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Reflections on Seminole Rock: The Past, Present, and Future of Deference to Agency Regulatory Interpretations

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**Reflections on *Seminole Rock*:
The Past, Present, and Future of Deference
to Agency Regulatory Interpretations**

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the American Bar Association's Section of Administrative Law & Regulatory Practice

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Introduction

Aaron Nielson

Seminole Rock (or *Auer*) deference prompts many disagreements. Everyone agrees, however, that *Seminole Rock* has captured the attention of scholars, policymakers, and the judiciary. That is why we at *Notice & Comment* have decided that the time has come to collect thoughts regarding different aspects of *Seminole Rock*. Indeed, over the next two weeks, we will run short essays from over twenty scholars.

It is my privilege to introduce the subject.

First, what is *Seminole Rock* deference? According to the [Supreme Court](#), “*Auer* deference is *Chevron* deference applied to regulations rather than statutes.” In other words, because of *Seminole Rock*, courts—[generally](#)—defer to an agency’s interpretation of its own ambiguous regulations.

Second, why should we care about it? Well, for one thing, because courts regularly cite *Seminole Rock*. For another, because it is controversial. In fact, [Justice Thomas](#) and the late [Justice Scalia](#) have called for *Seminole Rock* to be overruled, and *at least* Chief Justice [Roberts](#) and Justice [Alito](#) may be open to the argument.

Third, why is it controversial? Again, let me quote the [Supreme Court](#): “Deferring to an agency’s interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking.” And this concern has some historical pedigree. In the words of [John Manning](#):

Locke, Montesquieu, and Blackstone all emphasized that some separation of lawmaking from law-exposition promoted the rule of law and controlled arbitrary government in two important ways. First, such separation made it more difficult for lawmakers to write bad laws and then spare themselves from the effects of those laws through their control over the laws’ application. ... Second, separation of lawmaking from law-exposition also limits arbitrary government by providing legislators an incentive to enact rules that impose clear and definite limits upon governmental authority, rather than adopting vague and discretionary grants of power.

At the same time, however, doesn’t the agency that wrote a regulation know best what it means? And in any event, don’t all the justifications for *Chevron* deference—including political accountability—apply with full force to *Seminole Rock*?

Fourth, why care about it *now* in particular? Because it is timely! Just months ago, the Supreme Court—operating with eight justices—[denied](#) a certiorari petition calling for *Seminole Rock* be overruled. Some [speculate](#), however, that the Court may be more open to the issue once it again has a full bench. Indeed, a new petition raising the issue was filed just weeks ago in [Gloucester County School Board v. GG](#).

Finally, fifth, why have a symposium about it? Because *Seminole Rock* raises fascinating questions. In fact, scholars have addressed *Seminole Rock* in a wide variety of ways. In just the last few years, scholars have produced new historical investigations of *Seminole Rock*'s origins and development, empirical examinations of how courts and agencies understand this deference, and novel investigations of how it is applied in specific areas of law. At the same time, some have called for it to be overruled outright, while defenders have emerged to protect it. The Supreme Court is obviously paying attention, and Congress too has expressed interest.

In short, there never has been a better time to study *Seminole Rock*. By the end of this symposium, we at *Notice & Comment* hope that this will be the most complete collection of thoughts on *Seminole Rock* ever assembled. So brace yourself: Now is the time to really understand *Seminole Rock*.

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The Lost History of *Seminole Rock*

Sanne H. Knudsen & Amy J. Wildermuth

Steeped in World War II and with inflation growing, the United States sought to avoid repeating the financial mistakes of the first World War and turned for one of the few times in its history to price controls. On the heels of the passage of the Emergency Price Control Act, the Office of Price Administration (OPA) brought an action to recover from *Seminole Rock & Sand Company* for overcharging customers for crushed rock. After engaging in its own independent analysis and interpretation of the regulation, the [Supreme Court agreed](#) that *Seminole Rock* had charged too much. The Court then bolstered this conclusion with a short final paragraph: “Any doubts concerning this interpretation of [this] rule” were eliminated because the agency’s own interpretation of the rule was consistent with the Court’s reading.

From that five-sentence added-on paragraph sprung what is better known today as [Auer](#) deference, which affords deference to agency interpretations of their own regulations. Courts regularly defer to agencies under this doctrine. How did so much weight get placed on so little? Digging through years of old cases and forgotten scholarship, we expected to find the answer—a theoretical justification and accompanying scholarly discourse—to explain the birth and expansion of this broadly applied doctrine. We found instead that *Seminole Rock* was the product of a unique time, an era of wartime price controls, and later cases divorced *Seminole Rock* from that context without explanation.

Through the 1950s, courts cited *Seminole Rock* in very few cases and largely limited to the context of price control regulations. In those cases, courts deferred to agency interpretations only when certain procedures ensured fair notice, such as publishing the interpretations alongside the adoption of the regulations themselves. They were quite skeptical of deferring to interpretations that clarified the regulations only after litigation ensued.

The 1960s were a time of great change. In this period, when price control cases had disappeared from the docket, courts began to shed 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 began an era when deference generally became a rebuttable presumption. As a result of this, by the end of the decade, the last vestiges of *Seminole Rock*’s origins were completely shed and the doctrine was applied to interpretations in a variety of contexts, including those provided merely in letters or in response to litigation.

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. 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 were lost by later courts in their application of the doctrine.

Although little is written to explain the expansion of *Seminole Rock* beyond its modest origins, changes in the administrative state during the relevant period might offer some insight. First, as

the administrative state expanded, so too did rulemaking. More rules in turn meant agencies provided more interpretations of those rules. Second, faced with concerns about judicial activism, courts came to embrace judicial restraint when reviewing agency action. The substantial deference that would be associated with *Seminole Rock* was solidified during this period.

This best guess for the remarkable transformation of *Seminole Rock* notwithstanding, the lack of written discourse and rationale remain troubling. With no acknowledgment of *Seminole Rock*'s unique context and history, a reconsideration of the modern day doctrine is not only appropriate, but needed.

This post is based on our work Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 *Emory L.J.* 47 (2015), and Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of Seminole Rock*, 22 *Geo. Mason L. Rev.* 647 (2015). We are also deeply grateful for the helpful feedback we received as part of a series of events sponsored by the Law & Economics Center at George Mason University School of Law.

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Henry Hart’s Brief, Frank Murphy’s Draft, and the *Seminole Rock* Opinion

Aditya Bamzai

In the summer of 1942, Professor Henry Hart, then ten years into his career as a law professor, temporarily left the Harvard Law faculty to become an associate general counsel at the Office of Price Administration, an agency responsible for setting prices throughout the World War II economy. Just under three years later, Hart argued the government’s side in the most consequential case that he handled while in public service, *Bowles v. Seminole Rock*. The opinion in that case, written by Justice Frank Murphy, formed the basis for the doctrine that still sometimes bears its name — *Seminole Rock* deference, under which a reviewing court defers to an agency’s interpretation of its own ambiguous regulation.

There are many things that could be said about this doctrine, but I’ll focus on the following: I’ve dug up Hart’s brief and Murphy’s case file, neither one of which, to my knowledge, has been the subject of study to date. This post is my attempt to make sense of them. For those readers inclined to draw inferences about the meaning of the *Seminole Rock* opinion from its drafting history, the Hart brief and the Murphy drafts tend to suggest a particular interpretation of the case and to situate the opinion in the jurisprudential happenings of the era. For those *not* inclined to view the drafting history of Supreme Court opinions as relevant — and I certainly understand and have some sympathies for that impulse (e.g., Adrian Vermeule, *Judicial History*, 108 Yale L.J. 1311 (1999)) — let’s chalk up this blog post as an effort, in the tradition of the Greek historian Xenophon, “to record the minor deeds of serious men.”

1. Murphy’s drafts. Of most relevance to the current debate over the scope of *Seminole Rock*, following his initial circulation, Justice Murphy changed the language in the critical paragraph of the opinion that sets forth the standard of review. Murphy’s circulated draft provided that “[t]he intention of Congress or the principles of the Constitution have no direct relevance when the sole issue is to resolve a dispute as to the meaning that an administrative agency intended to attach to one of its regulations.” It was for that reason, the draft proceeded to contend, that “the administrative interpretation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” In joining the opinion, Justice Rutledge remarked that he was “dubious” that the “intention of Congress or the principles of the Constitution have *no direct relevance*” to the proper construction of a regulation, because (as Rutledge put it) “in case of doubt or ambiguity construction to conform with constitutional or statutory requirements would seem to be both relevant and necessary.” Rutledge proposed an edit to this sentence, which Murphy adopted with minor changes. In principal part, this edit replaced Murphy’s earlier contention that congressional intent or the Constitution has “no direct relevance” with the language of the final opinion. Those sources, the opinion now said, “in some situations may be relevant in the first instance in choosing between various constructions.” Most pertinently, in making that edit, Murphy also cut the remainder of the sentence that suggested that the “dispute [was about] the meaning that an administrative agency intended to attach to one of its regulations” — so that the opinion no longer contains an express reference to what the “administrative agency *intended*” about its own regulation.

Second, Murphy's circulated draft claimed that "[t]he *plain words* of Maximum Price Regulation No. 188 . . . compel[ed]" the holding reached in the case. When Justice Frankfurter joined the opinion, however, he sent Murphy a note suggesting that this language be changed. The note remarked that "[c]onsidering the not-so-plain formulation of No. 188, do you think it wise to say the 'plain words' compel"? Murphy responded by striking the reference to the regulation's "plain words" and replacing it with "[o]ur reading of the language of" the relevant section of Maximum Price Regulation No. 188.

2. The government's brief. Murphy's draft mirrored the arguments in the government brief filed by Hart. In the brief (at 12-16), the government first argued that the "plain terms" of the regulation supported its interpretation. The brief (at 12, 16, 18-20) then argued that the Court should give "weight" to the agency's "settled administrative construction" and its "consistently and repeatedly reaffirmed administrative interpretation," which was embodied in a bulletin issued "[c]oncurrently with the issuance of the" regulation. In light of the "[m]illions upon millions of transactions [that] have been settled" under the government interpretation, the brief (at 20) continued, "[t]hat construction can [] claim for itself all the weight to which settled practice in human affairs is entitled." And the brief criticized the lower court for treating the "settled administrative construction of the regulation . . . as if it were a position taken for the first time in this lawsuit."

The fundamental point, the brief contended, was that "weight" ought "to be given to [the administrator's] construction of his own regulations" in part because "he is explaining his own intention, not that of Congress." In this respect, the brief (at 21) faulted the lower court for concerning itself "with how the administrative discretion should have been exercised in order to conform to the statute, and not with what the Administrator's regulation was intended to mean." "The court's sole function," the brief (at 21-22) argued, "was to interpret the regulation—that is, to give it the meaning which the Administrator intended it to have" — with "the ultimate criterion [being] the intention of the writer of the document."

3. Some possible implications. As I suggested in my introduction to this blog post, reliance on "judicial history" of this kind poses conceptual difficulties. I hesitate to draw conclusions from the archival documents, but with the recognition that the materials are open to interpretation, I'll venture a few.

First, scholars have long observed that *Seminole Rock* can be read in several different ways. The opinion at one point claims that the regulation "clearly applies to the facts of this case," and at another point stresses that the agency's interpretation was "issued . . . concurrently with" the regulation. The exchanges between the Justices suggest why these claims are present. Murphy, it appears, was quite willing to rely on a "plain language"-style argument about Maximum Price Regulation No. 188, but Frankfurter was not. As a result, the opinion contains much of Murphy's "plain language" argumentation, but lacks his "plain words" punchline.

More importantly, Murphy's remedy for Justice Rutledge's edit removed his prior text that the "dispute" in the case hinged on "the meaning that an administrative agency *intended* to attach to one of its regulations." That removal seems inadvertent — in the sense that neither Murphy nor Rutledge appeared to have any objection to this aspect of the sentence. But it had the effect of

removing the link between the rule announced in *Seminole Rock* (“the administrative interpretation becomes of controlling weight”) and the justification for the rule (the court must find “the meaning that an administrative agency intended to attach”). That removal is potentially relevant because the justification for the announced rule may well tell us something about the envisioned scope of the rule.

Second, *Seminole Rock* is an important case not merely for the specific doctrinal issue it addresses, but also because of the year — 1945 — it was issued. One year later, Congress enacted the Administrative Procedure Act (“APA”) to establish, broadly speaking, scope-of-review rules governing the relationship between reviewing courts and the executive branch. An important question is whether the APA’s scope-of-review provision leaves in place, or rejects, Justice Murphy’s approach in *Seminole Rock*. In his reply brief in *Perez v. Mortgage Bankers Association*, for example, the Solicitor General claimed that the “Court’s *Seminole Rock* decision . . . confirmed—prior to the enactment of the APA—that [] deference principles apply on judicial review.” By contrast, the petitioners in the recent *Gloucester County* litigation have suggested that the text of the APA repudiates *Seminole Rock*. The APA, the *Gloucester County* petitioners observe, provides that a “reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” Because, they argue, “[n]o one thinks the APA’s command to ‘interpret constitutional . . . provisions’ requires courts to defer to an agency’s beliefs on what the Constitution means,” the parallel statutory command for rulemaking cannot “be reconciled with a regime that requires the judiciary to *defer* to an agency’s interpretation of its regulations.”

There is, however, a way to reconcile a limited understanding of *Seminole Rock* with the text of the APA — and it is, perhaps not coincidentally, the way suggested by the Murphy draft and the Hart brief. In the realm of constitutional law, a reviewing court may well “interpret [a] constitutional . . . provision” by reference to Executive Branch interpretations, so long as those interpretations provide evidence for what the drafters of the constitutional provision “intended” at the time of enactment or evidence of a “settled construction” of the provision by the political branches. Both the Murphy draft opinions and the Hart brief point to this understanding of *Seminole Rock*, which (if accepted) would harmonize the case with the practice of constitutional interpretation and, as a result, retain the APA’s parallelism between the interpretation of constitutional and other provisions.

Third, stepping back from this skirmish about *Seminole Rock*’s meaning, the broader question is how courts ought to interpret legal text contained in public documents generally — and specifically, whether one set of generalized interpretive principles should govern constitutional provisions, statutes, and regulations alike, or whether a cluster of disparate doctrines (each associated with idiosyncratic Supreme Court pronouncements like *Chevron* and *Seminole Rock*) ought to govern different kinds of legal documents differently.

On this question, my instincts are of the simplifying variety: One rule to bind them all. And in this regard, the recent efforts to construct a constitutional separation-of-powers argument against *Seminole Rock*’s validity strike me as misguided, because they tend to stress the differences between interpreting regulations and interpreting other public documents. If (as I have suggested above) *Seminole Rock* was about “deferring” to an agency’s contemporaneous or

settled construction of its own regulation, then Justice Murphy merely applied background interpretive techniques (about authorial intent) to an arguably new context (rulemaking). If that was the case, there was nothing constitutionally problematic about his interpretive approach. If later cases have extended *Seminole Rock*, then the proper objection to those later holdings would hinge on the formal argument that the extension departs from the text of the APA (and the interpretive principles it incorporated), as well as the prudential argument that maintaining one set of interpretive principles for constitutional and regulatory text alike is both easier for courts and better for an enlightened citizenry.

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Why Empirical Examination of *Seminole Rock* Is Important

Richard J. Pierce, Jr.

Empirical study of the effects of the *Seminole Rock/Auer* doctrine contributed to the decision of the Solicitor General (SG) to file the petition for writ of certiorari that led to the Supreme Court's 2015 decision in *Perez v. Mortgage Bankers Association* and may contribute to a decision by the Supreme Court to retain some version of the doctrine.

This story begins with my description of the then-existing empirical literature on judicial review of agency action to my 2009 administrative law class. I told the students that an empirical study of Supreme Court applications of the *Seminole Rock/Auer* doctrine had found that the Court upheld 91% of agency interpretations of agency rules between 1984 and 2006. (William Eskridge & Lauren Baer, *The Continuum of Deference from Chevron to Hamdan*). That finding, compared with the roughly 70% rate at which courts upheld other types of agency actions, suggested that the doctrine conferred some form of super deference on agencies. I also noted, however, that there were no empirical studies of application of the *Seminole Rock/Auer* doctrine by circuit courts or district courts. I asked if there were any students who were willing to help me fill that gap in our knowledge.

Several students volunteered for the job. I chose a particularly promising student, Josh Weiss, to be my research assistant. Josh made contributions so important that I made him co-author of the resulting essay, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*. Based on our study of 219 opinions issued during the period 1999 to 2007, we found that district courts and circuit courts upheld 76% of agency interpretations of agency rules when they applied the *Seminole Rock/Auer* doctrine—about the same rate at which courts upheld other types of agency actions through application of other doctrines. We attributed the 91% rate of upholding found in the prior study to the small number of cases (11) that were the basis for that finding.

Shortly after the results of our empirical study were published, the D.C. Circuit issued its opinion in *Mortgage Bankers Association v. Harris*. In that opinion the D.C. Circuit reaffirmed and applied a doctrine that it had first announced in its 1997 opinion in *Paralyzed Veterans v. D.C. Arena*. The *Paralyzed Veterans* doctrine required an agency to use the notice and comment process to announce a new interpretation of a legislative rule. I considered the *Mortgage Bankers* opinion a perfect vehicle to persuade the Supreme Court to abrogate the *Paralyzed Veterans* doctrine.

Since the *Paralyzed Veterans* doctrine was inconsistent with the Administrative Procedure Act (APA), I had no doubt that the Supreme Court would abrogate it if given a chance to do so. See Pierce, *Distinguishing Legislative Rules from Interpretative Rules*. I encountered a problem, however. The Solicitor General was reluctant to file a petition for writ of certiorari in *Mortgage Bankers*. Members of his office expressed concern that a victory in *Mortgage Bankers* might eventually lead to a Supreme Court opinion overruling the *Seminole Rock/Auer* doctrine.

The SG's office placed a particularly high value on the *Seminole Rock/Auer* doctrine because they believed that it conferred a form of super deference on agencies in an important context. Several Justices had expressed strong reservations about the doctrine based in part on their similar belief. One of the arguments I used to convince the SG to file the petition in *Mortgage Bankers* was that both the Supreme Court and the SG overestimated the power of the *Seminole Rock/Auer* doctrine. I used my empirical study to support my belief that the doctrine is roughly similar to myriad other doctrines with respect to the degree of deference it confers on agencies. I also expressed the belief that my study would reduce the risk that the Justices would overrule the *Seminole Rock/Auer* doctrine by reassuring them that it does not confer super deference on agencies. The SG filed the petition. The Court granted the petition and issued an opinion in which it unanimously abrogated the *Paralyzed Veterans* doctrine.

In the meantime, the Supreme Court acted in a way that assured that the *Seminole Rock/Auer* doctrine did not confer super deference on agencies. In their 2012 opinions in *Christopher v. Smithkline Beecham Corp.*, all nine Justices agreed that the agency interpretation at issue in that case was not due deference. The Justices then used the case to remind lower courts of the important limits on the deference accorded by the *Seminole Rock/Auer* doctrine, including an expanded version of the "fair warning" limit that lower courts had applied for decades.

