the EPA contended that its interpretation exempting logging from permitting was reasonable and therefore entitled to deference.¹⁰¹

III. ILLUSTRATIVE D.C. CIRCUIT OPINIONS

This Part imagines the response of the D.C. Circuit to the EPA's request for deference on the facts of *Decker* at various times in the development of the *Seminole Rock* doctrine. Although the EPA did not exist until 1970, the Article assumes that the EPA existed as of the first hypothetical opinion in 1947. In addition, although one issue before the Court in *Decker* was whether the regulations contradicted the statute,¹⁰² this Article assumes that no such contradiction exists. Finally, the citations in the opinions are not necessarily what one would expect at the time, but rather these citations intend to illustrate the contemporaneous concepts and/or examples used in writing the opinion.¹⁰³ As with any exercise like this, the hypothetical opinions cannot reflect the totality of the historical context. Rather, the hypothetical opinions intend to give a snapshot of *Decker*'s most likely outcome at various points of *Seminole Rock*'s interpretation. The opinions below start shortly after the *Seminole Rock* decision in 1945 and continue through five different periods, culminating in the modern interpretation of the *Seminole Rock* doctrine, which arose in the 1970s and was affirmed in 1982.

A. 1947—*Skepticism in the Wake of Seminole Rock*

The EPA has asked for deference under *Seminole Rock* to its interpretation of its regulation for storm water discharge permitting. We are surprised by this request. First, very few agencies engage in rulemaking and even fewer agencies have asked this court for deference to their interpretations of their regulations.¹⁰⁴ Although we can surely entertain a novel request like this, we are more troubled by the precedent that the EPA relies on

¹⁰⁰ *Id.*

¹⁰¹ See Brief for the United States as Amicus Curiae, *supra* note 95, at 13-14.

¹⁰² See Brief for Law Professors, *supra* note 73, at 12-15.

¹⁰³ For example, some of these citations draw upon modern scholarship and commentary regarding past events and interpretations.

¹⁰⁴ See 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.").

to make its request. It is unclear what weight, if any, ought to be accorded to *Seminole Rock* after the Supreme Court's decision in *M. Kraus & Bros., Inc. v. United States*.¹⁰⁵ In *Kraus*, unlike *Seminole Rock*, the Court did not follow the interpretation offered by the Office of Price Administration ("OPA") of its own regulations.¹⁰⁶ This leads us to conclude 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."¹⁰⁷ It therefore appears to us that *Seminole Rock* should be limited to its facts.

Even if we assume that *Seminole Rock* has not been called into question by *Kraus*, the interpretation at issue here fails to satisfy the requirements of *Seminole Rock*. First, *Seminole Rock* involved the OPA, which was operating in wartime circumstances to stabilize the country's economy.¹⁰⁸ This case, however, neither involves the OPA nor implicates any clear financial issues, let alone the stability of the nation's economy. In *Seminole Rock*, the OPA's interpretation was necessary to provide certainty and reliability. As a result, the deference found in *Seminole Rock* has never been extended to any agency other than the OPA. We are hesitant to extend it here to the EPA, an agency created to regulate environmental health and safety.

Second, the Court in *Seminole Rock* began its analysis with its own interpretation of the regulations at issue.¹⁰⁹ When we turn to the language of the statute and the regulations at issue here, we are concerned that the interpretation offered by the EPA is inconsistent with the governing statute and the text of the regulations.¹¹⁰

¹⁰⁵ 327 U.S. 614 (1946).

¹⁰⁶ *Id.* at 625.

¹⁰⁷ Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 598 (1950).

¹⁰⁸ See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413 (1945) (stating the Court "granted certiorari because of the importance of the problem in the administration of the emergency price control and stabilization laws"); Donald H. Wallace & Philip H. Coombs, *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 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.").

¹⁰⁹ See 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, 637, 639 (2014) (describing the analysis in *Seminole Rock* as follows: "The strong rule of deference described by the Court [in *Seminole Rock*] is, however, undercut by the analysis that follows the 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.").

¹¹⁰ The analysis that follows is based largely on Justice Scalia's opinion in *Decker*. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1343 (2013) (Scalia, J., concurring in part and dissenting in part).