The most important limit on the *Seminole Rock/Auer* doctrine that the Court reaffirmed in *Smithkline* may be the principle that "deference is likewise unwarranted when the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question." There is a lot of evidence that the Justices are increasingly concerned about the combined effect of deference doctrines and political polarity, e.g., if a court upholds as "reasonable" an interpretation of an ambiguous statute or rule, it might believe that it is required to uphold as "reasonable" the opposite interpretation adopted by an appointee of a newly-elected President of the opposite party, thereby creating a legal environment in which purely partisan changes in important areas of law and public policy become routine every time the White House changes hands. I discuss this problem in Pierce, *The Future of Deference*. The requirement of a "a fair and considered judgment" and the closely related requirement that an agency engage in "reasoned decision making" are the most promising ways of discouraging newly-elected presidents and their appointees from engaging in purely partisan flip flops. The Court's 2016 opinion in *Encino Motors v. Navarro* illustrates the Court's willingness to enforce those limits on the *Seminole Rock/Auer* doctrine.

It is too early to be sure, but I am cautiously optimistic that the Supreme Court will retain some version of the *Seminole Rock/Auer* doctrine now that the Court knows that it confers only an appropriately qualified degree of deference on agencies. The Court knows that, in part, because of empirical studies of the effects of the doctrine.

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An Empirical Analysis of *Auer* Deference in the Courts of Appeals

Cynthia Barmore

Most commentary about *Auer* deference has been theoretical and dramatic. Justice Scalia, for example, both the author of *Auer v. Robbins* and one of its early critics, [decried *Auer*](#) as an “evil” that allows “tyrannical laws” to be executed in a “tyrannical manner.” In [Auer in Action: Deference After Talk America](#), I argue that this rhetoric is out of step with reality, based on how the federal courts of appeals have used *Auer* deference since Justice Scalia first questioned the doctrine in his [Talk America concurrence](#).

My article offers a simple message: *Auer* isn’t all that special. And it doesn’t threaten the Republic.

First, the rate at which circuit courts grant *Auer* deference has fallen steadily from 82.3% in 2011 and 2012 before *Christopher* to 70.6% since *Talk America*. *Auer* is now comparable to the deference agencies receive under *Chevron*; it is not a form of super-deference that insulates agency action from review. That is true regardless of a judge’s political ideology, and deference rates have fallen over time among judges appointed by both Republican and Democratic presidents.

Second, it is extremely rare for a court to indicate that *Auer* requires it to adopt an interpretation it would otherwise reject. Instead, most courts use *Auer* as a shortcut to avoid lengthy regulatory analysis, or to conclude the agency’s position is a reasonable exercise of discretion to decide an unanswered policy question. Moreover, 20% of those that grant *Auer* deference go a step further and announce that the agency’s reading is the best one.

This finding undermines a central concern for *Auer*’s critics, namely that the doctrine compels courts to accept agency interpretations that border on implausible. In his [Mortgage Bankers concurrence](#), Justice Scalia again warned that deference largely “*compels* the reviewing court to ‘decide’ that the text means what the agency says.” Justice Thomas likewise criticized *Auer* in large part because he considered it to be a transfer of judicial power to executive agencies. *Auer* deference, he argued, “precludes judges from independently determining” the meaning of agency regulations.

There is some intuitive force behind their arguments. Agencies *could* respond to *Auer* by writing “substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpreting rules unchecked by notice and comment.” That would maximize their power during litigation under a system that grants deference to agency interpretations of ambiguous, but not unambiguous, regulations. And Justice Thomas is right, too, that courts could give agency interpretations “controlling weight” without exercising independent judgment.

But that is not the norm. *Auer* gives agencies a central voice in litigation, but courts still take *Auer*’s limitations seriously. They use its traditional boundaries—particularly on interpretations that are plainly erroneous, inconsistent, or not the product of the agency’s fair and

considered judgment—to evaluate the reasonableness of an agency’s views in ways that often resemble *Chevron* deference in practice. In short, courts both have and use a variety of tools to reject improper agency interpretations, just as they should under an appropriate level of judicial review.

Finally, the data reveal the details of when courts defer. Historically conservative circuits, including the Fifth, Eighth, and Eleventh, grant *Auer* deference most often, while the Ninth and D.C. Circuits are markedly more hesitant. Some agencies invoke *Auer* more often than others, particularly the Department of Labor and the Bureau of Immigration Affairs, but those agencies also receive it at lower rates than others. An agency’s interpretation prevails more often when the agency is party to the litigation than when it is not, but courts regularly refuse to defer if an agency’s interpretation simply appears in its party brief. Instead, courts defer most often when the interpretation appears in the agency’s order or public issuance.

It is important to ground the debate over *Auer* in what the doctrine is, not just what it might be. The data show that the Court has already accomplished a significant amount with its recent *Auer* decisions, and common concerns about *Auer* have not materialized in practice. Courts today can and do reject inappropriate agency interpretations within *Auer*’s existing framework. And what little [research](#) there is suggests at least some agency officials view their interests as better served by writing clear rules for regulated entities to follow, rather than by writing vague rules to be manipulated later in litigation. In sum, *Auer* already has meaningful limits. Overruling *Auer* would accomplish little beyond removing a useful tool that facilitates judicial review, increases the predictability of regulatory action, and maintains political accountability in agency decisionmaking.

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Empirical Answers to Outstanding Questions in the Ongoing Debate Over *Auer*

William Yeatman

Many unresolved questions weigh heavily on the debate over *Auer* deference, including:

- Is *Auer* deference “stronger” than *Chevron* deference?
- How varied are the procedural formats associated with regulatory interpretations that are reviewed under *Auer*?
- What would be the administrative burden of reforming *Auer* by adding a “Step Zero”?

In order to provide empirical answers to these pressing questions, I conducted a controlled comparison of deference principles as applied by U.S. Courts of Appeals over a twenty-year span.

To this end, I created an original dataset of variables attendant to 1,118 agency interpretations across 1,048 published opinions. The dataset includes all federal circuit court decisions that invoked *Auer* or related cases from 1993 to 2013. In order to allow for a comparative analysis, I employed simple random sampling to create samples representative of populations of U.S. Courts of Appeals opinions that invoked the other two primary deference principles in administrative law: controlling *Chevron* deference to an agency’s interpretation of its own enabling statutes and non-controlling *Skidmore* respect. For each interpretation, I recorded identifying information and whether the government’s interpretation prevailed in court. Also, each interpretation was put into one of twelve categories of administrative procedure: (1) appellate litigation positions; (2) non-legislative rules; (3) informal adjudications; (4) non-textual interpretations; (5) formal rules; (6) preamble; (7) notice and comment rules; (8) litigation positions before administrative adjudications; (9) non-precedential adjudications; (10) precedential adjudications; (11) administrative orders; and (12) party briefs.

The results of the study provide the following answers to the aforementioned questions:

- The data indicate that *Auer* deference has narrowed in U.S. Courts of Appeals over the last decade, in the wake of a number of Supreme Court opinions that were critical of the doctrine. Before 2006, when the Supreme Court first checked *Auer*, the government won 77 percent of the time when U.S. Courts of Appeals employed *Auer*, which is significantly greater than the government’s win rate under *Chevron*. From 2006 to 2013, the government’s win rate under *Auer* was 71 percent, which is on par with its win rate under *Chevron*. At any time scale, the government’s win rate when U.S. Courts of Appeals invoked *Auer* and *Chevron* was significantly greater than when they invoked *Skidmore*.
- S. Courts of Appeals give *Auer* deference to interpretations falling across the continuum of administrative procedure in a surprisingly balanced manner. Overall, federal circuit courts applied *Auer* deference to virtually the same number of interpretations resulting

from administrative processes that carry the force and effect of law as they applied the doctrine to processes that do not.

- Under conservative assumptions, implementing an *Auer* Step Zero would lead to an estimated difference in the government's win rate amounting to a single interpretation per U.S. Court of Appeals every eight years across 66 administrative agencies identified in the study. These results belie claims that disrupting the doctrine would lead to chaos in regulatory agencies and federal courts.

The study, [*The Simple Solution to Auer Problem*](#), is available on SSRN.

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***Auer* Deference Inside the Regulatory State: Some Preliminary Findings**

Chris Walker

Yesterday we had [three terrific posts](#) on whether *Auer* deference actually makes a difference in the federal courts of appeals. In other words, do agencies win more when courts apply *Auer* deference (also known as *Seminole Rock* deference) to give an agency’s regulatory interpretation “controlling weight unless it is plainly erroneous or inconsistent with the regulation”—as opposed to de novo review or under the less-deferential *Skidmore* standard?

That is certainly an important question. Based on my new coauthored empirical study [Chevron in the Circuit Courts](#), my intuition is that, of course, *Auer* deference matters in the courts of appeals. But I am somewhat relieved to learn from these studies that agencies seem to win less under *Auer* deference than *Chevron* deference and that the agency-win rates under *Auer* appear to have dropped since Justice Scalia—*Auer*’s author—began criticizing the deference doctrine.

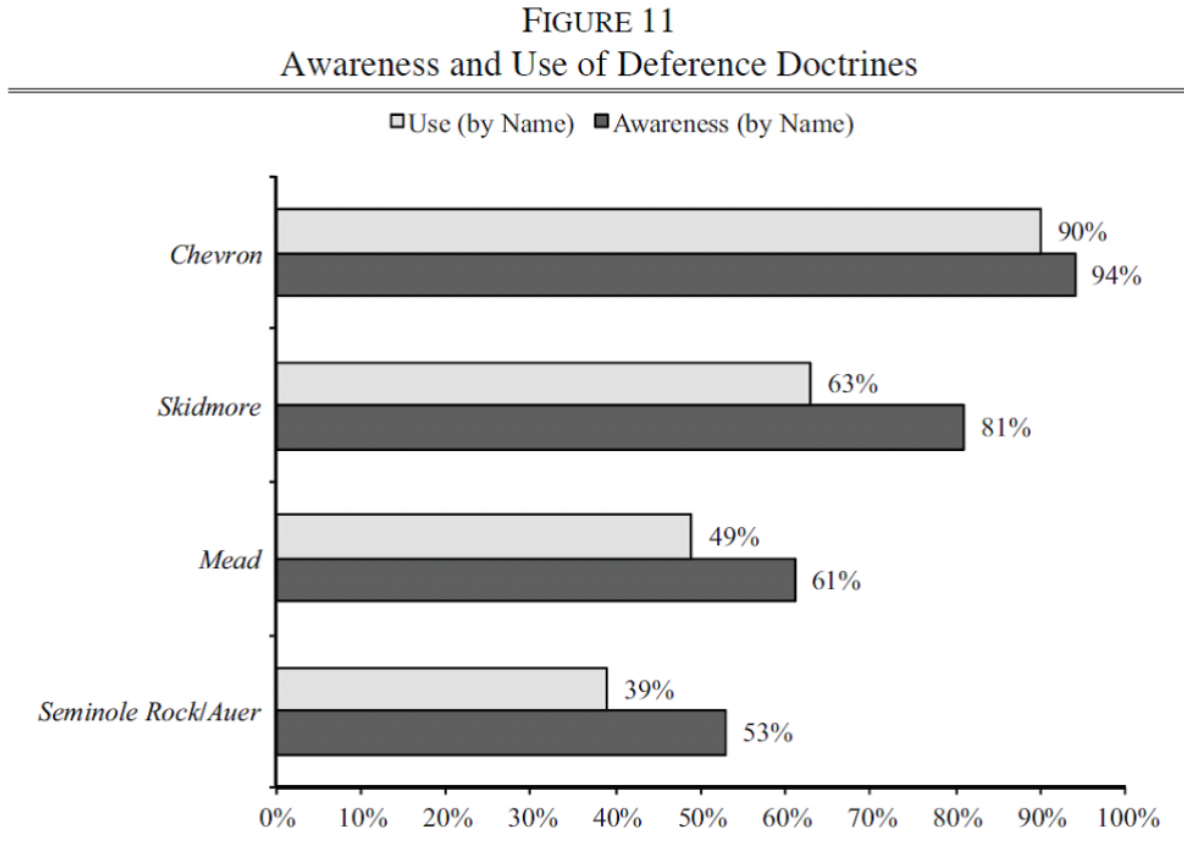
But what about *Auer*’s effects within the agency? This is an important empirical question in light of one of the twin pillars of Justice Scalia’s attack on *Auer*. In addition to arguing that *Auer* raises constitutional concerns by combining legislative and executive functions in one government actor—here, typically an unelected bureaucrat (with perhaps some presidential oversight)—he focused on the perverse agency incentives that *Auer* may produce. Justice Scalia detailed this agency incentives argument in [Talk America](#):

Deferring to an agency’s interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive.* By contrast, deferring 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. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.

Several years ago I asked 128 rule drafters at seven executive departments and two independent agencies 195 questions about how they interpret statutes and draft regulations, including a number of questions about their awareness and use in drafting of the main administrative law deference doctrines. I reported the findings from that study in [Inside Agency Statutory](#)

* In quoting this passage from Justice Scalia’s *Talk America* concurrence, I cannot resist noting that this legislative drafting analogy might be more complicated than the conventional account Justice Scalia depicted. As I explore in a forthcoming article entitled [Legislating in the Shadows](#), federal agencies are substantially involved in drafting the statutes they administer, and the bulk of their legislative drafting assistance occurs in the form of technical drafting assistance—a confidential process that usually begins before a bill is even introduced and then continues through its enactment. The interviews and surveys I conducted of agency officials demonstrate the breadth of their involvement in the legislative process, and one of the core themes that emerged during the interviews is that agencies often suggest that statutory language be drafted broadly to preserve regulatory flexibility. In other words, many of the agency self-delegation criticisms raised against *Auer* deference could apply with some force to agency statutory interpretation and *Chevron* deference as well.

Interpretation. The following table from that article summarizes the results as to the deference doctrines:



As the figure illustrates, 94% of the rule drafters knew *Chevron* deference by name, followed by 81% for *Skidmore*, 61% for *Mead*, and 53% for *Seminole Rock/Auer*. With respect to the role of these doctrines in drafting decisions, the agency rule drafters' reported use of these doctrines follows the same pattern, with varying levels of less reported use than familiarity: *Chevron* at 90%, *Skidmore* at 63%, *Mead* at 49%, and *Seminole Rock/Auer* at 39%. (I also asked about *Curtiss-Wright* deference—the superdeference for executive interpretations of statutes implicating foreign affairs and national security—but only 6% reported awareness and only 2% indicated use in drafting.)

So what can we make of the responses about *Seminole Rock/Auer* deference? It is a bit of a puzzle what impact *Seminole Rock/Auer* deference has on the two in five (39%) agency rule drafters who said they think about it when drafting regulations. One comment may shed some light: “Re: *Seminole Rock/Auer*, I personally would attempt to avoid issuing ambiguous regulations that we would then have to interpret.” In other words, the rule drafters who indicated *Auer* deference plays a role in drafting decisions may be saying they attempt to avoid inconsistent regulations.

Or perhaps because *Auer* is so deferential to an agency's interpretation of its own regulation, the rule drafters may be saying they do not have to worry about being clear and precise, as they can

always clarify and clean up in subsequent guidance. In other words, that two in five rule drafters confirmed that *Auer* deference plays a role in drafting may provide some support for Justice Scalia's [call](#) to revisit the doctrine due to the odd incentives it may create for agency drafting: "the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect."

Unfortunately, because the survey already included 195 questions, I decided to only ask two about *Auer* deference. I would have loved to have asked more about *how* the rule drafters "use" *Auer* deference when drafting regulations/interpreting statutes. I did, however, ask a number of follow-up questions about *Chevron*, *Mead*, and *Skidmore*, which I explore more fully in a separate [essay](#). The basic takeaways from those follow-up questions are that the vast majority of agency rule drafters surveyed think about judicial review when drafting rules and understand *Chevron* and *Skidmore* and how their chances in court are better under *Chevron*. Indeed, two in five rule drafters surveyed agreed or strongly agreed—and another two in five somewhat agreed—that a federal agency is more aggressive in its interpretive efforts if it is confident that *Chevron* deference (as opposed to *Skidmore* deference or de novo review) applies. In other words, there is at least some empirical support for the idea that those deference doctrines affect how agencies draft rules.

It would be interesting to know how exactly agency rule drafters use *Auer* in order to assess whether Justice Scalia's intuitions about perverse incentives are empirically grounded. But the fact that two in five rule drafters surveyed indicated that they are using *Auer* deference when drafting regulations may well further persuade many that *Auer* is not worth preserving (as such doctrine should play any role at the initial regulation-drafting stage). Cass Sunstein and Adrian Vermeule, by contrast, have [reached](#) the contrary conclusion, based on their interpretation of these findings: "A recent study finds that *Auer* was less well-known to agency drafters of regulations than *Chevron*, *Skidmore*, and *Mead*; drafters themselves knew about *Auer* only about half of the time. It is most unclear that even the half that knows *Auer* thinks seriously about it when they are writing regulations."

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Seminole Rock Step One

Kevin M. Stack

Seminole Rock has a step one inquiry too—and, like *Chevron*'s step one, it depends on the court's choice of interpretive method. *Chevron*'s step one asks whether the authorizing statute “directly” speaks “to the precise question at issue” in the sense of clearly prohibiting or requiring the agency's position. The method of statutory interpretation that the court adopts when applying *Chevron*'s step one notoriously influences the outcome. *Seminole Rock*'s step one asks the court to judge whether the agency's interpretation of own regulation is “plainly erroneous or inconsistent with the regulation.” Resolving *Seminole Rock*'s step one inquiry also requires the court to adopt an interpretive method—a method of regulatory interpretation—to determine if the agency's position is foreclosed or warrants controlling deference.

How should courts interpret an agency's regulations when applying *Seminole Rock* step one? In decisions applying *Bowles v. Seminole Rock & Sand Co.* and later *Auer v. Robbins*, the Supreme Court has [relied upon a grab bag of tools](#), but not given the issue sustained analysis. As a matter of first principles, the method of regulatory interpretation should be informed by the distinctive legal character of regulations. As required by the Administrative Procedure Act and enforced by judicial doctrine, notice-and-comment regulations have a distinctive form: the agency issues the regulations with an extensive statement of their “basis and purpose.” These statements—which form the heart of the regulation's preamble—include an articulation of the purposes of the regulation, its evidentiary and economic basis, its place in the regulatory scheme, the agency's consideration of alternatives and comments, as well as interpretive commentary. The regulation's preamble is the agency's official justification of the regulation, issued contemporaneously with the regulations, and the basis for judicial review of the validity of the regulations. Regulatory preambles also undergo extensive consideration and vetting both inside the agency and by [other executive branch officials](#). For all of these reasons, it makes sense to interpret regulations in light of their preambles—including the purposes set forth in them. The Second Circuit's recent decision in *Halo v. Yale Health Plan*, per Chief Judge Robert Katzmann, exemplifies this approach.

This method of regulatory interpretation, which I have defended [at length](#) and [more briefly](#), should apply under *Seminole Rock* step one. The question of whether an agency position is permitted by or inconsistent with a regulation is a matter of independent judicial determination, just as *Chevron*'s step one question of permissibility is a matter of independent judicial evaluation. As such, the method of interpretation under *Seminole Rock* should follow the approach applicable to regulatory interpretation more generally.