The Clean Water Act defines the term “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged.”¹¹¹ It also requires permits for all storm water discharges “associated with industrial activity.”¹¹² The regulation describing what is “associated with industrial activity” sets out eleven “categories of industries.”¹¹³ As to those industries, discharges are “associated with industrial activity” if they come from sites used for “transportation” of “any raw material.”¹¹⁴

The forest roads at issue here are used to transport raw material (logs); the only question is whether logging is a “categor[y] of industr[y]” enumerated in the regulation’s definition.¹¹⁵ It is. The second listing of industries in the EPA’s regulation enumerates activities in “Standard Industrial Classifications 24 (except 2434)” as qualifying industries.¹¹⁶ Opening one’s hymnal to Standard Industrial Classification 24 (“Lumber and Wood Products, Except Furniture”), one finds that the first industry group listed is “Logging”—defined as “[e]stablishments primarily engaged in cutting timber.”¹¹⁷ If that were not clear enough, the SIC lists an illustrative product of this industry: “Logs.”¹¹⁸ In short, our reading of the statute and the regulations in this case is at odds with the conclusion reached by the EPA. Even under *Seminole Rock*, we cannot give effect to a proffered interpretation that contravenes the plain text.¹¹⁹

Finally, the EPA’s interpretation lacks the key procedural features of the interpretation in *Seminole Rock*. The OPA interpretation at issue in that case was published concurrently with the regulation,¹²⁰ was made widely available,¹²¹ and was directly on point.¹²² Here, the EPA has offered an explanation in an amicus brief in this litigation.¹²³ It has never been published or made widely available. This falls far short of what we would expect

¹¹¹ 33 U.S.C. § 1362(14) (2012).

¹¹² *Id.* § 1342(p)(2)(B).

¹¹³ 40 C.F.R. § 122.26(b)(14) (2013).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ 40 C.F.R. § 122.26(b)(14)(ii) (2009).

¹¹⁷ SIC Manual, Occupational Safety & Health Administration, U.S. DEP’T OF LABOR, https://www.osha.gov/pls/imis/sic_manual.display?id=17&tab=group (last visited Feb. 20, 2015) [hereinafter SIC Manual].

¹¹⁸ This passage is based largely on the language found in Justice Scalia’s opinion in *Decker*. *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1343 (2013) (Scalia, J., concurring in part and dissenting in part).

¹¹⁹ *Id.*

¹²⁰ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945).

¹²¹ Frank C. Newman, *How Courts Interpret Regulations*, 35 CAL. L. REV. 509, 531 (1947).

¹²² OFFICE OF PRICE ADMIN., BULL. NO. 1, THE GENERAL MAXIMUM PRICE REGULATION 3 (1942).

¹²³ See Brief for the United States as Amicus Curiae, *supra* note 95, at 13-14.

when affording weight to an agency interpretation.¹²⁴ In short, we disagree with the interpretation offered by the EPA and conclude that permits are required for the storm water discharges at issue in this case.

B. *1952—Great Restraint Continues with Only Small Changes*

The EPA has asked for deference to its interpretation of its regulation under *Seminole Rock*. We decline this request for three reasons. First, although we have extended the reach of *Seminole Rock* to agencies other than the OPA, we have largely done so when the agency relying on *Seminole Rock* is one of the OPA's successor agencies, such as the Office of the Housing Expediter, the Department of Agriculture, the Department of Commerce (Division of Liquidation), and the Reconstruction Finance Company.¹²⁵ Moreover, the principles embraced in *Seminole Rock* were designed to create reliability in an unstable period of war. They are not principles of general applicability. We have therefore generally limited the application of *Seminole Rock* to cases involving price controls, labor, and wartime loyalty;¹²⁶ this case does not raise any of those issues.

Second, we are troubled by the lack of notice given by the EPA for this interpretation. The interpretation was not published in the Federal Register, nor does it appear in any other public forum.¹²⁷ Instead, the EPA provided the interpretation in a brief after this litigation began. As a matter of fundamental fairness, we are particularly wary of these kinds of interpretations.

Finally, because the interpretation appears for the first time in a brief in litigation, it does not demonstrate characteristics that might give it more weight under *Skidmore* such as “the 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, if lack-

¹²⁴ *Fleming v. Van Der Loo*, 160 F.2d 906, 912 (D.C. Cir. 1947) (refusing deference to unpublished, private letter to the litigant after the onset of the controversy).

¹²⁵ See, e.g., *Danz v. Reconstruction Fin. Corp.*, 193 F.2d 1010, 1016 (Emer. Ct. App. 1952) (applying *Seminole Rock* to the Reconstruction Finance Company); *Woods v. Petchell*, 175 F.2d 202, 206 (8th Cir. 1949) (applying *Seminole Rock* to the Office of the Housing Expediter); *L. Gillarde Co. v. Joseph Martinelli & Co.*, 169 F.2d 60, 61 (1st Cir. 1948) (applying *Seminole Rock* to the Department of Agriculture); *Fleet-Wing Corp. v. Clark*, 166 F.2d 145, 147 (Emer. Ct. App. 1948) (applying *Seminole Rock* to the Department of Commerce, Division of Liquidation). For a list of OPA's successor agencies, see *Records of the Office of the Price Administration*, NAT'L ARCHIVES, <http://www.archives.gov/research/guide-fed-records/groups/188.html#188.1> (last visited Jan. 2, 2015).

¹²⁶ See *supra* note 108 and accompanying text.

¹²⁷ See *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 332 (D.C. Cir. 1952) (refusing to defer to interpretive letter to litigant in a case involving the Internal Revenue Service); *Bailey v. Richardson*, 182 F.2d 46, 52 (D.C. Cir. 1950) (deferring to a Presidential Memorandum, which was published in the Federal Register, in case involving the Civil Service Commission's Loyalty Review Board).

ing power to control.”¹²⁸ Without such a showing, we will not give deference to the EPA’s interpretation. Under our own reading of the statute and its regulation, we conclude that permits are required for the storm water discharges at issue here.

C. *1964—Transformation to a Doctrine of Judicial Restraint with Some Remaining Limits*

The EPA has asked for deference under *Seminole Rock* to its interpretation of its regulation for storm water discharge permitting. We are unsurprised by this request because many agencies engaged in rulemaking have sought *Seminole Rock* deference for interpretations of their rules.¹²⁹ Our cases have signaled that we will entertain whether *Seminole Rock* deference is appropriate regardless of the agency requesting the deference.¹³⁰

As we have said in several cases, an agency is subject to our review only if it has acted arbitrarily or unreasonably or if the interpretation offered is erroneous as a matter of law.¹³¹ As *Seminole Rock* requires, if the agency’s interpretation is reasonable, we cannot disturb it.¹³²

The respondent NEDC claims, however, that regardless of whether the EPA’s interpretation is reasonable, this court should not afford deference to an interpretation that is not found in the Federal Register or at least published and widely available like the interpretation in *Seminole Rock*. We think a requirement to publish in the Federal Register “would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.”¹³³ We agree, though, that some notice is required.

Accordingly, to satisfy notice, we must examine whether the EPA has consistently applied the interpretation in practice and in previous adjudica-

¹²⁸ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In this time period, it was common for courts to cite both *Seminole Rock* and *Skidmore* as if they were two sides of the same coin. See *Gibson Wine*, 194 F.2d at 332.

¹²⁹ See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 546-70 (2002) (describing advocacy for the increased use of rulemaking in the late 1950s and 1960s and noting the large uptick in the use of rulemaking resulting from those advocacy efforts by the 1960s).

¹³⁰ See *Wright v. Paine*, 289 F.2d 766, 768 (D.C. Cir. 1961) (applying *Seminole Rock* to interpretations of the Department of the Interior); *Outland v. Civil Aeronautics Bd.*, 284 F.2d 224, 228-29 (D.C. Cir. 1960) (applying *Seminole Rock* to interpretations of the Civil Aeronautics Board).

¹³¹ See *Morgan v. Udall*, 306 F.2d 799, 801 (D.C. Cir. 1962).

¹³² See *Sw. Petroleum Corp. v. Udall*, 325 F.2d 633, 635 (D.C. Cir. 1963).

¹³³ *Boesche v. Udall*, 303 F.2d 204, 206 (D.C. Cir. 1961) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947)) (internal quotation marks omitted), *aff’d*, 373 U.S. 472 (1963).

tions.¹³⁴ In this case, the EPA’s interpretation first appeared in this litigation. It is therefore not longstanding and cannot qualify for deference.