This interpretive approach to *Seminole Rock* also addresses criticism that the doctrine undermines rule-of-law values of notice. A prominent critique is that *Seminole Rock* fails to give parties adequate [notice](#) of the meaning of regulations because it effectively binds courts to enforce a construction of the regulation that is “permissible” but would not be obvious or predictable to parties. But under the approach to *Seminole Rock*'s interpretive step just outlined, agency positions qualify for *Seminole Rock*'s controlling deference only when they are consistent

with the text of a regulation when read in light of its preamble. This grants *Seminole Rock*'s controlling deference to a narrower range of agency positions than simply according this deference to any agency position permitted by the regulatory text. That limit directly augments notice of the meaning of regulations. It tells regulated parties and regulatory beneficiaries to expect the regulations to be enforced in ways that are permitted by the regulation's text when read in light of its preamble—and that they will have an opportunity to contest agency positions that veer from text when read in light of its preamble.

While treating statements in preambles as bearing on how a regulation will be later interpreted, this approach to regulatory interpretation at *Seminole Rock*'s step one still preserves important agency flexibility. First, the agency will receive *Seminole Rock*'s controlling deference for any position that is consistent with the regulatory text when read in light of the preamble. Second, this approach does not prohibit an agency from taking a position inconsistent with the regulatory text when it is read in light of its preamble—it just will not receive controlling deference for those stances. Third and most important, the agency writes the preamble. A preamble can be written with exhaustive commentary and interpretive directions about the rule's meaning and application or much more sparsely. The agency thus has a significant hand in determining the extent of the interpretive constraint a preamble imposes on the regulations it accompanies.

Answering the *Seminole Rock* step one question by reading agency regulations in light of their preambles has important implications for agencies. In general, it gives agencies incentives to provide relatively more guidance in their preambles (or have reasons for declining to do so) because they know that their preamble guidance will be used in determining whether later agency actions are consistent with the regulations. From a publicity perspective, it is hard to object to an agency providing more guidance rather than less at the time it issues its rules. In addition, once this guidance function of the preamble comes fully into view, it also becomes clear that agencies need to do more to present preamble guidance in an accessible manner and to integrate it with other forms of guidance, as recommended by the Administrative Conference of the United States in its [Recommendation 2014-3](#).

The question of what matters more in a framework of judicial review—the level of deference or the court's interpretive method—has no general answer. But it is clear under both *Chevron* and *Seminole Rock* that interpretive method plays a central role in how these deference frameworks operate. At least in the case of *Seminole Rock*, the right interpretive approach—determining the meaning of the rules in light of the regulatory preamble—gives agencies reasons to be forthright about how they understand their rules and, by holding agencies to those understandings, enhances notice of the meaning of regulations without abandoning *Seminole Rock* deference.

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Deference by Bootstrap

Andy Grewal

If the Supreme Court abandons the deferential approach articulated in *Auer v. Robbins*, will agencies lose interpretive power over their own regulations? Not necessarily.

Under *Auer* and various predecessor cases, an agency's interpretation of its own regulation controls, unless that interpretation is plainly erroneous or inconsistent with the regulation. Courts do not always precisely explain why they defer to agencies in this context, but respect for an agency's expertise likely plays a role, as does the belief that deference comports with Congressional intent. See generally *Pauley v. Beth Energy Mines, Inc.*, 501 U.S. 680, 696–97 (1991). Given that *Auer* stems from these “soft” or prudential concerns, and not from an inexorable Constitutional or statutory command, the Court apparently remains free to abandon *Auer* in favor of a less deferential approach.

But what happens if courts abandon *Auer* and the agency itself then claims, through a regulation, the independent power to control the application of those regulations? Must a court defer to the agency?

Various tax regulations present that issue. In *RLC Industries v. Commissioner*, 58 F.3d 413 (9th Cir. 1995), for example, the taxpayer challenged a regulation dealing with timber deductions. The relevant regulations instructed that, to compute the appropriate deductions, the taxpayer had to divide its timber into various “accounts,” and the regulations set forth various general principles under which timber should be assigned to such “accounts.” See 26 C.F.R. 1.611-3(d)(1).

The taxpayer believed that its timber account should be defined one way under section (1), but the IRS disagreed. It claimed *Auer*-style deference for its different interpretation of the regulation but, for somewhat inscrutable reasons that are better discussed in a separate post, the court rejected that claim.

Though it could not earn deference for its interpretation of section (1), the IRS claimed that another provision granted it the overriding power to re-write that regulation. Under section (5) of the same regulation, the standards described in section (1) for establishing “accounts” could be readjusted for “good and substantial reasons satisfactory” to the IRS, including through “dividing individual accounts, by combining two or more accounts, or by dividing and recombining accounts.”

The 9th Circuit scoffed at this assertion of the power to decide how IRS regulations apply to individual cases. Nothing in the statute authorized that power, and the IRS's regulation “eviscerate[d] the fundamental distinction that is deeply embedded in administrative law between quasi-legislative and quasi-judicial power,” 58 F.3d at 418. The court consequently held that the regulation was invalid.

RLC Industries would seemingly curb efforts by the IRS or other federal agencies to receive quasi-*Auer* deference through “bootstrapping” regulations, but it does not seem to have had any effect. Numerous tax regulations continue to set forth standards for the application of a statute but then go on to grant the IRS the authority to modify those standards, determine how those standards apply, and so on. If these provisions are given their plain meaning, then *Auer* may mean very little for such regulations. The IRS doesn’t need *Auer* if it can issue regulations setting forth an interpretation of a statute while reserving the power to disregard or modify that interpretation as it sees fit.

If *Auer* were abandoned, the IRS’s different sorts of bootstrapping regulations would present some fun questions. *RLC Industries* hardly resolves all the issues, and whether and to what extent “*Auer* by bootstrap” works necessarily depend on the context and the statutory provision at issue. Also, though various scholars have advanced justifications for *Auer* (see, for example, “[The Unbearable Rightness of Auer](#),” by Cass Sunstein and Adrian Vermeule), those justifications do not necessarily extend to claims created by the agency itself. Consequently, discussions over the potential dangers related to the commingling of quasi-legislative and quasi-judicial functions should continue, whatever the Court does or does not do with *Auer*.

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***Seminole Rock* in Tax Cases**

Steve R. Johnson

This article is not about the wisdom or lack thereof of *Auer/Seminole Rock* (“ASR”). Instead, it explores an aspect of ASR “on the ground.” Specifically, this article considers the considerable gaps between how the Supreme Court has framed the doctrine and how the United States Tax Court has applied (or not applied) it.

Some of the observations herein are discussed in greater detail in a 2013 article of mine (*Auer/Seminole Rock Defense in the Tax Court*, 11 PITT. L. REV. 1 (2013)); *see also* Steve R. Johnson, *Deference to Tax Agencies’ Interpretation of Their Regulations*, 60 STATE TAX NOTES 665 (May 30, 2011), part of a series of articles of mine for that publication on deference doctrines applied by the states in tax cases). This current article includes major post-2013 Tax Court ASR cases. These cases continue the Tax Court’s guerilla war against ASR deference described in the 2013 article.

Part I below sketches the escape hatches built into the doctrine (with a somewhat unsteady hand) by the Supreme Court, the exceptions under which deference need not be accorded to agencies’ interpretations of their regulations. Part II shows how the Tax Court, in evident hostility to the ASR doctrine, construes—indeed contorts—these exceptions ungenerously, rendering the doctrine a virtual dead letter in the Tax Court. Part III considers possible reasons for this behavior. It suggests that the culture of tax practice makes the Tax Court an inhospitable forum for deference generally and ASR deference in particular. Part IV concludes.

I. ASR Escape Hatches

Despite rumblings of discontent from some justices and despite mounting critical commentary, the Supreme Court still treats ASR as a viable doctrine. However, from the start and continuing today, the Court has recognized situations in which ASR deference is inappropriate.

The case law is not fully reconcilable as to the number and the contours of the exceptions. Support can be found in various decisions for six exceptions. Deference should not attach when (1) the agency’s interpretation is “plainly erroneous or inconsistent with the regulation” (*Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); (2) the regulation is unambiguous (*e.g.*, *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)); (3) the agency’s position is not settled or is not an authoritative expression of the agency’s position (*e.g.*, *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837-38 (Fed. Cir. 2006)); (4) the regulation merely parrots the statute (*Gonzales v. Oregon*, 546 U.S. 243, 255 (2006)); (5) regulated parties have not had fair warning of the conduct required or prohibited by the interpretation (*Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2167-68 (2012)); and (6) the interpretation “does not reflect the agency’s fair and considered judgment on the matter in question” (*Auer v. Robbins*, 519 U.S. 452, 462 (1997)). This last exception may involve various circumstances, such as when the current interpretation conflicts with the agency’s prior interpretation of the same regulation (*e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513 (1994)) or when the interpretation is merely a “convenient litigating position” or a “*post hoc* rationalization” (*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 213 (1988)).

II. Tax Court's Hostility to ASR

What is now the Tax Court originated in 1924 as an administrative agency. Congress made it a multi-member Article I trial court in 1969. The court's "function and role in the federal judicial scheme closely resemble those of the federal district courts" (*Freytag v. Comm'r*, 501 U.S. 868, 891 (1991)). Because of the court's "tax only" docket and the fact that the court's judges nearly always had extensive tax experience before taking the bench, Congress believed that the Tax Court would bring special expertise to bear and that nationwide jurisdiction would promote uniform national application of the tax laws.

The Tax Court's jurisdiction now embraces most kinds of civil tax controversies. As to some matters, it has exclusive jurisdiction. Other times, taxpayers may choose to litigate in one of several federal courts, usually choosing the Tax Court because it is a prepayment, not refund, forum. The clear majority of federal tax cases are litigated in the Tax Court. In the Tax Court, the IRS is represented by attorneys from the IRS Chief Counsel's Office. In all other courts, the IRS is represented by the Department of Justice. (See generally *Steve R. Johnson, Reforming Federal Tax Litigation: An Agenda*, 41 FLA. ST. U.L. REV. 205 (2013)).

After the Internal Revenue Code ("IRC"), regulations promulgated by the Treasury and IRS are the most importance source of federal tax law. Unsurprisingly, taxpayers and the IRS often disagree as to what the regulations command. The great majority of the Tax Court's opinions in these cases resolve the clash through traditional interpretation. Whether because the parties failed to argue ASR or because the Tax Court ignored such arguments, ASR is notable by its absence from most opinions in which it could have appeared.

In recent years, however, administrative law principles have breached the citadel of tax insularity. (See generally *Steve R. Johnson, Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269 (2012)). Since 2009, Tax Court decisions discussing ASR have increased. But increased discussion has not meant increased acceptance. From early days to today, the Tax Court has given lip service to ASR but has gone to lengths to neuter the doctrine.

Sometimes, the court obviously was aware of ASR and discounted it without even citing *Auer* or *Seminole Rock*. For example, the regulation at issue in *General Dynamics* was "couched in broad terms, leaving room for the parties to advance differing interpretations." Citing traditional tax cases but neither *Auer* nor *Seminole Rock*, the court declared: the IRS's "litigating position is not afforded any more deference than that of [the taxpayers] That is especially so here, where [the IRS] did not publish [its] position prior to this controversy. Accordingly, we proceed to decide which party's approach harmonizes with the statutory intent." (*General Dynamics Corp. v. Comm'r*, 108 T.C. 107, 120-21 (1997); to similar effect see *Garnett v. Comm'r*, 132 T.C. 368, 380-81 (2009)).

When the Tax Court has mentioned *Auer* or *Seminole Rock*, it typically has avoided them by invoking the exceptions noted in Part I—reading them aggressively when needed. My 2013 article exemplified this by decisions from 1980 to 2011. (See 11 PITT. TAX REV. at 14-24, discussing *Southern Pacific*, *CSI*, *Phillips Petroleum*, *Honeywell*, *Woods*, *Lantz*, *Pierre*, *Intermountain Insurance*, *Carpenter*, and *NEA*).

This pattern continues in more recent cases. For example, in an *en banc* decision (ten judges participating in the majority opinion), the IRS argued for ASR deference.

Although conceding that such deference can attach even when the agency's interpretation appears on brief, the majority declared: "Judicial deference need not give way to judicial abdication. The regulations are silent on the issue before us, and [the IRS's] position on brief is at least arguably inconsistent with the statute [We] do not in this instance defer to [the IRS's] interpretation on brief." (*Rand v. Comm'r*, 141 T.C. 376, 394 (2013)).

In a 2014 case, the IRS argued *Bowles* for the first time in its final summary judgment brief. The court again showed its preference for decision via interpretation over decision via deference. "We need not decide whether [the IRS] timely advanced [its] deference argument or whether we would defer to litigating positions that do not derive their support from regulations, rulings, or longstanding administrative practice [W]e are able to decide this case without according any deference to [the IRS's] interpretation." (*Guardian Inds. Corp. v. Comm'r*, 143 T.C. 1 at n.10 (2014) (citations omitted)).

III. Possible Explanations

George Bernard Shaw is supposed to have said that the English and Americans are two nations divided by a common language. Sometimes courts in the same system are divided by a common doctrine. So it is with the Supreme Court, the Tax Court, and ASR deference. Why?

The IRS often fails to advance ASR arguments in Tax Court cases in which they would seem appropriate. Perhaps in early years, this was explained by tax law's general neglect of administrative law and IRS Counsel attorneys having less awareness of administrative law than did Justice attorneys. But, with the passage of time and dramatically more attention being paid by the tax community to administrative law in general and deference doctrine in particular, such explanations are harder to credit today.

Yet even today the IRS argues ASR only sporadically. For instance, in a 2014 case, neither party raised ASR explicitly. (*Shea Homes, Inc. v. Comm'r*, 142 T.C. 60, 99-10 (2014) (The IRS "does not claim that [its] position constitutes 'fair and considered judgment on the issue' rather than 'a post hoc rationalization' Thus, [it] does not argue [its] position is entitled to any special deference, and we accord it none.") (citations omitted); *see also Guardian Industries, supra*)) There is a chicken-and-egg question: does the Tax Court often ignore ASR because IRS Counsel doesn't press it or does IRS Counsel choose not to press it because it knows the Tax Court will be unreceptive?

Similarly, in a high-profile 2015 case involving transfer-pricing regulations, the IRS cited neither *Auer* nor *Seminole Rock*. The IRS lost 15-0 in the Tax Court. (*Altera Corp. v. Comm'r*, 145 T.C. 91(2015), on appeal, No. 16-70496 (9th Cir.)) On appeal, an amicus supporting the IRS raised *Auer*, but Justice did not, indeed perhaps could not. (*E.g., Tibble v. Edison Int'l*, 820 F.3d 1041, 1046 (9th Cir. 2016) (noting "a general rule against entertaining arguments on appeal that were not presented or developed [below]."))

The continued subversion of ASR by the Tax Court suggests that something deeper is at work: subcultural differences between the Supreme Court, a generalist court, and the Tax Court, a

specialist court. Two such differences are key. First, deference doctrines apply most naturally to agencies making policy choices under statutory delegations. Many areas of tax do entail substantial administrative discretion.

Nonetheless, there is a lingering tradition in tax that the job of the IRS is not to make policy but to find the “right” answer “by correctly applying the laws enacted by Congress” (Rev. Proc. 64-22, 1964-1 C.B. 689; *see also* *Manhattan Gen’l Equipment Co., Inc. v. Comm’r*, 297 U.S. 129, 134 (1936)) and that the Tax Court is charged with the same mission (*see, e.g.,* Theodore Tannenwald, Jr., *Tax Court Trials: An Updated View from the Bench*, 47 TAX LAW. 587, 588 (1994); *cf. Comm’r v. Engle*, 464 U.S. 206, 217 (1984)).

The “right answer” mission of the Tax Court is based in part on the language of a key jurisdictional statute: IRC section 6214(a). It provides: “the Tax Court shall have jurisdiction to redetermine the *correct* amount of the [tax] deficiency” (emphasis added). One Tax Court judge (and, previously, IRS Chief Counsel) explained:

This language is not the precise equivalent of a general grant of jurisdiction over a suit by the taxpayer against the [IRS]. The court is not charged with the task of arbitrating or resolving a controversy Rather, the court is directed to determine ‘the correct amount’ of a deficiency or an overpayment. In other words, the court does not simply determine which party wins the lawsuit, but instead determines the taxpayer’s correct tax liability. This is a different responsibility, for example, from that of the United States district court. (Meade Whitaker, *Some Thoughts on Current Tax Practice*, 7 VA. TAX REV. 421, 437 (1988)).

Given this tradition, there is some truth in the observation that “the tax bar and the specialized tax bench form a closed community that has developed many characteristics of a Mandarin class, including a conviction of its own ability to interpret properly a document [the IRC] which ordinary mortals find impenetrable.” (John F. Coverdale, *Text as Limit: A Plea for a Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501, 1504-1505 (1997)). A subcultural tradition of “we’re here to get this right” tends towards resolution on the merits, not deference.

Second, deference doctrines also are rooted partly in agency expertise. Generalist judges often confess their befuddlement in tax cases and consequent tendency to go along with the experts. (*E.g., Flora v. United States*, 362 U.S. 145, 198 (1960) (additional opinion of Frankfurter, J.)). In contrast, Tax Court judges, from their experience before and after taking the bench, often are more experienced than the IRS lawyers appearing before them and the Treasury/IRS lawyers who drafted the regulations. For the senior to defer to the junior goes against the grain.

IV. Conclusion

This article has suggested that considerations specific to context explain the stark gap between ASR deference in the Supreme Court and ASR deference in the Tax Court. This may have broader implications. Scholars in other fields can assess whether a similar gap exists in their areas and, if so, why it exists. If their conclusions differ from mine, my work should be reconsidered. If their conclusions are similar to mine, a useful general theory may emerge as to the “on the ground” implementation of commands from a central judicial authority.

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***Seminole Rock* in Environment Law: A Window Into Weirdness**

Daniel Mensher

Auer deference is weird. It is different from all the other forms of judicial deference to agency actions. As a result, it has become the topic of some debate. Some, like Justice Scalia, find the doctrine disturbing because it gives agencies the authority to be the legislature, the judiciary, and the executive, resulting in agencies that make, interpret, and enforce the law. Others find *Auer* problematic because it encourages agencies to make vague rules, thereby leaving themselves room to create new law through later informal interpretations. Of course, defenders of *Auer* are not troubled by these concerns, noting that bright lines between law making and law interpreting never really exist. Whenever a court is called on to interpret a vague statute or regulation, it necessarily creates some law to fill the gap, thus exercising “legislative” powers. Both sides have good points, and their critiques flow from legitimate concerns about how laws are made and interpreted.

And, all that is fine, as far as it goes, but what I find most perplexing about *Auer* is that it demands courts defer to nearly *any* agency interpretation of its regulations, regardless of where, when, or how the agency offers that interpretation. This leads to some bizarre results.

In *Decker v. Northwest Environmental Defense Center*, for example, the Court deferred to an agency interpretation of its regulations offered for the first time in an amicus brief filed three months after the plaintiff had filed its complaint in the case and nearly two decades after the agency wrote the regulations. The issue in *Decker* was whether stormwater discharges from logging roads required a Clean Water Act permit. Under the Clean Water Act, the “discharge [of stormwater] associated with industrial activity” is illegal unless authorized by a permit. In its “Industrial Stormwater Rule,” promulgated through notice and comment rulemaking, EPA defined the scope of “industrial activity” that would be subject to the permit requirement. The Rule explicitly included the logging industry within the sweep of regulated activities, and clarified that “industrial activity” extended beyond the immediate site of activity, and included any access roads associated with those activities.