Because we are not obligated to defer, we adopt the more natural reading of the regulations. The regulation explains that discharges are “associated with industrial activity” and therefore require permits if they come from sites used for “transportation” of “any raw material.”¹³⁵ The forest roads in this case are used to transport raw material—logs—and logging is a “categor[y] of industr[y]” enumerated in the definition because SIC 24 (“Lumber and Wood Products, Except Furniture”), No. 2411 lists “Logging” as industrial activity.¹³⁶ We therefore conclude that permits are required for the challenged storm water discharges at issue in this case.

D. 1972—Full Transformation

The EPA has asked for deference under *Seminole Rock* to its interpretation of its regulation for storm water discharge permitting. There is no question that the EPA is authorized to promulgate the regulations at issue. We are therefore required to give its interpretation of those regulations great weight: “[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”¹³⁷ Because no plain error or inconsistency is obvious, we defer to the EPA’s interpretation.

Respondent NEDC complains that the interpretation at issue in this case only appeared in the litigation itself. Our cases make clear, however, that deference attaches to interpretations, regardless of where or how they appear.¹³⁸ The EPA cannot possibly anticipate each and every possible variation of facts under its rules. As a result, it often must interpret regulations in the face of specific facts when they arise, as the EPA did here.

¹³⁴ *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 Interior Dec. 417, 419 (1955))); see Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 921 (1948) (remarking that “[m]ore 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))).

¹³⁵ 40 C.F.R. § 122.26(b)(14) (2013).

¹³⁶ *Id.*; SIC Manual, *supra* note 117.

¹³⁷ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see also *Mobil Oil Corp. v. Fed. Power Comm’n*, 469 F.2d 130, 138 n.8 (D.C. Cir. 1972) (“Since this interpretation of the regulation is not arbitrary or unreasonable, we accept it.”).

¹³⁸ See *Cedar Rapids Television Co. v. FCC*, 387 F.2d 228, 230 (D.C. Cir. 1967) (applying *Seminole Rock* to an interpretation provided for the first time in the litigation); *Robertson v. Udall*, 349 F.2d 195, 197-98 (D.C. Cir. 1965) (rejecting a requirement that the interpretation be longstanding or necessarily consistent with prior practices).

Because we conclude that the EPA's interpretation is entitled to "controlling weight,"¹³⁹ we find that no permits are required for the discharges at issue in this case.

E. *1982—Transformation Reaffirmed (with Some Wavering Along the Way)*

The EPA has asked for deference under *Seminole Rock* to its interpretation of its regulation for storm water discharge permitting. Under *Seminole Rock*, "[a]n agency's construction of its own regulation demands deference by the courts, and is not to be upset unless inconsistent with the regulation or unreasonable."¹⁴⁰ Although we have signaled some limits to this rule, such as whether the issue involves agency expertise and whether the agency consistently applied the interpretation for a significant period of time,¹⁴¹ the way in which we consider these factors varies from case to case.

"It is a basic tenet of administrative law that administrative agencies are entitled to wide latitude in interpreting their own regulations."¹⁴² In this case, we believe the exclusion of logging roads from permitting reflects the EPA's experience and expertise in this arena. We "need not find that the agency's construction is the only possible one, or even the one that [we] would have adopted in the first instance."¹⁴³

Although several alternative interpretations are possible, our task here is narrow: is the EPA's interpretation "reasonable and consistent with the regulation"?¹⁴⁴ We find that it is. The EPA relies on the common-sense understanding of the phrase "industrial activity" in the regulation to conclude that it does not include logging. Moreover, "even if logging . . . is a type of economic activity within the regulation's scope, a reasonable interpretation of the regulation could still require the discharges to be related in a direct way to operations 'at an industrial plant'" to trigger permitting requirements under the Clean Water Act.¹⁴⁵

We therefore defer to the EPA's interpretation and conclude that no permit is required in this case.

¹³⁹ *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part) (quoting *Seminole Rock*, 325 U.S. at 414) (internal quotation marks omitted).

¹⁴⁰ *Koch Indus., Inc. v. Fed. Power Comm'n*, 554 F.2d 1158, 1163-64 (D.C. Cir. 1977).

¹⁴¹ *See S. Mut. Help Ass'n v. Califano*, 574 F.2d 518, 526-27 (D.C. Cir. 1977) (concluding that deference need not be afforded after articulating and analyzing the new factors).

¹⁴² *See Ashland Exploration, Inc. v. Fed. Energy Regulatory Comm'n*, 631 F.2d 1018, 1021-22 (D.C. Cir. 1980) ("It is a basic tenet of administrative law that administrative agencies are entitled to wide latitude in interpreting their own regulations.").

¹⁴³ *See Belco Petroleum Corp. v. Fed. Energy Regulatory Comm'n*, 589 F.2d 680, 685 (D.C. Cir. 1978).

¹⁴⁴ *Id.*

¹⁴⁵ *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013).

IV. OBSERVATIONS

As this exercise has demonstrated, the history of *Seminole Rock* is a complicated one. This Part offers a few observations.

First, and perhaps most obvious, the hypothetical opinions illustrate that the constrained roots of the *Seminole Rock* doctrine do not explain its present expansive application. For this reason alone, the Supreme Court ought to reconsider *Seminole Rock/Auer* deference to reconcile the doctrine with its history.

Second, the most dramatic transformation of *Seminole Rock*—found in the sequence of example opinions from 1964 to 1982¹⁴⁶—occurred during a period when rulemaking was coming into fashion.¹⁴⁷ In the late 1940s and 1950s, adjudication (i.e., developing a rule to a specific factual setting) was the predominant way in which administrative rules were made.¹⁴⁸ The adjudicative setting provided the origin of *Seminole Rock* and remains the typical setting for *Auer* deference.¹⁴⁹

By the late 1950s, many began to question the wisdom of making rules through fact-specific proceedings.¹⁵⁰ The advocates argued, “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.”¹⁵¹ As more scholars and judges joined in support of rulemaking, agencies engaged in more and more of it.¹⁵² Rulemaking was so popular that by 1978, Professor Kenneth Culp Davis proclaimed that “administrative rulemaking is ‘one of the greatest inventions of modern government.’”¹⁵³

In the excitement for rulemaking, one would expect both an increase in rules and in requests from agencies for judicial deference to their interpretations of these new rules. When faced with agencies’ requests for *Seminole Rock* deference, no opinions or even journal articles explained the metes and bounds of *Seminole Rock* in the manner of the hypothetical opinions provided in Part II. Given the dearth of supporting case law and scholarly commentary, the D.C. Circuit began to accept the arguments for expan-

¹⁴⁶ See *supra* Part III.C-E.

¹⁴⁷ Merrill & Watts, *supra* note 129, at 526.

¹⁴⁸ *Id.*

¹⁴⁹ Manning, *supra* note 6, at 639.

¹⁵⁰ Merrill & Watts, *supra* note 129, at 546.

¹⁵¹ *Id.* (footnote omitted).

¹⁵² *Id.* at 548-49.

¹⁵³ 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 448 (2d ed. 1978) (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15 (Supp. 1970)).

sive deference in the 1970s¹⁵⁴ without, it appears, fully appreciating the change it was making in the law.

Given its unique and prolific role in administrative law, the D.C. Circuit was, and is, particularly influential on other courts.¹⁵⁵ Its embrace of new administrative law principles has been and remains important in the development of administrative law.¹⁵⁶ The court's location and repeat relationship with many government lawyers might be part of the answer. The judges' everyday exposure to local lawyers both in—and one would assume—out of court might persuade the court to adopt an expanded interpretation of *Seminole Rock* over time.

Third, and finally, the full expansion of *Seminole Rock* has not come without periods of concern. Courts signaled this discomfort by occasionally articulating the *Seminole Rock* test in combination with *Skidmore* deference or in *Skidmore*-like terms.¹⁵⁷ Two periods of D.C. Circuit opinions demonstrate this trend. First, in the 1950s, the D.C. Circuit mixed the two opinions, largely as a mechanism to restrain the application of *Seminole Rock*.¹⁵⁸ Later, in the mid-1970s, a few notable opinions conditioned *Seminole Rock* deference on terms more consistent with *Skidmore*'s approach.¹⁵⁹ After the 1970s, the D.C. Circuit and Supreme Court backed away from *Skidmore*-like factors, and by the early 1980s, the *Seminole Rock* test again omitted *Skidmore*-like factors.¹⁶⁰