The plaintiff argued that because logging is defined as an industrial activity, and logging roads are access roads associated with logging, discharges from these roads comfortably fell within the regulatory sweep of the Clean Water Act. And, on this point, it seems pretty straight forward that the plaintiff was right – its interpretation of the rules was the most logical way to read the regulations. But EPA disagreed; the agency filed an amicus brief in support of the defendants’ motion to dismiss in which it said that, actually, when the agency drafted the stormwater rule twenty years earlier, it did not intend to include discharges from logging roads. The court then invoked *Auer*, and just like that, two decades later, EPA changed its regulations through a single amicus brief.

This is not an isolated instance of courts deferring to relatively isolated “interpretations” of regulations. In *Udall v. Tallman*, for example, the Court deferred to an agency’s interpretation of

its regulations offered in testimony to a congressional committee. Even longtime and consistent agency practice can constitute an “interpretation” that gets *Auer* deference.

This “defer to anything” standard is both weird and diametrically opposed to the jurisprudence on deference to agency interpretations of statutes. When a court reviews an agency’s interpretation of a statute, one of the most important questions it asks is how was the agency’s interpretation created and published. The level of deference to an agency’s interpretation depends, nearly entirely, on the rigor and formality of the agency’s action. If the agency went through notice and comment rulemaking, the resulting rule is law so long as it is not “arbitrary and capricious,” while an agency’s informal policy paper drafted without public notice or input gets consideration only to the extent its logic has the power to persuade. In short – the more formal an agency’s interpretation, and the more public process it has gone through, the more weight it will carry before the court. The same should be true for agency interpretations of its own rules.

If parties do take up Chief Justice Roberts’ invitation to challenge *Auer* deference, I think courts would go a long way to getting rid of the weirdness of *Auer* simply by making it more like *Skidmore* and *Chevron* deference, and calibrate the level of deference to the thoroughness or formality of the agency’s interpretation of its regulations.

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Auer, Mead, and Sentencing

Andrew Hessick

Hear *Auer* deference, and you're unlikely to think of criminal law. After all, *Auer* deference is a doctrine of administrative law, and administrative law has traditionally been viewed as separate from criminal law. And it's true, *Auer* deference does not often come up in determining whether a substantive criminal violation has occurred.

But *Auer* deference does play a significant role in federal sentencing. The U.S. Sentencing Commission promulgates federal sentencing guidelines that prescribe punishment ranges for criminal defendants. The Sentencing Reform Act directed that those guidelines be binding, but in *United States v. Booker*, 543 U.S. 220 (2005), the Court rendered the guidelines advisory to avoid a 6th Amendment problem. Still, federal law requires courts to consider the guidelines at sentencing, and they are the most important consideration.

The Commission often provides commentary that explains how and when a guideline should be applied. This commentary appears alongside the guidelines themselves in the Federal Guidelines Manual. In *Stinson v. United States*, 508 U.S. 36 (1993), the Court held that this commentary is entitled to *Auer* deference. Commentary accordingly is binding on the courts so long as it is consistent with the guidelines and other laws.

It is not surprising that commentary receives *Auer* deference. The guidelines are regulations, and commentary constitutes the Commission's view of how its guidelines should work. What is surprising is that commentary is the only Commission material that receives *Auer* deference. The Commission produces all sorts of documents—including press releases, reports, and speeches—related to the guidelines. Courts have not said that these non-commentary statements receive *Auer* deference.

It is possible that courts have not extended *Auer* deference to these materials simply because they have had no occasion to do so. The Commission has generally been careful to avoid proclaiming its position on what the guidelines mean outside the Manual. For example, although the Commission produces [primers](#) that describe how to apply the guidelines, each primer includes a disclaimer stating that the information in the primer does not necessarily represent the views of the Commission and should not be treated as binding. While some Commission statements offering a gloss on the guidelines do not contain such disclaimers, the government may not have argued that those interpretations should receive deference.

But there is another explanation for why non-commentary interpretations have not received *Auer* deference. *Stinson* and subsequent opinions suggest that, when it comes to *Auer* deference, commentary is special. Those opinions do not say “Commission interpretations” receive *Auer* deference. Instead, they say that “commentary” receives *Auer* deference, and some opinions highlight that limitation by juxtaposing Commission “commentary” with other “agency interpretation[s] of [their] own regulations.” *E.g. Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1214 (2015) (Thomas, concurring in the judgment).

Although limiting *Auer* deference to commentary is anomalous, there are some justifications for the limitation. One is that the guidelines result in criminal punishment. They therefore raise some of the same concerns as substantive criminal law. For this reason, courts have held that the guidelines must satisfy at least some of the heightened notice requirements applied to criminal laws. For example, the Supreme Court has held that the *ex post facto* clause prohibits the retroactive application of new sentencing guidelines that disadvantage defendants, and several circuits have held that overly vague sentencing guidelines are unconstitutional. Limiting *Auer* deference to interpretations rendered in the commentary helps protect this notice interest. Instead of having to review everything the Commission says, potential criminals can stick to reviewing the Guidelines Manual, which contains both guidelines and commentary.

Another reason to limit *Auer* deference to the commentary is that, although they must be the product of notice and comment, the sentencing guidelines are not subject to judicial review when they are promulgated. Not having to justify the guidelines to a court results in the Commission having broader discretion in promulgating the guidelines. Broad *Auer* deference also increases agency discretion. To the extent that critics complain that agencies have too much discretion, limiting *Auer* deference to a single source of interpretation—the commentary—responds to that complaint.

Even though these reasons don't apply to all other types regulations, it still seems like it would be a good practice to limit *Auer* deference to interpretations from particular sources, just as *United States v. Mead Corp.*, 533 U.S. 218 (2001), limits *Chevron* deference to interpretations from particular sources. One complaint about *Auer* deference is that it requires regulated entities to be constantly vigilant for new agency interpretations. Limiting *Auer* deference to only a few sources would go a good way towards addressing that complaint.

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What “Sex” Has to Do with *Seminole Rock*

Jonathan H. Adler

All G.G. wanted was to be like other high schoolers, and use the bathroom that corresponds with his gender identity. Yet this small request triggered a high-profile legal battle over the meaning and application of Title IX that may be well on its way to the U.S. Supreme Court. After losing in the U.S. Court of Appeals for the Fourth Circuit, the Gloucester County School Board obtained a [stay of the lower court’s judgment](#) from a divided Court. A [petition for certiorari](#) is now pending.

Many people may have strong opinions on how (and perhaps even whether) schools and other educational institutions should accommodate transgender students. Yet the ultimate outcome in *G.G. v. Gloucester County School Board* and [other cases](#) challenging the Department of Education’s policy on the accommodation of transgender students may ultimately turn on questions of administrative law – the vitality and application of *Seminole Rock/Auer* deference in particular. This is because one of the central issues in these cases is whether courts should defer to the Department of Education’s interpretations of its own regulations implementing Title IX, put forward in various letters and guidance documents. The controversy illustrates how *Seminole Rock/Auer* deference often operates in the real world and the problems it can create.

Some quick background: Under [Title IX](#) of the Education Amendments of 1972, all educational associations that receive federal funding from discriminating “on the basis of sex.” This prohibition [applies](#) to all fund-recipient operations and facilities. Title IX expressly [allows](#) for the maintenance of single-sex living facilities, such as dormitories, bathrooms, and the like. Perhaps because questions of gender identity were not particularly salient at the time, Title IX does not define the term “sex.”

After Title IX’s enactment, the U.S. Department of Education promulgated regulations to implement the statutory prohibition. One [regulation of particular relevance](#) provides that: “A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.” Like the statute, however, the Education Department’s regulations do not define the term “sex.”

Some decades after these regulations were adopted, the Department of Education concluded that Title IX imposes obligations on educational institutions with regard to transgender students. The problem, however, is that neither Title IX nor the Department’s regulations address the issue. There are serious arguments that the prohibition on sex discrimination should be applied so as to take account of an individual’s gender identity, as opposed to that individual’s biological sex at birth, and that [such a determination would be eligible for *Chevron* deference](#), but the Education Department has never issued a regulation to that effect. Thus, while Title IX and its implementing regulations prohibit sex-based discrimination, they leave unanswered how a student’s sex is to be determined and when a failure to treat a student based upon the student’s self-professed gender identity may constitute such discrimination.

In recent years, controversies have emerged concerning whether and how primary and secondary schools should accommodate transgender students. Rather than address this question through regulations – which would require going through a lengthy (and likely controversial) notice-and-comment rulemaking – the Education Department simply declared in [letters](#) and [guidance documents](#) that the federal prohibition “encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.” The Department further declared that it treats “a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations,” and that, as a consequence “a school must not treat a transgender student differently from the way it treats other students of the same gender identity.” In the Department’s view, Title IX and its regulations require that once a student’s parent or guardian “notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student’s gender identity.”

As the relevant guidance documents (and court filings) make clear, the Department is trying to have its cake and eat it too – and *Seminole Rock/Auer* deference provides it with that opportunity. The Department wants deference for its interpretations without having to go through the time and effort of a rulemaking. Not only would such an effort consume agency resources and potentially court controversy, it would result in a final agency action – a final rule – that would be a ready target for litigation. *Seminole Rock/Auer* to the rescue.

In court proceedings, the Department has argued – and the U.S. Court of Appeals for the Fourth Circuit accepted – that courts must defer to the Department’s interpretation of its regulations under *Auer* and *Seminole Rock*. According to the Fourth Circuit’s opinion in the *Gloucester County* case:

Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board’s reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department’s interpretation—determining maleness or femaleness with deference to gender identity

Concluding that “the regulation is ambiguous as applied to transgender individuals,” the Fourth Circuit concluded that it must defer to the Department’s interpretation under *Auer* and *Seminole Rock*.

Whether or not one believes this is how Title IX should be applied, deference to the agency’s interpretation in this case is highly problematic. For starters, the relevant ambiguity exists in the underlying statutory language as well. This matters. In *Gonzales v. Oregon*, the Supreme Court explained that agencies should not get *Seminole Rock/Auer* deference where agency regulations reiterate the relevant statutory language, thereby importing a statutory ambiguity into the agency’s regulations. In such cases, agency interpretations of their own regulations are, for all practical purposes, interpretations of the *statute*, and are therefore only eligible for deference under *Chevron*—and *Chevron* (as explicated in *Mead*) requires an agency to do more than issue a guidance letter or file a brief.

A second problem is that such use of *Seminole Rock/Auer* deference enables agencies to alter longstanding interpretations and understandings of relevant legal requirements without going through the rulemaking process. In the case at hand, this enables the agency to sidestep difficult questions, such as how to balance accommodation of gender identity with concerns for privacy and modesty and whether schools may require a gender dysphoria diagnosis before providing an accommodation (as is often requirement before providing accommodations for certain disabilities), and so on. In the context of Title IX, it may also give the Education Department a new means of circumventing the clear notice requirements for conditions placed on federal grants to states.

This controversy highlights *Seminole Rock/Auer* deference's uneasy fit with *Chevron*. As post-*Chevron* cases have made clear, *Chevron* deference is premised upon a theory of delegation. Statutory gaps and ambiguities are understood to represent implicit delegations of authority from the legislature to the agency. When agencies promulgate ambiguous regulations, however, they cannot be said to be delegating anything to themselves.

Insofar as Title IX is ambiguous, *Chevron* provides that Congress has delegated authority to the Education Department to fill in the details and clarify grant recipient obligations. *Chevron* and its progeny further make clear that such gap-filling and clarification is to come in the form of regulations or other agency actions that have the force of law – and not in the form of guidance letters or legal advocacy. So to grant *Seminole Rock/Auer* deference to the Education Department's guidance and letters here allows the Department to exercise its delegated power without having to fulfill the procedural requirements that ensure greater transparency and accountability in the exercise of such power. And if agencies are given this sort of opportunity to circumvent *Chevron*'s requirements, we should expect them to act accordingly.

As a policy matter, the Education Department may well be correct. Nothing in this essay should be read to suggest that Title IX cannot or should not be interpreted and applied as the Education Department insists. But for Title IX to be applied and enforced as the Education Department insists, it must promulgate an interpretation worthy of judicial deference – and any such interpretation must be adopted in the usual course and through the proper procedures. Yet so long as *Seminole Rock/Auer* deference remains on the table, there is little reason for the Education Department to make such an effort.

Seminole Rock/Auer deference may seem like a simple extension of *Chevron* that accounts for the complexity and latent ambiguity of agency rules. In practice, however, it provides a means for agencies to circumvent *Chevron*'s requirements and its rationale. In the real world, *Seminole Rock/Auer* deference gives agencies a means to seek the benefits of regulatory interpretations without any of the burdens.

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***Auer* Federalism: Preemption and Agency Deference**

Catherine Sharkey

An August 13, 2016 [New York Times](#) article reports that “Mr. Obama will leave the White House as one of the most prolific authors of major regulations in presidential history.” Putting to one side the detail that agencies authorized by Congress—not the President—promulgate regulations, the article looks behind the widespread public perception that “President Obama has sought to reshape the nation with a sweeping assertion of executive authority and a canon of regulations that have inserted the United States government more deeply into American life.”

Chief Justice Roberts, in a vehement [dissent in *City of Arlington v. FCC* \(2013\)](#), cast these sweeping regulations as an unfortunate development, warning of “the danger posed by the growing power of the administrative state,” involving “hundreds of federal agencies poking into every nook and cranny of daily life.” The late Justice Scalia, in a [dissent in *EPA v. EME Homer City Generation, L.P.* \(2014\)](#), similarly lamented that “[t]oo many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people’s representatives in Congress.” And, in a [concurrency in *Perez v. Mortgage Bankers Ass’n* \(2015\)](#), Justice Thomas unleashed perhaps the most heated invective against the expansion of the administrative state, which he believed has been fueled by a misguided “belief that bureaucrats might more effectively govern the country than the American people.”

A. Revisiting Auer Deference

Justice Scalia was the author of the unanimous decision in [Auer v. Robbins](#) (1997). But sixteen years later in his [partial dissent in *Decker v. Northwest Environmental Defense Center* \(2013\)](#), he described the doctrine as “a dangerous permission slip for the arrogation of power.” More pointedly, Justice Scalia proclaimed: “When the legislative and executive powers are united in the same person, . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.” The thrust of Justice Scalia’s challenge to *Auer* deference—drawing heavily from the intellectual foundation laid by [John Manning](#)—is that if an agency is allowed to interpret its own regulations, it wields the power both to write the law (a legislative function) and to interpret and enforce the law (an executive function), thus raising serious separation-of-powers concerns.

Chief Justice Roberts (joined by Justice Alito) made it plain in his separate [concurrency in *Decker*](#) that he too would welcome the opportunity to revisit *Auer* deference. Two years later, in his [concurrency in *Perez*](#), Justice Thomas criticized *Auer* deference as “a transfer of the judge’s exercise of interpretive judgment to the agency,” and analogized the threat to individual liberty posed by the administrative state to that of the 17th century English King and Parliament, when the theory of separation of powers was put forth to counter “the dangers of tyrannical government posed by each.” In a [separate concurrency](#), Justice Alito, likewise “concern[ed] about the aggrandizement of the power of administrative agencies,” also signaled an interest in revisiting *Auer* in an appropriate case. And, in his [separate concurrency](#), the late Justice Scalia

did not mince words: “I would . . . restore the balance originally struck by the APA [Administrative Procedure Act] with respect to an agency’s interpretation of its own regulations . . . by abandoning *Auer*.”

B. The Puzzling Persistence of Auer Deference in Preemption

Many commentators have focused on various aspects of this attack on *Auer* deference, including that it was gaining momentum at the U.S. Supreme Court at the time of Justice Scalia’s untimely death. Others have situated the attack on *Auer* deference within a broader framework of antipathy towards the administrative state.

Here instead, drawing from my [recent article](#) in the *Emory Law Journal*, I probe an ostensible paradox: the persistence of doctrines of agency deference in the Supreme Court’s “conservative core’s” preemption jurisprudence, notwithstanding those very same Justices’ call for their demise as part and parcel of wider distaste for and distrust of the administrative state.

Consider, for example, the vehement [dissent](#) of Justice Alito (joined by the Chief Justice and the late Justice Scalia) in *Wyeth v. Levine* (2009). In *Levine*, the Court’s majority held that a plaintiff’s state law failure-to-warn claim against a brand name drug manufacturer was not preempted, even though the FDA had specifically approved the warning on the drug. The dissent accused the majority of “turning a common-law tort suit into a ‘frontal assault’ on the FDA’s regulatory regime for drug labeling”—adopting the position (and “frontal assault” terminology) put forth by the United States (representing the FDA) as Amicus Curiae supporting the drug manufacturer. The dissent further chastised the majority for not “relying on the FDA’s explanation of its own regulatory purposes.”

Justice Thomas refused to join the dissent in *Levine*; unlike the rest of the conservative core, in a [separate concurrence](#), he held firm to the position that “no agency . . . can preempt a State’s judgment by merely musing about goals or intentions not found within or authorized by the statutory text.” Notably, Justice Thomas stood apart from his conservative brethren in *Levine* and staked out his own position that vests his hostile attitudes towards agencies with a [consistency](#) that his conservative colleagues’ approach lacks.

But, there is a chink in even Justice Thomas’ armored resistance to the administrative state: his puzzling adoption of *Auer* deference in the context of so-called implied impossibility preemption. In *PLIVA, Inc. v. Mensing* (2011), Justice Thomas, joined by his fellow conservative core Justices (and Justice Kennedy), held that state tort law failure-to-warn claims against a generic drug manufacturer were preempted. Central to this holding is the requirement that the generic drug manufacturer must use the exact same label as that of the corresponding brand-name drug, making it “impossible” for a generic drug manufacturer to add any additional warning to its label. To reach this conclusion, the majority deferred to the FDA’s interpretation of its generic drug regulations: “The FDA . . . tells us that it interprets its regulations to require that the warning labels of a brand-name drug and its generic copy must always be the same—thus, generic drug manufacturers have an ongoing federal duty of ‘sameness.’” Here, Justice Thomas cited the Brief for the United States (representing the FDA) as Amicus Curiae and repeatedly invoked *Auer* in deferring to the agency’s interpretation of its regulations,

emphasizing that “[t]he FDA’s views are ‘controlling unless plainly erroneous or inconsistent with the regulation[s]’ or there is any other reason to doubt that they reflect the FDA’s fair and considered judgment.”

The conservative core Justices (again joined by Justice Kennedy), implicitly rallied behind *Auer* deference in a subsequent generic drug preemption case, *Mutual Pharmaceutical Co. v. Bartlett* (2013), once more showing no qualms where the doctrine’s application meant preempting common law tort claims. Justice Alito penned the [majority opinion](#), which (quoting *Mensing*) relies on federal drug regulation “as interpreted by the FDA” in deeming state law preempted.

C. Common Law Tort (and Juries) as Least-Favored Regulator

Why are the Justices’ fears of the behemoth administrative state—and more specifically, their calls to revisit *Auer*—suddenly allayed when it comes to deferring to FDA interpretations of its own drug regulations?