¹⁵⁴ See, e.g., *Belco Petroleum Corp. v. Fed. Energy Regulatory Comm'n*, 589 F.2d 680, 685-86 (D.C. Cir. 1978) (“When construction of an agency regulation is in issue, courts owe great deference to the interpretation adopted by the agency and will uphold that interpretation if it is reasonable and consistent with the regulation. The court need not find that the agency’s construction is the only possible one, or even the one that the court would have adopted in the first instance.”); *Koch Indus., Inc. v. Fed. Power Comm’n*, 554 F.2d 1158, 1163-64 (D.C. Cir. 1977) (“An agency’s construction of its own regulation demands deference by the courts, and is not to be upset unless inconsistent with the regulation or unreasonable.”).

¹⁵⁵ See FUNK ET AL., *supra* note 15, at 66.

¹⁵⁶ Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 348-49, 359.

¹⁵⁷ See *British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 995 (D.C. Cir. 1978).

¹⁵⁸ See *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).

¹⁵⁹ See, e.g., *British Caledonian Airways*, 584 F.2d at 994-96 (“Relying on the factors set forth in *Skidmore v. Swift & Co.*, we feel that the Board’s interpretation is, in light of the statute and the regulations, persuasive and in conformity with law.” (citation omitted)); *S. Mut. Help Ass’n v. Califano*, 574 F.2d 518, 526-27 (D.C. Cir. 1977) (citing *Skidmore*-like factors of expertise and consistency as requirements for applying *Seminole Rock* deference).

¹⁶⁰ Professor Kevin Leske has argued that “[a] significant change to the *Seminole Rock* standard emerged in 1988 . . . [The] analysis required consideration of the original intent of the agency when it promulgated the regulation at issue.” Leske, *supra* note 73, at 253-54. In support of this change, Leske cites *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988), and *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512-13 (1994). *Id.* By 1997, however, the Court no longer mentioned the original intent of the

In recent cases in which several members of the Supreme Court openly questioned *Seminole Rock/Auer* deference, the Court has returned to a more *Skidmore*-like test. In *Christopher v. SmithKline Beecham Corp.*,¹⁶¹ the Court made clear that it would not afford *Auer* deference in several circumstances, all of which reflect *Skidmore*'s requirements of consistency, thoroughness, and validity.¹⁶² Consistent with scholarly arguments,¹⁶³ this phenomenon suggests growing judicial support for independent checks on agency interpretations of their own regulations.

CONCLUSION

Deference doctrines are tricky. They have confounded, confused, and inspired much criticism. This is particularly true for *Seminole Rock/Auer* deference the more one understands about its history and development. In short, the *Seminole Rock/Auer* doctrine has expanded from its constrained origins into an “axiom of judicial review,”¹⁶⁴ but no one has ever explained why. Alongside the already-voiced policy and separation of powers concerns,¹⁶⁵ this powerful evidence should prompt the Court to reconsider the basis for the current application of deference for an agency's interpretation of its own regulations.

agency as part of the *Seminole Rock* inquiry. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997); Leske, *supra* note 73, at 257.

Arguably, consideration of original intent is more consistent with *Seminole Rock*'s origins, which relied on a published interpretation that was issued simultaneously with the regulation. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945). It is unclear, however, if the Court decided to consider the agency's original intent during this brief period to better align with *Seminole Rock*'s original context. Professor Manning has suggested that the intent of an agency when the regulation is promulgated—and, more specifically, the agency's statement of basis and purpose—ought to be one of the factors considered if *Skidmore* were to replace *Seminole Rock*. Manning, *supra* note 6, at 689-90.

¹⁶¹ 132 S. Ct. 2156 (2012).

¹⁶² See *id.* at 2166.

¹⁶³ Manning, *supra* note 6, at 682.

¹⁶⁴ *Knudsen & Wildermuth*, *supra* note 9, at 1 (quoting *Allen M. Campbell Co. v. Lloyd Wood Construction Co.*, 446 F.2d 261, 265 (5th Cir. 1971)) (internal quotation marks omitted).