The conservative core is ostensibly quite comfortable with the encroachment of the federal regulatory state, at least where the encroachee is the common law of torts. Justice Alito’s conviction, expressed in his *Levine* dissent, that “juries are ill equipped to perform the FDA’s cost-benefit balancing function” echoed that of the late Justice Scalia in his [majority opinion in *Riegel v. Medtronic* \(2008\)](#), an express preemption case arising under specific statutory provisions for medical devices. In *Riegel*, Justice Scalia extolled the comparative advantage of the FDA, whereas “[a] jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with benefits; the patients who reaped those benefits are not represented in court.”

Those representing business interests before the Court confront the same tension between agency deference and preemption. According to the [U.S. Chamber of Commerce](#), the “U.S. business community has become increasingly concerned in recent years about the consequences of courts granting too much deference to regulatory decisions made by federal agencies.” But when it comes to the prospect of common law torts as an additional regulator, companies (such as those represented by [PhRMA and BIO](#), as well as the [Chamber](#)) have rallied behind preemption on the ground that one regulator (the FDA) is superior to two and thus have favored wiping out tort law—wielding *Auer* deference in service of this goal.

Auer deference remains a cornerstone of preemption in the generic drug context. Their fates are intertwined—and may pull conservatives (on the Supreme Court and in the business community) in opposite directions.

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***Auer* in the Circuit Courts**

David Feder

Auer matters. It makes the difference between winning and losing on important issues that matter to real people—such as what bathroom a transgender student may use, what costs foreign employees must be reimbursed for, and the proper sentence for a convicted criminal. Consider these recent examples:

1. *G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), *mandate recalled and stay granted* by 136 S. Ct. 2442 (U.S. 2016), involved a transgender boy, Gavin Grimm, who seeks to use the boys’ restroom at his high school. The local school board, however, passed a policy that banned him from the boys’ restroom. Mr. Grimm sued, alleging that the policy violated Title IX.

Title IX states that “[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). The Department of Education’s regulations implementing Title IX permit the provision of “separate toilet, locker room, and shower facilities on the basis of sex, but such facilities shall be comparable to such facilities for students of the other sex.” 34 C.F.R. § 106.33. In an opinion letter, the Department determined how this regulation applies to transgender students: “When a school elected to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”

Judge Floyd, writing for the panel, held that although the regulation referred unambiguously to males and females it failed to address how to treat transgender individuals when it comes to single-sex bathrooms. Sex could be determined under the regulation by reference to *either* genitalia or gender identity. The Department’s resolution of this ambiguity was not unreasonable because, at the time the regulation was adopted in 1975, “sex” was not *always* understood as binary.

Judge Niemeyer dissented on this point. He would have declined to defer to the Department’s opinion letter because, in his view, Title IX and its implementing regulations were unambiguous. Sex, as generally understood at the time of the regulation’s enactment referred only “to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions.” Thus, he concluded, “[a]ny new definition of sex that excludes reference to physiological differences” such as that reflected in the majority opinion, “is simply an unsupported reach to rationalize a desired outcome.”

2. *United States v. Raupp*, 677 F.3d 756 (7th Cir. 2012), concerned the proper calculation of a criminal sentence. After Anthony Raupp pleaded guilty to possessing a firearm despite having a prior felony, the district court added two offense levels under the Sentencing Guidelines because Mr. Raupp had been previously convicted of two or more “crime[s] of violence.” U.S.S.G. § 2k2.1(a)(2).

On appeal, the Seventh Circuit considered whether Mr. Raupp’s prior conviction for *conspiracy* to commit robbery qualified as a “crime of violence” under the Guidelines. Application Note 1 to the relevant section—§ 4B1.2—explains that an inchoate offense like conspiracy is a “crime of violence” when the underlying crime is one. Judge Easterbrook, writing for the panel, held that the text of § 4B1.2 was ambiguous because it did not explain one way or another whether inchoate offenses are included or excluded. Thus, Application Note 1 was a reasonable interpretation of the ambiguity because it did not conflict with the text. Accordingly, Judge Easterbrook afforded the note *Auer* deference.

Judge Wood dissented. In her view, *Auer* deference should not be afforded to Application Note 1 because it interpreted the text unreasonably. “Crime of violence,” she explained “should be interpreted the same as “violent felony” in the Armed Career Criminal Act. And under that Act, conspiracy to commit robbery is *not* a “violent felony.” Thus, conspiracy to commit robbery was unambiguously not a “crime of violence” for purposes of § 4B1.2 and *Auer* deference was inappropriate.

3. *R. v. Dreyfus*, 663 F.3d 1100 (9th Cir. 2011), dissent from denial of rehearing en banc, 697 F.3d 706 (9th Cir. 2012), involved Washington’s Department of Social and Health Services regulation reducing the amount of in-home “personal care services” available under the state’s Medicaid plan by an average of 10% per beneficiary per month. Plaintiffs contended that this reduction violated the Americans with Disabilities Act because it substantially increased the risk they would be institutionalized to receive adequate care.

The ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132; *accord* 29 U.S.C. § 794(a). The Department of Justice has promulgated regulations implementing the ADA including the “integration mandate,” which provides that “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). Before the district court, Justice filed a “statement of interest” explaining that “[t]he integration mandate prohibits public entities from pursuing policies that place individuals at risk of unnecessary institutionalization.”

Judge Fletcher, writing for the panel, deferred to Justice’s statement of interest under *Auer*. He believed that the statement of interest in the district court was comparable to an amicus brief because of the agency’s in ensuring a proper interpretation and application of the integration mandate. Justice’s interpretation, moreover, was consistent with its interpretation in another case before the Ninth Circuit. Finally, its interpretation was not only reasonable but better effectuated the ADA’s policy “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(2).

Nine judges dissented from the denial of rehearing en banc and would not have afforded *Auer* deference Justice’s statement of interest. Judge Bea, writing for the dissenters, explained that the case for deference was even worse than in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 n.12 (1999)—where the Supreme Court declined to afford *Auer* deference to Justice—because

the United States did not even submit an amicus brief to the Ninth Circuit on appeal. And, the dissenters pointed out, a “statement of interest” lacks the rigorous controls that regulations or even a Supreme Court amicus brief have undergone. Finally, Justice’s interpretation was unreasonable because there is no “discrimination” when an agency provides for an even-handed reduction of a voluntarily-provided welfare benefit and when there is no proof such a reduction would lead to anyone’s imminent institutionalization.

4. *Perez v. Loren Cook Co.*, 803 F.3d 935 (8th Cir. 2015) (en banc), involved an industrial accident where a workpiece was ejected from a catastrophic lathe breakdown at Loren Cook Company. The Secretary of Labor determined that the company violated 29 C.F.R. § 1910.212(a)(1), which requires barrier guards on certain industrial equipment, and imposed a \$490,000 fine. Section 1910.212(a)(1) provides: “One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazardous such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc.”

Writing for the court, Judge Shepherd held the Secretary’s interpretation of § 1910.212(a)(1) to be unreasonable and not deserving of *Auer* deference. The section’s language creates two distinct categories of hazards covered: sources or causes of the hazard and by-products from routine operation of the machinery. And, the court explained, a catastrophic failure of a lathe ejecting a workpiece falls into neither of these categories. It wasn’t a source of the hazard because that category is limited to those from a worker’s point of operation—not an ejected workpiece. Likewise, it wasn’t a by-product from the lathe’s routine operation because it differed greatly in nature and quality from the by-products listed, flying chips and sparks. The Secretary’s interpretation, moreover, was unreasonable because it read “rotating parts” hyper-literally and as applying to virtually any situation, no matter how remote or atypical, in which the hazard can be tied to some movement on a machine.

Four judges dissented and would have afforded *Auer* deference to the Secretary’s interpretation. Judge Melloy, writing for the dissenters, pointed to two textual features that rendered the Secretary’s broader interpretation reasonable. The enumerated hazards were preceded by the phrase “created by,” meaning that the regulation necessarily reached a larger class of hazards than those enumerated. The enumerated hazards were also preceded by the phrase “such as” which demonstrated that the list was illustrative and not exhaustive. Accordingly, the dissenters concluded that the Secretary’s interpretation was a reasonable interpretation of the regulation’s text and they would have afforded it *Auer* deference.

5. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) (en banc), involved a hotel company—Decatur Hotels—left devastated by Hurricane Katrina and unable to hire enough American workers to staff its hotel properties. Decatur, through recruitment companies, hired one hundred foreign workers to come to New Orleans on H-2B visas. The workers alleged that they were required to pay their own expenses in moving to the United States and that Decatur did not reimburse them. The workers sued, alleging that Decatur violated the Fair Labor Standards Act because once the moving expenses were deducted from their first week’s salary they were paid less than the minimum wage.

Judge Haynes, writing for the court, explained that during the relevant time period no statute or regulation addressed whether a company must pay for expenses incurred by a foreign worker it hired when he or she moved to the United States. While the Department of Labor had issued a Field Assistance Bulletin addressing the question, it did not do so until 2009—well after the events of the case. And for the majority, that was enough to conclude that *Auer* deference was not appropriate.

Six judges dissented on this point. Judge Dennis, writing for the dissenters, would have deferred to the Department of Labor’s interpretation because it preexisted the 2009 Bulletin. He began his analysis by explaining that the Fair Labor Standard Act’s text was ambiguous. In relevant part, it provided that the “[w]age’ paid to any employee includes the reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.” 29 U.S.C. § 203(m).

The Department of Labor had issued regulations interpreting this provision, which explained that the minimum wage requirements are not satisfied “where the employee ‘kicks-back’ directly or indirectly to the employer or to another person for the employer’s benefit the whole or part of the wage delivered to the employee.” 29 C.F.R. § 531.35. So, for example, “if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer’s particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act.” *Id.*

And, the dissent explained, for fifty years Labor had interpreted this provision to mean that employers had to pay a foreign worker’s inbound costs. Accordingly, the 2009 Bulletin did not change the law but merely restated the agency’s longstanding view and, accordingly, deserved *Auer* deference.

In all these cases, *Auer* was a critical or even dispositive factor in the case’s outcome. Get rid of *Auer* and some of these cases come out the opposite way. And these are but some of the recent cases in the circuit courts in which *Auer* played an important role—there are many more. *See, e.g., Summit Petroleum Corp. v. U.S. E.P.A.*, 690 F.3d 733 (6th Cir. 2012); *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Township, York County, Pennsylvania*, 768 F.3d 300 (3d Cir. 2014); *Reizenstein v. Shinseki*, 583 F.3d 1331 (Fed. Cir. 2009); *Swecker v. Midland Power Co-op*, 807 F.3d 883 (8th Cir. 2015); *Lezama-Garcia v. Holder*, 666 F.3d 518 (9th Cir. 2011).

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***Auer*, Now and Forever**

Cass R. Sunstein & Adrian Vermeule

For more than seventy years, courts have deferred to reasonable agency interpretations of ambiguous regulations. The *Auer* principle, as is it is now called, has attracted academic criticism and some skepticism within the Supreme Court – although we will see the tide of skepticism appears to have receded recently. In any event the principle is entirely correct. In the absence of clear congressional instructions, courts should assume that because of agencies’ specialized competence, greater accountability, and discretion over the choice between more or less formal modes of proceeding, agencies are in the best position to decide on the meaning of ambiguous terms – whether through binding rulemaking or nonbinding guidance and interpretation. The recent challenges to the *Auer* principle rest on fragile foundations, including an anachronistic understanding of the nature of interpretation, an overheated argument about the separation of powers, and an empirically unfounded and logically weak argument about agency incentives, which exemplifies what we call “the sign fallacy.”

In a forthcoming paper, from which this post is taken, we identify three reasons why a strand of the contemporary legal culture finds *Auer* jarring, in a sense even unbearable. The first involves anachronistic but influential understandings of what interpretation actually entails. Even in the aftermath of legal realism, some people believe that the interpretation of ambiguities always or generally calls for purely legal skills – as it plainly does not. Here we follow Justice Scalia, *Auer*’s author, who insisted – at least until very late in his career – that in many cases, interpretation necessarily includes consideration of policy consequences, and of the institutional roles that best serve to allocate responsibility for policy consequences.

The second reason is that the separation-of-powers critiques of *Auer* are applied in a context in which they do not belong, and without regard to their far larger implications. The constitutional critique of *Auer* rests on generalities about the separation of lawmaking from law-execution and law-interpretation. If those generalities were applied consistently, however, they would require declaring unconstitutional dozens of major federal agencies exercising combined functions. The theory of the administrative state, for better or for worse, is that so long as separation of powers operates at the top level (Congress, Presidency, Judiciary), there is no general problem if the top-level institutions decide to create lower-level agencies that combine functions. And in any event, the whole frame for the constitutional critique is misguided, for it is quite clear that agencies do not actually mingle or combine constitutional powers at all. So long as they act within and under a legislative grant of statutory authority, everything they do amounts to an exercise of “executive” power, including both the making and interpreting of rules — as that radical New Dealer, Justice Scalia, emphasized for the Court as recently as 2013. In some ways, then, the issue of *Auer* deference appears to be a stalking-horse for much larger game – namely a wholesale critique of the administrative state. Whatever the appeal of *Auer*, there is certainly no appetite on the Court for such a sweeping retrenchment, with the possible exception of Justice Thomas.

It seems arbitrary, even bizarre, to attack *Auer* by reference to grand (and in our view implausible) constitutional artillery that the Court would not invoke in other contexts. Though the Court often sees *Auer* in settings that provoke concerns about broadening of agency authority, the real force of the ruling is in the mundane cases, where an agency is interpreting some technical term (like “diagnosis”), responding to a request for clarification from the regulated class, or giving people assurance that it will not overreach under some ambiguous provisions in a regulation. *Auer* is frequently an engine of predictability and in a sense of deregulation – though the Supreme Court, and even academic commentators, are not likely to see that. In these circumstances, overruling *Auer* would produce chaos.

The third reason, underscored by Ron Levin and Aaron Nielson, is that *Auer* is essentially a corollary of agency discretion over the choice between legislative rulemaking and other modes of interpretation, including adjudication and nonbinding guidance. At any given time, the agency’s choice is to allocate its authority between more general rulemaking now and more specific interpretation or adjudication later. The more content the agency supplies through legislative rulemaking now, the less content it will have to supply (or indeed be able to supply, so long as the legislative rule stands) through issue-specific interpretation or case-specific adjudication later. The law’s approach to this tradeoff – at least since *Chenery II* in 1947, and continuing throughout the modern era – has been that agency discretion to make such choices is extremely broad. *Auer* merely recognizes and implements that approach.

The fourth and last reason involves the sign fallacy — an intuitively appealing, but wildly unrealistic, understanding of the incentive effects of *Auer*. The critics worry that strategic agencies will exploit *Auer* deference by opting more often for nonbinding guidances than they otherwise would. But even if this is possible, there is no systematic evidence, or even much unsystematic evidence beyond say-so, that the possibility is real or important. As Chris Walker has discovered, many agency drafters don’t even know about *Auer*. And there is a cross-cutting incentive as well: agencies who want to bind their own successors, perhaps because a change of administration looms, are better off creating a binding rule, repealable only through the same relatively costly process.

What is *Auer*’s future? In this context especially, we have low confidence in Supreme Court prognostication, either by ourselves or by others. It is possible that *Auer* is still under a cloud – in part because much will depend on who the next Justice may be, in part because one can imagine future cases in which a majority of the Court would balk at agency overreaching that leverages *Auer* (the recent transgender guidance might be an example).

However, as a matter of evidence currently on the public record, here is what can be said with confidence: the assault on *Auer* has failed, at least for now. In *Perez v. Mortgage Bankers* in 2015, six Justices — including the Chief Justice and Justice Kennedy — joined the opinion for the Court and its note 4. That note clearly contemplates and endorses a regime in which *Auer* deference is the ordinary baseline, subject to various safeguards and qualifications, most importantly the ability of judges to determine whether the underlying agency regulation does or does not clearly contradict the agency’s interpretation. Further evidence that the assault seems to have failed is supplied by [United Student Aid Funds v. Bible](#), (No. 15-861) (May 16, 2016), a certiorari petition that asked the Court to overturn *Auer*, but that was denied by a 7-1 vote, with

Justice Thomas the lone dissenter. Anything else anyone says about *Auer*'s future is essentially speculative. For now, at least, the center holds.

(This post is adapted from *The Unbearable Rightness of Auer*, U. Chi. L Rev. forthcoming)

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Why *Seminole Rock* Should Be Overruled

Allyson N. Ho

Seminole Rock (or *Auer*) deference requires courts to defer to an agency’s interpretation of its own regulation “unless that interpretation is plainly erroneous or inconsistent with the regulation.” *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1337 (2013). Courts will defer even when the agency’s interpretation is not “the only possible reading of a regulation—or even the best one.” *Id.* But as several members of the Supreme Court have recognized, there is a wide gulf between deferring to agency interpretations of statutes—over which Congress has presumably delegated interpretive authority—and deferring to agency interpretations of regulations promulgated by the agency itself. *Seminole Rock* deference—especially as currently applied—violates separation of powers, thwarts the original design of the Administrative Procedure Act, and undermines the rule of law.

First, *Auer* deference is an affront to the separation of powers inherent in our constitutional structure. As Justice Scalia wrote in his concurrence in *Talk America v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011), “[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.” This is because “[w]hen the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.’ ” *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) (quoting Montesquieu, *Spirit of the Laws* bk.XI, ch. 6, pp. 151-52 (O. Piest ed., T. Nugent transl. 1949)). The Framers took great care—and for good reason—to ensure that the separation of powers was fundamental to the very structure of the Constitution (and the government it established). *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1217-20 (2015) (Thomas, J., concurring in the judgment).

But instead of independently applying “recognized tools of interpretation to determine the best meaning of a regulation, [*Auer*] demands that courts accord ‘controlling weight’ to the agency interpretation of a regulation.” *Id.* at 1219. This “amounts to a transfer of the judge’s exercise of interpretive judgment to the agency.” *Id.* Without the structural protections of the judicial branch, the executive branch is “not properly constituted to exercise the judicial power under the Constitution [and] the transfer of interpretive judgment raises serious separation-of-powers concerns.” *Id.* at 1220.

Auer deference also diminishes a critical check the Founders intended the judiciary to perform over the executive branch by “enforcement of the rule of law through the exercise of judicial power.” *Id.* at 1221. The “abandonment” of judicial authority required by *Seminole Rock* “permits precisely the accumulation of governmental powers that the Framers warned against.” *Id.* (citing *The Federalist No. 47*, at 302 (James Madison) (Clinton Rossiter ed., 1961)).

Second, *Auer* deference is contrary to the original design of the Administrative Procedure Act. Section 706 states that courts are to determine the meaning of agency actions. *Auer*, however, rejects this judicial supremacy in favor of blanket deference—even to low-level bureaucrats on

some issues (and even to positions taken in amicus briefs, as in *Auer* itself). But plenary review aligns with the APA drafters' understanding that, while the Act must be interpreted and applied by agencies, "the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis." *S. Rep. No. 79-752* (1945), reprinted in *Administrative Procedure Act: Legislative History, 79th Congress, 1944-46* at 217 (1946). In fact, the drafters of the APA specifically indicated that agency interpretations should receive judicial review "precisely because the APA exempts them from the safeguards of notice-and-comment rulemaking." Staff of S. Comm. On the Judiciary, 79th Cong. (Comm. Print 1945), *excerpted in APA Legislative History 18*. *Auer* deference, however, offends the principle that there should be either more rigorous process on the front end of agency action (i.e., notice-and-comment rulemaking) or less deference on the back end (i.e., plenary judicial review).

The Supreme Court has repeatedly applied that principle in the context of *Chevron* deference. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 232-34 (2001); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). But agencies do not need *Chevron* deference so long as *Auer* is in place, because agency action that would not receive *Chevron* deference will receive *Auer* deference if made in the context of interpreting an agency rule instead of a statute.

In the typical scenario, Congress passes a broadly worded statute accompanied by an authorization for agency rulemaking. The agency then promulgates an ambiguous rule that, although preceded by notice and comment, does not address many critical issues. The agency then uses interpretive rules—issued without public feedback—to provide the only meaningful guidance on those issues—guidance that under *Auer* and *Seminole Rock* generally binds courts. *See Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (observing that agencies "need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment" and that the APA "does not remotely contemplate this regime").

Thus under *Auer*, agencies acquire the power to create binding norms without either procedural safeguards ("paying now") or meaningful judicial review ("paying later"). *See* Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 *Geo. Wash. L. Rev.* 1449, 1463-64 (2011). But the APA distinguishes between legislative rules (which have the force of law and require notice-and-comment rulemaking) and interpretive rules (which do not) precisely to prevent agencies from doing an end-run around the processes attendant to lawmaking. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules From Interpretative Rules*, 52 *Admin. L. Rev.* 547, 555 (2000) ("[T]he agency has an incentive to mischaracterize a legislative rule as interpretative to circumvent the APA rulemaking procedure.").

Auer opens a loophole through which interpretive rules receive the force of law without having gone through notice-and-comment rulemaking. The result is "[a]n unqualified version of *Seminole Rock* [that] threatens to undermine this doctrinal compromise by enabling agencies to issue binding legal norms while escaping both procedural constraints and meaningful judicial scrutiny." Stephenson & Pogoriler, *supra* at 1464. *Auer's* erasure of the line between legislative and interpretive rules thus sets it at odds with the APA's fundamental structure.

Third, *Auer* deference has serious, practical consequences for the rule of law. As the Supreme Court has observed, “[i]t is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time . . . and demands deference.” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

For example, in one recent case, the Seventh Circuit asked the Department of Education to file an *amicus* brief in a case involving a regulation that had been on the books for years. *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633 (7th Cir. 2015), *reh’g denied*, 807 F.3d 839 (7th Cir. 2015), *cert denied sub nom., United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607 (2016) (petition [here](#)). Although the interpretation provided in the *amicus* brief was directly contrary to the agency’s own previous guidance—contrary even to the current guidance on the Department’s website—the court deferred to the Department’s interpretation. As Justice Thomas put it in dissenting from denial of *certiorari*, the case is “emblematic of the failings of *Seminole Rock* deference.” *Id.* at 1608.

To be sure, elections have consequences, and different administrations will naturally have different priorities and policy views when it comes to administrative agencies. But the APA “requires that the pivot from one administration’s priorities to those of the next be accomplished with at least some fidelity to law and legal process. . . . Otherwise, government becomes a matter of the whim and caprice of the bureaucracy” *N.C. Growers’ Ass’n v. UFW*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring).

Seminole Rock—especially as expanded in *Auer*—is the vehicle for precisely such caprice. As currently applied by courts, it violates separation of powers, conflicts with the APA, and offends the rule of law. It should be overruled.

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Auer and the Incentive Issue

Ronald M. Levin

At the center of the challenge to *Auer* deference is the thesis that the deference prescribed in that case gives agencies an incentive to write regulations vaguely, so that they will subsequently be able to adopt interpretations of those regulations that have not undergone the rigors of the notice and comment process but will nevertheless receive the benefit of strong judicial deference. A problem with the argument, however, is that there appears to be no good evidence showing that this incentive has often – or for that matter ever — had the effect that the theorists ascribe to it. I am not saying that the evidence of the incentive effect is *weak*. That label would imply that there is at least *some* evidence of it – but, as best I can discover, the literature on this subject contains *no* evidence of it at all.

The theory got its start in a well-known 1996 [article](#) by John Manning. He discussed *Shalala v. Guernsey Memorial Hospital* as a case in which the agency would have known that writing a vague rule would have left it significant latitude to interpret the rule afterwards, without judicial interference. But Manning did not assert that in *Guernsey*, or any other case, the issuing agency actually did write the rule for the purpose of reaping these benefits of vagueness. In a contemporaneous case, *Thomas Jefferson University v. Shalala*, Justice Thomas wrote in dissent that “[i]t 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.” But he did not say, let alone try to show, that the agency actually had kept the regulation vague for that reason.

Justice Scalia gave further impetus to the challenge to *Auer* deference in his separate opinions in the line of decisions running from *Talk America* through *Decker* to *Mortgage Bankers*, but even he did not claim that the specific regulations underlying those cases were, in fact, examples of rules in which the incentive to be vague had played any part. (Indeed, none of those rules looks particularly bereft of detail.) Meanwhile, a rapidly burgeoning scholarly literature has developed in recent years to fuel the anti-*Auer* crusade. I have read as much of it as I can find and have spotted not a single example of a regulation that, in some author’s view, purportedly was written vaguely so as to reap the benefits of *Auer* deference. (I acknowledge the data cited by Chris Walker in his [blog post](#) in this symposium; I consider it nonprobative for reasons expressed by Cass Sunstein and Adrian Vermeule, as quoted in that post.)

When I refer to evidence, I do not mean to insist on specific case citations or empirical studies. As yet, however, the critics of *Auer* have not even produced any good anecdotes to support their theory. I have yet to read an account by a former regulator saying, “why, sure, I exploited the opportunities *Auer* creates all the time.” Or even: “I remember once when I proposed a regulation, my boss responded, ‘Why bother? We can get the same deference through interpretation with much less procedural hassle.’” Frankly, I have been surprised that no such stories have crept into the public dialogue. Considering the enormous variety of situations that can arise in bureaucratic life, I assume that at some point such tales will be told. Then we can have a debate over whether this paltry evidence is enough to justify foregoing the benefits

of *Auer* deference. At present, however, the factual basis of the critique of *Auer* isn't paltry. It's one hundred percent guesswork.

Actually, however, I've got some evidence of my own. Last year the GAO [asked](#) officials at four departments (including twenty-five subagencies) to explain what factors they consider in deciding whether to issue guidance or undertake rulemaking. You can probably guess how many of them mentioned judicial review as a factor. (Hint: If you guessed "one," you're high.)

"But wait!" the perspicacious reader might interject. "Of course they didn't mention judicial review. Since they would get about the same deference regardless of whether they proceed by regulation or by guidance, naturally they don't consider deference when they choose which of these routes to take. But if the courts were to abolish or substantially dilute *Auer* deference, agencies would *then* have an incentive to favor notice and comment rulemaking in order to take advantage of the higher level of deference they could thereby obtain." In fact, this is similar to an argument that Bill Funk [offered](#) in a recent blog post.

Even that line of reasoning would rest on unproven factual assumptions about how much influence the supposed incentive would exert. (Its magnitude might depend on what, exactly, the new standard of review for agency interpretations of their regulations would turn out to be.) But let's assume for the moment that the newly created incentive would, indeed, make agencies less inclined to deploy interpretations through guidance. Proponents of this alteration in the standard of judicial review would still need to answer the question of *why* the alteration should be adopted. The goal of curing the allegedly distortive incentive effects of *Auer* deference – the policy foundation of the Manning-Scalia critique – would not suffice.

It is disconcerting that the challenge to *Auer* deference has picked up so much steam with so little factual grounding for one of its key premises. Manning's article provided an excellent theoretical analysis, but the logical next step should have been to ask whether agencies really do act in line with the theory. I do not mean to suggest that the incentive to write regulations vaguely does not exist at all. It presumably does – but it surely does not exist in a vacuum. A myriad of factors may influence agencies in their decisions about how broadly or narrowly to write a given regulation. Some of those factors can militate toward specificity rather than vagueness. A good reason to be specific, for example, is to nail down a concrete application of the regulation, instead of leaving the question to be resolved through all the contingencies and delays that may accompany the implementation and enforcement process. How all these diverse influences net out in the regulatory process is far from obvious.

Auer deference is a venerable doctrine. It is [deeply rooted](#) in our history and, in its [Seminole Rock](#) formulation, older than the Administrative Procedure Act. It reflects the courts' sound recognition of the value of the agency's perspective in judicial review, in light of the complexity of many regulations and the agency's responsibility for making the overall program work. In my view, the incentive argument is far too speculative to justify abandonment of that doctrine.

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a subcommittee of the Senate Committee on Homeland Security and Governmental Affairs in April 2015.

Seminole Rock and Unintended Consequences

Aaron Nielson

It's no secret that some people have misgivings about the administrative state—including, most notably, the Chief Justice of the United States. In fact, Chief Justice Roberts [believes](#) that the administrative state—with its “vast and varied federal bureaucracy”—presents a “danger” that “cannot be dismissed.” Although “it would be a bit much” to condemn today’s regulatory scheme as “the very definition of tyranny,” the Chief Justice laments that there are “hundreds of federal agencies poking into every nook and cranny of daily life.” “And,” the Chief Justice ominously reminds us, “the federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies. And more are on the way.”

To those who share the Chief Justice’s concerns, [Seminole Rock](#) deference no doubt is unsettling. After all, because of it, agencies [may](#) “promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking.” A skeptic therefore might conclude [that](#) this deference “promotes arbitrary government.” Doesn’t this sort of [deference](#) “subject[] regulated parties to precisely the abuses that the Framers sought to prevent”? Isn’t it “‘perfectly understandable’ for an agency to ‘issue vague regulations’ since ‘doing so will ‘maximiz[e] agency power’”? Why not reject *Seminole Rock* as “a dangerous permission slip for the arrogation of power”? In short, why shouldn’t *Seminole Rock* be overruled?

My answer: wait a second—not so fast. The situation is more complicated than one might think. Although it is counterintuitive, if you side with the skeptics, you ought to be *particularly* worried about overruling *Seminole Rock*. In fact, the more cynical you are about agency motives, the more you should fear a post-*Seminole Rock* world. (Of course, whether you *should* side with the skeptics is a [question](#) for another day.)

In a forthcoming article, [Beyond Seminole Rock](#), I offer a take on *Seminole Rock* that should give pause to skeptics of the administrative state.* In particular, without *Seminole Rock*, agencies might stop promulgating as many regulations, and instead begin conducting more adjudications. That would be worse, not better, for regulated parties.

To understand why, it is necessary to appreciate another aspect of administrative law. The Supreme Court’s decision in [SEC v. Chenery](#) (1947) (*Chenery II*) holds that an agency generally has discretion whether to engage in prospective rulemaking or instead to simply enforce the statute itself in a retroactive adjudication. *Chenery II* was controversial when it was decided—Justice Jackson in dissent, for instance, condemned the Court for sanctioning “conscious lawlessness as a permissible rule of administrative action” and rejecting the principle that “men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as of those who are subject to authority”—but it is now settled law. As the Supreme Court announced in [NLRB v. Bell Aerospace Co.](#), an agency “is not precluded from announcing new principles in an adjudicative proceeding and ... the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”

And as the Court stated in [Martin v. Occupational Safety and Health Review Commission](#), such “adjudication [can] operate[] as an appropriate mechanism not only for fact finding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation.” Likewise, subject to some [exceptions](#), agencies receive *Chevron* deference for interpretations announced in these adjudications. To be sure, there are retroactivity limits on an agency’s ability to make law through adjudication, but those limits are, well, [limited](#): “[A] mere lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct.” With that background in place, consider a point I have made [before](#):

[I]f the Supreme Court were to overrule Seminole Rock, what would happen? The intended consequence would be clearer regulations, as agencies would have one less reason to promulgate ambiguous rules. But isn’t there also an unintended consequence lurking in the background? Might agencies not promulgate clearer regulations, but instead promulgate fewer regulations? In particular, if Seminole Rock were gone, agencies might respond at the margins by retreating from rulemaking in favor of their power under Chenery II to enforce the statutes they administer through retroactive adjudication—no doubt coupled with a lot more guidance documents and “agency threats.” If that were to happen, regulated parties could easily find themselves worse off.

To meaningfully predict what a post-*Seminole Rock* world would look like, “we need to know an agency’s ‘[cross-elasticity of demand](#)’ between rulemaking and adjudication, and have a good sense for how that cross-elasticity would change if *Seminole Rock* (which makes rulemaking relatively more attractive) were no longer part of the equation.” The more distrustful one is of agencies, the more one should worry that they would shift to the unintended consequence rather than the intended consequence. After all, the cynical view is that agencies are actively looking for ways to increase their flexibility going forward. Without *Seminole Rock*, one way for an agency to continue to do that is through adjudications under *Chenery II*.

And that sort of shift away from rulemaking would be a bad thing. Almost by definition, even an ambiguous regulation provides more notice of someone’s legal duties than the statute that the regulation implements. It could not be otherwise. If the regulation covers more policy “space” than the underlying statute, the regulation is *ultra vires*, and if the regulation covers the same “space,” there is no *Seminole Rock* deference anyway because of the [anti-parroting principle](#). The upshot, as Jason Marisam has [explained](#), is that “regulations are typically narrower than enabling statutes.” Thus, if agencies shift away from rulemaking in favor of adjudication, regulated parties will receive even less notice of their legal obligations than they do now. At the same time, making policy through adjudication is problematic because it generally involves less public participation.

So what is the bottom line? It is important to understand the interrelated nature of “admin law”—what happens to one doctrine has repercussions for other doctrines. Until we understand those repercussions, we should move cautiously. And if the Court is inclined to overrule *Seminole Rock*, it should think about *Chenery II* too. For reasons explained in my article, the Court could mitigate the most problematic substitution away from rulemaking without overruling *Chenery II* (which would have unintended consequences of its own). But the Court can’t mitigate that substitution unless it first recognizes how *Seminole Rock* and *Chenery II* fit together. This means

that the Court should tread carefully when it comes to *Seminole Rock*. Otherwise, the Justices could end up harming the very people they hope to help.

* Of course, my article should be of interest to non-skeptics too. Even if agencies do not intentionally promulgate vague regulations, it is a fact of life that it takes resources to anticipate and preemptively address potential ambiguities. A rational agency may be more willing to tolerate unknown ambiguities if it is confident that, should such an ambiguity arise, the agency will receive deference in addressing it. If *Seminole Rock* ceased to exist, an agency may be less willing to engage in rulemaking because—inevitably—it would have less confidence in its ability to control enforcement of its regulation down the line. Nothing about this analysis requires bad faith or a nefarious scheme on the agency’s part. But it does mean that without *Seminole Rock* (so long as *Chenery II* is not adjusted), we may get more adjudication.

Between *Seminole Rock* and a Hard Place: A New Approach to Agency Deference

Kevin Leske

There is no question that there are both weighty constitutional concerns and practical problems with the *Seminole Rock* doctrine that impede the achievement of consistency, fairness and transparency in our modern administrative state. These concerns coupled with the [confusion and inconsistencies in the lower courts](#) when they attempt to apply *Seminole Rock*'s "plainly erroneous or inconsistent with the regulation" standard demonstrate why the Court should re-evaluate the doctrine. But unlike some commentators, I do not believe that the *Seminole Rock* standard should be completely abandoned and replaced with, for example, the *Skidmore* standard. Nor do I agree, however, that the *Seminole Rock* inquiry should remain in its current form. Instead, I have offered a new approach in order to address the persuasive practical and constitutional concerns expressed by Justice Scalia, other members of the Court, and by scholars.

In my 2013 article in the Connecticut Law Review, titled *Between Seminole Rock and Hard Place: A New Approach to Agency Deference*, I explored the genesis of the *Seminole Rock* deference regime and analyzed the Supreme Court's articulation, application, and interpretation of the doctrine from its inception in 1945 to 2013. I then argued that a comprehensive analysis of the Court's opinions that apply the *Seminole Rock* doctrine, as well as the Court's various deference regimes, revealed three things. First, substantial doctrinal inconsistency, even confusion, exists with respect to *Seminole Rock* deference inquiry. Second, when the Court has invoked the *Seminole Rock* doctrine, it has engaged in a far more searching inquiry than the plain text of the standard would suggest. And third, many of the factors actually considered by the Court in those opinions promote fair notice, consistency, and accountability in the administrative state, while muting concerns regarding unconstitutional agency "self-interpretation" and a lack of an independent judicial check on the agency interpretation.

I then proposed a new approach to determine whether to defer to an agency's interpretation of its regulation that incorporates many of the objective factors previously applied by the Court when applying the doctrine over the past 70 years, as well as traditional factors courts have looked to when approaching interpretative questions. My intent was to fashion a formal, clearly articulated, and relatively simple standard. And by relying upon objective factors, thereby limiting the subjective inquiry, and erring, in a sense, on the side of the original *Seminole Rock* deference standard, this new approach falls comfortably between *Chevron*'s controlling deference and *Skidmore*'s less deferential treatment that the courts apply when reviewing an agency's interpretation of an ambiguous statutory provision.

The formulation of the *Seminole Rock* standard that I advance essentially incorporates the following three key elements: (1) the core holding of the decision itself—namely, that deference to an administrative agency's interpretation of its own regulation is warranted unless the interpretation "is [plainly erroneous or inconsistent with the regulation](#)"; (2) features relied upon

by the Court in other deference regimes, such as *Chevron*; and (3) factors from the Court's previous decisions applying the *Seminole Rock* doctrine.

This new deference approach for *Seminole Rock* is divided into a two-step test. As in *Chevron*, a court would first determine whether the regulation is ambiguous. If the regulation is not ambiguous then the court would simply apply the plain language of the regulation. If ambiguous, the second step would be to apply four objective factors. These factors are: (1) the administrative agency's stated intent at the time of the regulation's promulgation; (2) whether the interpretation currently advanced has been consistently held; (3) in what format the interpretation appears; and (4) whether the regulation merely restates or "parrots" the statutory language. The analysis of these factors would determine whether or not the agency would be entitled to controlling deference under *Seminole Rock*.

Exploring each of the factors is well beyond the scope of this blog post, but as I explain in the [article](#), the new approach offers a practical solution that aims to address legitimate criticism on both sides of the issue. The application of this two-part test does not wholly reject or accept *Seminole Rock* deference and instead represents an intermediate level of deference that essentially combines features of the current controlling deference standards, including *Seminole Rock* and *Chevron*, with the less deferential standard of *Skidmore*. Applying the factors in step-two (when the regulation is ambiguous) continues to value the expertise and experience that an agency brings to the table when determining the meaning of a regulation. And while it allows the agency's proffered interpretation to remain the focal point, it also ensures that the judiciary will play a more prominent and independent role when reviewing the underlying regulation than under the current *Seminole Rock* standard. It is able to accomplish this important goal by incorporating objective criteria into the analysis to determine whether to defer.

But the test does not go so far as to include a key feature of the *Skidmore* standard: its reliance on the "persuasiveness" as the "[ultimate touchstone for deference.](#)" By eschewing such a factor, a court's ability to substitute its own policy judgment for that of the agency will be more limited. While this may not entirely satisfy some critics, such as Professor Manning, who believe that a court must have "[an independent judicial check,](#)" it nonetheless should satisfy their view 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.](#)"

And while I recognize that these scholars may believe that it would be prudent to replace the *Seminole Rock* standard with *Skidmore*'s test, I find it to be unrealistic for both pragmatic and doctrinal reasons. As a pragmatic matter, the Court has reaffirmed the *Seminole Rock* doctrine as recently as last year and it seems extremely unlikely to sweep away so many years of adherence to the doctrine now. In addition, as other scholars, such as Professor Neilson have pointed out, overruling *Seminole Rock* could have [unintended consequences](#). Also, as a doctrinal matter, the modification that I propose will remain faithful to *Seminole Rock*'s core holding, thereby avoiding the need for the Court to overrule the case directly.

In the end, I believe adoption of this new approach will be effective at taking the courts, the public, and administrative agencies out from their respective "rock and a hard place." Courts, for instance, have been understandably hesitant to give controlling deference to agencies (e.g.,

Seminole Rock and *Chevron*) in interpretive cases because it may constitute an abdication of the judicial role. On the other hand, courts have also been concerned about withholding the proper amount of deference agencies deserve (e.g., *Skidmore*) because doing so may improperly shift the regulatory burden and policy-making choices to the courts. Given the uncertainty in this area of the law generally, and the doctrinal confusion with respect to *Seminole Rock* specifically, agencies, for their part, are often caught between deciding whether to interpret a regulation informally, or engage in a more costly and time consuming procedure involving the notice and comment procedure of the [Administrative Procedure Act](#). It thus seems clear that both agencies and courts would benefit from a clearly articulated and more balanced standard to look to when undertaking their respective roles in the judicial and administrative processes.

And the same can be said with respect to the public, and, by extension, regulated industries. With this new approach, an administrative agency would have a diminished incentive to promulgate vague regulations (thereby limiting its broad leeway to interpret them in the future), and a diminished opportunity to re-interpret a regulation routinely without adequate notice. The new approach would therefore promote much-needed certainty for the public. At the same time, it would protect some of the much-needed deference and flexibility that the public expects to be given to the expert administrative agency responsible for administering the statute. The approach consequently has the effect of freeing the public and industry from facing two unsatisfactory scenarios—too much deference to the agency, creating regulatory uncertainty, and too little deference, creating administrative inflexibility.

This blog post draws from his article, [Between a Rock and Hard Place: A New Approach to Agency Deference](#), 46 Conn. L. Rev. 227 (2013). He has also written three additional articles on the *Seminole Rock* doctrine: [Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U.S. Courts of Appeals](#), 66 Admin. L. Rev. 787 (2014); [Chipping Away at the Rock: Perez v. Mortgage Bankers Association and the Seminole Rock Deference Doctrine](#), 49 Loy. L.A. L. Rev. __ (2016), and [A Rock Unturned: Justice Scalia's \(Unfinished\) Crusade against the Seminole Rock Deference Doctrine](#) (forthcoming, 2017).

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Rejecting *Auer*: The Utah Supreme Court Shows the Way

James Phillips & Daniel Ortner

For decades, the Supreme Court of Utah reviewed agency action under either express or implicit “delegations of discretion” for abuse of discretion. This approach “proved difficult to apply” and resulted in widely inconsistent decisions that depended on whether a court found that a statute granted an implicit delegation of power. So in 2013 the Utah Supreme Court reevaluated its approach and drastically curtailed agency discretion in a unanimous opinion (*Murray v. Utah Labor Comm’n*). In doing so, the Court drew a distinction between questions involving “choice” or “discretion,” such as determining the proper tariff schedule, and mixed or legal determinations. With the former there “are a range of ‘acceptable’ answers,” and so the agency “is free to choose from among this range without regard to what an appellate court thinks is the ‘best’ answer.” On the other hand, with mixed or legal determinations there is “a single ‘right’ answer in terms of . . . the law.”

Subsequently, the Utah Supreme Court, in a unanimous opinion by Justice Thomas R. Lee, extended the reasoning of *Murray* and eliminated *Seminole Rock/Auer*-style deference to state administrative agencies. (Two years prior, Justice Lee writing for the court had also rejected *Chevron*-like deference to agency interpretations of statutes.)

The court provided several rationales for its repudiation of deference to agencies’ interpretation of their own regulations. First, the court emphasized that agency actions are laws and the court is “in as good a position as the agency to interpret the text of a regulation that carries the force of law.” Second, the court raised concerns about the rule of law, noting that “parties have a right to read and rely on the terms of [agency] regulations,” and therefore “an agency has no authority to override the terms of an issued order by vindicating the agency’s ‘true’ intent.” Finally, the court noted that since the agency “is in the position of lawmaker . . . it makes little sense for us to defer to the agency’s interpretation of law of its own making.” The court cited to John Marshall’s famous lines in *Marbury v. Madison*: “It is emphatically the province and duty of the judicial department to say what the law is,” and noted that “plac[ing] the power to write the law and the power to authoritatively interpret it in the same hands . . . would be troubling, if not unconstitutional.”

Thus the Court relied on the Montesquieu-Madison-Marshall line of logic, a logic that is embedded in both the Utah and federal Constitution. Similar themes have been recently raised at the U.S. Supreme Court, such as Justice Thomas in *Perez* observing that *Seminole Rock* deference “effects a transfer of the judicial power to an executive agency . . . [and so it] undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.”

The principle of separation of powers—and its inherent logic that the judiciary will not defer to an agency’s interpretation of a law of the agency’s own making—may seem antiquated or naïve today. After all, the Framers set up our Constitution in a world far removed from the modern administrative state and its attempts to regulate an increasingly complex and inter-connected

society. But whether separation of powers (and its fatal implication for *Seminole Rock* deference) is antiquated, or naïve, or even leads to unintended consequences, is, frankly, irrelevant—at least to the judicial branch—because it is a question of constitutional policy. And such questions in our system are left to the Sovereign—the People. So the People are free to match our Constitution to the age by amending it as they please. But that’s up to them. Not the courts. And until such amending occurs, the judicial branch is bound to follow the separation of powers. Justice Scalia put it better than we can in his *Decker* opinion: “[H]owever great may be the efficiency gains derived from [*Seminole Rock*] deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.”

But what about *stare decisis*? Regardless of one’s theory of the Constitution, precedent gives away at some point. To paraphrase Abraham Lincoln, one does not have a right to do that which is unconstitutional. So unless one’s theory of the meaning of the Constitution, and thus the separation of powers, is it’s merely whatever the Supreme Court says it is, at some point the document itself has to supersede how it has been misinterpreted. (And if that is one’s theory, then a new majority on the Court is not really bound by an old one.) Given the fundamental importance of the separation of powers, we see this as one of those times where *stare decisis* cannot be allowed to supersede constitutional text and structure.

We actually do not think the separation of powers to be antiquated or naïve or harmful (though it is arguably incompatible with our current administrative state). The Framers understood human nature, and how the granting of authority to one group of humans vis-à-vis another so often throughout history led to abuse of people’s rights and liberties. And the tendency towards abuse is not some historical relic. As Justice Scalia noted in his dissent in *Morrison v. Olson*, “Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.”

Thus recognizing the un-angelic aspects of humankind, especially those placed to “rule” in government, “auxiliary precautions” were designed to ensure the government will be “oblige[d] . . . to control itself.” That seems wise to us. But our view is also irrelevant. And that is the whole point. Whether one lauds it or loathes it, separation of powers is the “supreme Law of the Land.” Until that is no longer true, courts have no authority to delegate their job to independently say what the law is to anyone else. Maybe most especially to agencies. And thus *Seminole Rock* must fall. Because most if not all state constitutions are built on those same foundational principles, state supreme courts are free to **take the lead** and be more than just laboratories of democracy, but safeguards of democracy’s foundation—the separation of powers—after years of erosion by an encroaching administrative state. To do otherwise may be wise, it may be modern, it may be popular. But it would not be constitutional.

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Auer as Administrative Common Law

Gillian Metzger

To some, *Auer* deference stands apart from the rest of administrative law. On the one hand, *Auer* is distinguished from other forms of deference as uniquely constitutionally problematic, because it grants agencies deference for their own interpretations of their own regulations. This, according to Justice [Scalia](#) (accepting an argument raised by his former law clerk, [John Manning](#)), violates “fundamental principles of separation of powers” by “permit[ing] the person who promulgates a law to interpret it as well.” On the other, *Auer* deference is also seen as uniquely at odds with the Administrative Procedure Act. Thus, [Scalia](#) criticized *Auer* not simply for deviating from the APA’s [scope of judicial review provision](#) but also for offering agencies a route to evading the APA’s [notice-and-comment requirements](#) by promulgating vague regulations that they can broadly interpret.

In fact, however, there is nothing so special about *Auer*. To begin with, as [Cass Sunstein and Adrian Vermeule](#) contend, the constitutional and statutory attacks on *Auer* are hard to cabin. Administrative agencies regularly issue regulations, enforce those regulations, and adjudicate controversies involving those regulations. If *Auer* runs afoul of a constitutional “same hands” prohibition by allowing an agency to specify the meaning of regulations it promulgates, then this combination of functions— a core characteristic of administrative agencies — seems unconstitutional in spades. *Auer* and *Chevron* are particularly intertwined, with both provoking similar claims of APA incompatibility and both resting on recognition of the impossibility of separating interpretation and policymaking. Moreover, as [Perez v. Mortgage Bankers Association](#) emphasized, *Auer* exists alongside other requirements, in particular the basic demand of reasoned decisionmaking, that ensure some judicial check on agency regulatory interpretations.

Auer is also typical of administrative law in another way: the debate over *Auer* is a prime example of administrative law’s common law character. As I have argued [elsewhere](#), much of administrative law rests on judicial conceptions of appropriate institutional roles as well as pragmatic and normative concerns. These concerns are constitutionally and statutorily rooted, but rarely does the Constitution or the APA require a particular doctrinal response. Instead, judges draw on these background constitutional, statutory, and pragmatic concerns to develop administrative law incrementally, with attention to changing institutional dynamics and the comparative competencies of agencies and courts.

Such is the case with *Auer*. Here, too, the constitutional concerns are indeterminate and countervailing. The fact that the Court has repeatedly accepted intermixing of functions make it hard to see *Auer*’s combination of regulation promulgation and interpretation as clearly unconstitutional. In addition *Auer* may yield constitutional benefits. [Aaron Nielson](#) has pointed out how *Auer* may advance due process fair notice and rule of law norms, given the risk that agencies otherwise might choose to issue their regulatory interpretations through ad hoc administrative adjudication. Further, by encouraging an agency to issue rules clarifying how its regulations should be read, *Auer* also may serve to support top-down oversight and control of

agency personnel, thereby reinforcing [constitutional supervisory structures](#). *Auer* also serves constitutional values of effective and accountable government, insofar as it gives agencies needed ability to tailor regulations to emergent problems in an informed and responsive manner. This is not to deny the separation of powers concern raised by concentrating powers in administrative agencies, but rather to underscore that there are other constitutional concerns in play. Administrative common law is the prime mechanism by which courts balance such competing constitutional concerns.

Similarly, *Auer* is not plainly at odds with the APA. Both *Chevron* and *Auer* deference can be viewed as adhering to the APA's instructions for judicial review: deference, on this view, follows from courts concluding the statutes at issue grant policymaking and gapfilling authority to the agency. Moreover, given that the APA expressly exempts agency interpretations from notice and comment constraints, it seems unfair to presumptively deem agency exercise of this exemption to be procedural evasion. And discussion of whether *Auer* creates incentives in tension with the APA is emblematic of the doctrine's common law basis. Such pragmatic consideration of existing doctrine and proposed alternatives is a central feature of administrative common law.

Recognizing *Auer*'s common law character helps frame the debate over its future. Courts should not pretend that overturning *Auer* is constitutionally or statutorily compelled. It's not. Instead, courts need to frankly acknowledge the wide-ranging normative and pragmatic concerns in play. They need to engage with empirical evidence on *Auer*'s actual impact on notice-and-rulemaking and not rely simply on judicial intuitions. And they need to recognize that *Auer* cannot be singled out for revision without calling modern administrative law more broadly into question. Indeed, courts should consider whether, if agencies are turning to *Auer* to avoid rulemaking constraints, the fault may lie more in other administrative common law doctrines—such as judicial elaboration of the APA's notice and comment requirements—than with *Auer* deference itself.

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Why the Supreme Court Might Overrule *Seminole Rock*

Adam White

In 1951, when Kenneth Culp Davis published his first comprehensive study of administrative law under the newly enacted APA, he explained that the deference courts give interpretative rules necessarily depends on a range of factors, from “the relative skills of administrators and judges in handling the particular subject matter” to “the extent of judicial confidence in the particular agency,” to other “special circumstances.”

On that last factor, Professor Davis appended a long footnote to further analyze one particularly “interesting special circumstance” worth scrutinizing: “the agency’s interpretation of its own rules.” While conceding that “the science of interpretation of administrative rules—both administrative interpretation and judicial interpretation—is still in its infancy,” Davis paused to note a recent Supreme Court decision of just six years earlier, with particularly significant implications.

The case, as you might guess, was *Seminole Rock*.

Professor Davis quoted the Court’s rule that an “administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” But he then contrasted the Court’s holding with a recent decision of the Fourth Circuit, *Southern Goods Corp. v. Bowles* (1946), which squarely rejected the notion of granting such judicial deference to many classes of agency interpretations. “It would be *absurd*,” the court held (with my emphasis), “to hold that the courts must subordinate their judgment as to the meaning of a statute or regulation to the mere unsupported opinion of associate counsel in an administrative department.”

Davis predicted that the Supreme Court would likely endorse the Fourth Circuit’s skepticism, although he conceded that “[h]ere as elsewhere, judges’ views of the merits of particular cases are likely to govern choices among competing degrees of judicial intervention.”

Professor Davis’s brief observations—found in *Administrative Law* (1951), p. 202, n.72—fairly reflect my own reasons for believing that the Supreme Court will eventually pare back *Seminole Rock* deference significantly, if not overturn it altogether. Just as *Chevron*’s simple two-step framework was eventually supplemented with a “Step Zero” inquiry intended to vindicate structural constitutional interests and other prudential concerns, I expect the Supreme Court to eventually endorse a “*Seminole Rock* Step Zero” to serve as a prerequisite for granting an agency *Seminole Rock*’s “controlling” deference. (This “Step Zero” label has already been adopted by [Sanne Knudsen & Amy Wildermuth](#), as well as by [Will Yeatman](#), and I do hope it catches on.)

Justice Scalia’s own criticism of *Seminole Rock* and *Auer* famously adopted Professor Manning’s separation-of-powers [analogy](#): as [Montesquieu](#), [Massachusetts](#), and [Madison](#) all warned, liberty requires us to separate the task of legislation from the tasks of interpretation and adjudication. It

is an attractive and perhaps even compelling argument. But even more directly, reforming *Seminole Rock* would vindicate the concerns of another set of framers: the framers of the APA, who recognized the crucial relationship between the procedural protections that precede agency action, and the judicial review protections that follow it.

That was the major theme of [an amicus brief](#) that I co-authored in the *Perez v. Mortgage Bankers Association* case, and then in [an essay](#) that I wrote for the *Cato Supreme Court Review*. The APA's framers recognized the necessary relationship between *ex ante* procedural protections, and *ex post* judicial protections. If agency action is preceded by *ex ante* procedures to protect the public and preserve an opportunity for meaningful public involvement, then *ex post* judicial review is less necessary. But if an agency action *lacks* those *ex ante* protections, then the *ex post* protections become all the more important.

Today scholars sometimes call this the “[pay me now or pay me later](#)” principle. Or, to borrow a memorable line from FDR's Brownlow Committee, the administrative process requires [either “prenatal” or “postnatal” safeguards](#).

This intuitive principle was what originally justified the notice-and-comment exception for interpretative rules—and it's what animated the Labor Department's critics in *Perez*, as exemplified by the opinions of Justice Scalia and the other dissenters. Precisely because the problem could not be solved through judicial imposition of *ex ante* procedures—as Justice Alito observed, “the *Paralyzed Veterans* doctrine is not a viable cure for these problems—the problem of granting controlling judicial deference to agency's interpretative rules would need to be solved on the *ex post* side, by reforming judicial deference to agency interpretations.

Of course, with the loss of Justice Scalia, it would be foolish to predict that significant change will come immediately, especially after the Court denied cert in *United Student Aid Funds v. Bible* despite [Judge Easterbrook's emphatic separate opinion](#) below. But I would not write it off altogether. We already have seen Roberts, Kennedy, Thomas and Alito raise (or at least acknowledge) serious concerns about *Seminole Rock*. And while the others have largely refrained from commenting upon the new doctrinal debate, the same justices who created *Chevron's* Step Zero might ultimately come to the same conclusions with respect to a *Seminole Rock* Step Zero.

As always, it will require the right case, and the right combination of judicial motivations. Justice Ginsburg, for example, is unlikely to chart a new anti-deferential course in, say, *Gloucester County School Board v. G.G.* But a Trump Administration's legal interpretations might spur Justice Ginsburg and more than a few judges to pick up their hammers and put some cracks in *Seminole Rock*.

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Why the Supreme Court Might Not Overrule *Seminole Rock*

Conor Clarke

Predictions are hard, especially about the future. It's much safer to hide behind a broad trend: There was a time, just a couple of years ago, when it seemed like *Auer* and *Seminole Rock* were not long for this world. *Auer*'s author, Justice Scalia, turned his back on the doctrine. The tide of scholarly opinion—led by former Scalia clerk *John Manning*—seemed to rise comfortably, almost casually, in opposition to *Auer*. Fueled by a few encouraging concurrences, cases percolated through the federal courts that seemed to provide a ripe opportunity for review.

But no longer. The Court *reaffirmed* *Auer* last year. And the scholarly waters—if the previous contributions in this symposium and a few longer papers are a reasonable guide—seem a little more brackish than they once did. Casual contempt is now matched with casual acclaim. (Spake *Sunstein and Vermeule*: “the [*Auer*] principle is entirely correct.”) Can these datapoints be shoehorned into a prediction? Sure, why not: The Supreme Court isn't going to overturn *Auer* and *Seminole Rock* anytime soon.

The brute facts mentioned above are a big reason. The Court just reaffirmed *Auer*; the doctrine lost one of its staunchest critics. The votes to overturn it don't seem to be there. And the existence of a symposium like this one is surely another brute fact in *Auer*'s favor. If the doctrine really were just conspicuous lunacy, it seems unlikely that smart people would spend so much time disagreeing over it.

And there are two additional reasons why *Auer* will persist. The first has been flagged by many previous contributions to this symposium: The big criticism of *Auer*—the incentive for vague regulations—can feel a little underwhelming. Even if you buy the criticism in theory—and I do—there is always the intractable-feeling question of how to weigh it against the other values of administrative law. Administrative law serves many masters. Vague regulations can be bad—but so can *fewer regulations*, slower regulations, and en-masse-suddenly-rewritten regulations. It's anyone's guess how these various levers will shift in a post-*Auer* world; it seems to me that modesty dictates a bit of uncertainty about the pluses and minuses of it all. And even if you buy the criticism in practice—that is, even you're confident that the cost of vagueness outweighs these other effects—you may run up against an equally intractable-seeming question of how to *prove* the point. Proving *Auer*'s vices decisively requires more than counting cases; it requires finding an acceptable measure of vagueness and a plausible source of exogenous legal variation. No mean feat.

The second reason: Even if we think *Auer* is broken or imperfect, there are plenty of ways to fix it short of scrapping the whole doctrine. Many possible fixes have been flagged by other contributors. But it seems to me that a perfectly reasonable way to cabin *Auer* is to operate at the so-called step zero: We can limit the types of agency interpretations to which it applies. The basic idea is simple: If we're most concerned about opportunistic or feckless agencies surprising regulated entities with last-minute interpretations, we can keep *Auer* from rubber-stamping the worst of the bunch.

Indeed, the *Auer*/*Seminole Rock* test — “the administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation”— has already been circumscribed in a number of key ways, all of which one can think of as amounting to an *Auer* step zero. I catalog these step-zero (or sometimes step-one) cases in a [semi-recent essay](#). First, *Auer* deference is warranted only when the regulation in question is really ambiguous. Second, the agency’s interpretation must be a considered judgment; it can’t be simple after-the-fact convenience. Third, the agency’s interpretation cannot impose too much unexpected liability. Fourth, in at least one circuit, the agency’s interpretation cannot be interpreting a pre-existing interpretation. And fifth, in several circuits at least, the relevant interpretation cannot conflict with the agency’s previous interpretations.

These cases matter because they suggest that *Auer* can fix itself—should we believe it’s broken, of course. This step-zero circumscription “tailor[s] deference to variety,” as Souter once said of *Mead*. A little careful tailoring might serve regulated entities much better than blowing up *Auer* entirely.

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Congress Must Act to Restore Accountability to the Regulatory Process

Senator Orrin G. Hatch

“[I]t is emphatically the province and duty of the Judicial Department to say what the law is.” These simple, straightforward words constitute Chief Justice John Marshall’s foundational definition in *Marbury v. Madison* of “the judicial Power” that the Constitution vests in the federal courts. Repeated in countless court decisions, law review articles, and civics textbooks, Marshall’s formulation is today seen as an uncontroversial assertion of the proper role of the federal judiciary. It also squares neatly with the traditional separation of powers doctrine expressed in *Federalist 47*: “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” To prevent the consolidation of power, the Constitution established a system of government that divides authority among the three branches, as well as between the states and the federal government. It is a system in which “[t]he interpretation of the laws is the proper and peculiar province of the courts.”

Contrast this understanding of the judicial power with what has come to be the judiciary’s role in modern administrative law. Under so-called *Chevron* deference, courts now defer to an agency’s interpretation of a statute so long as the statute is “ambiguous” and the agency’s reading is “permissible.” Similarly, under so-called *Seminole Rock* or *Auer* deference, “the ultimate criterion” for a court’s interpretation of an ambiguous regulation “is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” Such deference is problematic in several respects.

First, judicial deference to administrative agencies lacks a clear constitutional basis. By transferring power to “say what the law is” from courts to agencies, *Chevron* and *Seminole Rock* conflict with the clear assignment of that power to the courts in Article III of the Constitution. In the words of one noted expert, the modern deference regime represents “a counter-*Marbury* for the executive branch.” Troublingly, some defenders of the current deference regime respond merely by noting that the modern administrative state as a whole “epitomizes the combination of functions the separation of powers is supposed to keep apart,” as if the number of constitutional infirmities in administrative law somehow excuses the problematic nature of *Chevron* and *Seminole Rock*. Indeed, while attention to the problems of judicial deference should not preclude efforts to enhance procedural protections in the rulemaking process or fix other ways in which the bureaucracy concentrates power to the detriment of our liberties, neither of these alternatives meaningfully mitigates the inconsistency between judicial deference and the text and structure of the Constitution.

Second, *Chevron* and *Seminole Rock* deference lacks a clear statutory basis. The Administrative Procedure Act (APA) defines the scope of judicial review of agency action thusly: “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” The Act contains no language to support the idea that courts should defer to agency interpretations. In

the words of [one astute commentator](#), the Act’s “text . . . is not just in tension with [deference] doctrine,” but “downright contrary to it.”

For those committed to the principle that judges should apply the law as written, modern deference doctrines are troubling. Even at the height of his enthusiasm for *Chevron*, Justice Scalia could muster only a weak reconciliation between the APA and judicial deference. [In a 1989 law review article](#) on the topic, after conceding that any “quest for ‘genuine’ legislative intent is probably a wild-goose chase” and that “[i]n the vast majority of cases . . . Congress [did not] mean to confer discretion upon the agency, but rather . . . didn’t think about the matter at all,” Scalia resorted to a functionalist justification for the contemporary deference regime. He cited benefits such as “needed flexibility, and appropriate political participation, in the administrative process”; predictability of outcomes; and making the legislative process “less of a sporting event [in which] those supporting and opposing a particular disposition do not have to gamble upon whether, if they say nothing about it in the statute, the ultimate answer will be provided by the courts or rather by the [agency].” While these features may represent benefits of deference for the efficient and fair operation of government, they do not address the fundamental disconnect between deference doctrines and the clear statutory language of the APA.

Third, *Chevron* and *Seminole Rock* create strong incentives for agency misbehavior. Courts have come to define with extraordinary breadth both the textual ambiguity that is a prerequisite for deference and the reasonableness of agencies’ proposed interpretations. In the case of *Chevron* analysis, these loose limits give agencies what amounts to broad authority to rewrite statutes as they please. Several recent high-profile examples—such as [the Environmental Protection Agency’s decision](#) to change statutorily prescribed pollutant levels by three orders of magnitude, or [the Department of Health and Human Services’s redefinition](#) of the term “exchange established by the state” in the Affordable Care Act to include exchanges established by the federal government—illustrate how courts’ permissive attitude toward agency interpretations breeds administrative hubris. And while courts do sometimes rein in agency misbehavior, such examples illustrate how far agencies sometimes go in twisting the law to serve their preferred policy goals.

In the context of *Seminole Rock* deference, an additional factor compounds the problem. By instructing courts to defer to agency interpretations of their own ambiguous regulations, *Seminole Rock* incentivizes agencies to write vague rules. Then, if an agency later wishes to change the rule, it can simply issue guidance rather than formally modifying or amending the rule, thereby bypassing the procedural protections built into the rulemaking process. Worse yet, the agency can leave the rule the way it is and simply change its application of the rule in future enforcement proceedings. Either way, under *Seminole Rock*, agencies’ freedom from scrutiny “[frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government](#)”—the type of governance the Constitution was structured to avoid. With [empirical evidence](#) indicating that two-in-five agency bureaucrats admit “using” *Seminole Rock* in drafting rules, this concern about improper incentives can hardly be dismissed as “[a phantasmal terror](#).”

In response to these arguments, proponents of the current deference regime offer various unpersuasive rationales why agencies should receive deference. First, advocates frequently cite technical expertise as the foremost reason why agencies should be the preferred interpreter of the

law. But a reliance on agency technical expertise is misplaced in an era in which numerous parties to regulatory litigation—from businesses and trade associations to non-profits and think tanks—can bring sophisticated expertise to the table that can rival or even surpass that of agencies. Moreover, this argument seems to discount, for no apparent reason, the ability of courts to digest an agency’s briefing as the appropriate vehicle for bringing the agency’s technical expertise to bear, even though numerous other legal proceedings—from expert witness testimony to patents—require courts to process complex technical information without deferring to one party or another. But most importantly, this argument obfuscates the issues at hand. An agency’s technical expertise is directly relevant to questions of fact, on which the APA grants significant discretion to agencies by directing courts to review such questions only for whether an agency’s action is “arbitrary, capricious, [or] an abuse of discretion.” On questions of law, however, the relevant expertise lies in textual interpretation, an area in which courts possess equal—if not greater—expertise than agencies.

Advocates also cite agencies’ superior policy judgment as a rationale for deference, claiming that technocratic know-how produces all sorts of benefits ranging from greater flexibility to improved responsiveness to stakeholder feedback. While the current deference regime may or may not yield benefits from a functional perspective—indeed, asserted benefits such as flexibility may also carry equally significant downside, such as reducing certainty for regulated parties—this argument fundamentally confuses what is at stake in the debate over *Chevron* and *Seminole Rock*. By the time a case ends up before a court, the policy judgment has already been made—through the legislative process in *Chevron* cases, and through the rulemaking process in *Seminole Rock* cases. Rather, the question is which organ of government is the proper forum for construing a binding legal text. The Constitution and the APA leave little doubt that this power of interpretation is firmly assigned to the judiciary.

The accountability deficit that *Chevron* and *Seminole Rock* create is only exacerbated by the difficulty the other branches of government encounter in attempting to oversee agency action. Put simply, the ever-expanding size and scope of the federal government complicate efforts by politically accountable executive branch officials and Congress to monitor and influence the full range of government operations. Although congressional staff budgets and the number of political appointees in the executive branch have grown in recent years, they have not kept pace with the vast expansion of the federal bureaucracy.

Examples abound of how the growth of the administrative state has diminished Congress’s ability to check agency actions that stretch statutory authority beyond the breaking point. Consider two of the Obama administration’s recent immigration programs—Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans. Both programs involve a series of administrative actions that not only shield individuals illegally in the country from immigration enforcement, but also affirmatively grant such individuals a quasi-legal status contrary to existing statute. Legislative proposals roughly similar to the administration’s programs have been the subject of intense political debate in recent years. As standalone bills, both programs would surely have been rejected by both the House and Senate. Despite intense disapproval of the administration’s actions by a majority of lawmakers, however, Republicans in Congress were unable to defund either program, and thus unable to undo the administration’s actions. This was because Democratic opposition to defunding meant that undoing the programs

likely would have entailed a broader shutdown of the Department of Homeland Security (DHS). But because DHS administers a large number of crucial services, this outcome was politically untenable. The size and scope of the agency made it impossible for Congress effectively to exercise the power of the purse.

In a polarized political environment, courts thus stand as the only government actor truly capable of restraining overzealous regulators. But deference to agencies undercuts the judiciary's ability to hold administrative officials accountable to the law. This grant of effectively unfettered discretion to the executive branch—largely to unelected bureaucrats subject to virtually no meaningful political accountability—has in turn incentivized a massive expansion of the administrative state. [By some estimates](#), federal regulations now impose a burden of \$1.885 trillion dollars on our economy. That amount equals roughly \$15,000 per household per year and represents more than the entire nation's corporate and individual income tax load combined. This burden has grown tremendously over recent years, with 20,642 new rules and 566 new major rules [added over the last seven years alone](#). [According to one study](#), by its sixth year in office the Obama administration had already surpassed every other presidential administration since 1976—when the study began—in the number of regulatory restrictions issued.

Restoring the constitutionally ordained judicial role is vital to returning accountability to the regulatory process and creating the conditions for economic growth. When reviewing agency actions, courts should say what the law is and not simply ratify what regulatory agencies want the law to be. To restore the judiciary's proper role in interpreting statutes and regulations, Representative John Ratcliffe and I introduced legislation—S. 2724 and H.R. 4768, the Separation of Powers Restoration Act—grounded on the basic principle that courts, not agencies, have the power to decide questions of law and to hold agency officials accountable to the law.

The bill is remarkably straightforward: it merely clarifies the APA to restore de novo judicial review of questions of law. Such an approach is hardly a step into the radical unknown. Instead, the legislation would simply have courts employ, as Justice Scalia put it in [Decker v. Northwest Environmental Defense Center](#), “familiar tools of textual interpretation to decide.” Today's federal bench, consisting of intelligent, thoughtful, and well-educated jurists, consistently demonstrates its ability to do just that, tackling challenging areas of law such as high-technology patents and complex antitrust analysis. There is no reason to think that judges—with the help of thorough briefing from interested parties—are somehow incapable of correctly applying these same skills to administrative law. With the basic change that the Separation of Powers Restoration Act would enact, we can restore accountability to the regulatory process and begin to undo the damage *Chevron* and *Seminole Rock* have wrought.

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Why SOPRA is Not the Answer

William Funk

The Separation of Powers Restoration Act, or more easily known as SOPRA, is not a complicated bill. If enacted, it would amend the Administrative Procedure Act to require courts to decide *de novo* all questions of law, whether constitutional, statutory, or regulatory. As the House Report makes abundantly clear, the intent is to overrule statutorily both *Chevron, USA, Inc. v. NRDC* and *Auer v. Robbins* (and its forebear *Bowles v. Seminole Rock & Sand Co.*), but not *Skidmore v. Swift & Co.*

The idea is not new. Indeed, beginning in 1975, well before *Chevron* began its journey through the courts, Senator Dale Bumpers introduced bills (or amendments to bills) that were intended to have the same effect. Although versions of his proposal were passed by the Senate on at least two occasions, the so-called Bumpers Amendment never became law because cooler heads prevailed. Undoubtedly the same fate will meet SOPRA. Why?

First, as several law review articles have tried to demonstrate, *Chevron* and *Auer* rarely decide a case differently than the case would have been decided in the absence of the doctrines. One can probably count the number of cases on one hand in which the court said it would reach a different conclusion but for applying *Chevron* or *Auer* deference. Articles like [David Feder's blog here](#) that purport to show that *Auer* matters only show that judges cite *Auer*. They do not show how those judges would have voted in the absence of *Auer*. Even in David Feder's blog, the disagreements between the judges was over whether the regulations were or were not ambiguous, and *Auer* does not factor in making that decision. Indeed, in one of the cases, the court that invoked *Auer* said the agency's interpretation was not only reasonable but also the best one, clearly demonstrating that it would have ruled the same way in the absence of *Auer*.

Second, much of the motivation for SOPRA, as reflected by the floor speeches of its proponents, is to reduce government regulation, viewed as improper extensions of the laws passed by Congress. But one must have a short memory to support SOPRA on that basis. *Chevron* itself involved a Reagan administration attempt to lessen regulation, and it was the D.C. Circuit applying a SOPRA-type approach that set aside that more lenient regulation; it was the Supreme Court applying *Chevron* that upheld the more lenient regulation.

Third, and more academically, the theoretical justification offered to support overruling *Chevron* is faulty. If one reads the House Report on SOPRA, there is one set of explanations given for overruling *Chevron* and a different one for overruling *Auer*. The explanations for overruling *Chevron* are that *Chevron* is at odds with the text of the APA, because the APA says that the court is to "decide all relevant questions of law," not let agencies decide them; it is at odds with *Marbury v. Madison*, because the courts have given to the executive the power to say what the law is; and it is at odds with the Separation of Powers, because the courts have impermissibly delegated to agencies the judicial power to say what the law is. The problem with these explanations is that they all incorrectly characterize *Chevron*, as the late-Justice Scalia would have told them.

In step one of *Chevron* a court says what the law is *and is not*. Often a court will find that the law is discernible and uphold or set aside the agency action on that basis. However, if a statute is truly ambiguous – or as the Court’s opinion in *Chevron* described it, if after using all the ordinary tools of statutory construction, a court ascertains that Congress did not have an intention on the precise question at issue – then there is no “law” for the court to find. In short, Congress in the statute simply did not make “law” regarding this particular application. Thus, the court has decided *de novo* the question of law – the statute does not decide the case. Because the statute as written and interpreted does not provide the law necessary to decide the case, the court in *Chevron* recognized that it had two options. Either the court itself could fill the void and *make* the law, not interpret it, or it could *interpret* the vacuum left in the statute as Congress leaving to the agency the authority to *make* the law, so long as the agency’s action is permissible under the statute as it can best be interpreted.

However one wishes to characterize it, once a court has faithfully applied step one and found that it cannot discern a congressional intent reflected in the statute that would decide the case, someone needs to provide the “law” to decide the case. In *Chevron*, the Court assumed that Congress would prefer the agency to make that “law,” because Congress had given that agency the responsibility for implementing the law. Presumably, Congress could overrule *Chevron* and tell courts that it prefers the courts to make the law, but why would it prefer courts to do that? Even if the administration is in the hands of a different party than Congress, Congress has more influence on agencies’ decisions than it does on courts’ decisions.

The theoretical justification for overruling *Auer* is different. Here there is extended citation to the late-Justice Scalia’s concurring and dissenting opinions in which he outlined the policy reasons why he believe *Auer* should be overruled. Professors Sunstein and Vermeule have in [their blog here](#) and in their Chicago Law Review article provided their policy reasons for why they believe *Auer* should be retained. I will not add to that debate except to second, on the basis of my experience as a government lawyer writing regulations, their belief that *Auer* does not in fact result in agencies writing vaguer regulations than they otherwise would.

Missing from both the House Report and Sunstein and Vermeule’s article, however, is a consideration of a different incentive created by *Auer* deference. That incentive is to clarify rules by means of an interpretive rule or policy statement, rather than by issuing a new, clarified rule after notice and comment. The former is faster, cheaper, and easier in every respect, so there is already a great incentive to avoid notice-and-comment rulemaking. If *Auer* deference – which is equivalent to *Chevron* deference – will be accorded to the interpretive rule or policy statement, one of the incentives of using notice-and-comment rulemaking – to qualify for *Chevron* deference – disappears, and the balance between the two options is greatly tilted. And it is the misuse of interpretive rules and statements of policy that have exercised both the bench and the academy. Unlike the incentive to write ambiguous regulations in order to retain flexibility for later interpretation, for which there is no empirical support for agencies acting on that basis, the incentive to avoid notice-and-comment rulemaking is strong, and there is a wealth of empirical support for the fact that agencies indeed try to cut corners, especially given the number of cases challenging agency interpretive rules as improperly adopted legislative rules. This may suggest that *Auer* deference should not be at one with *Chevron* deference but instead should be equated with *Skidmore* deference – a lighter deference, one with the power to persuade if not to bind.

Agencies then could make a choice between taking the longer route with resulting greater deference, or the shortcut and less deference. The more obviously correct (or inconsequential) the interpretation is, the stronger the case for the shortcut. The more the interpretation raises important policy issues that may be highly contested, the stronger the case might be for notice-and-comment rulemaking. And shouldn't that be the correct direction for the incentives to work? Thus, the substitution of *Skidmore* respect for the great deference of *Auer* might well be worthwhile. But is it worth a statute? Perhaps, but not SOPRA with its effect on *Chevron*.

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Contemplating a Weaker *Auer* Standard

Kristin E. Hickman

In thinking about the future of *Auer* deference, I begin with a critical supposition, that *stare decisis* will prevail and the Court will not overturn *Auer*, at least not based on separation of powers principles.* Retaining *Auer*, however, does not mean that its doctrine will remain static. Drawing especially but not exclusively from *Christopher v. SmithKline Beecham Corp.*, at least some circuit court opinions suggest that a less deferential but more complicated version of *Auer* deference may be emerging. That complexity may, in turn, offer an additional reason why we ought to consider whether keeping *Auer* review is worth the candle.

Elsewhere in this series, [Cynthia Barmore](#) contended that the rate at which circuit courts grant *Auer* deference has fallen meaningfully since the Court decided *Christopher*. More qualitatively—and this observation is merely impressionistic rather than empirical—the circuit courts seem to be approaching analysis under the *Auer* standard differently, both in asking whether *Auer* rather than *Skidmore* provides the appropriate evaluative standard and in putting forth greater effort to assess regulatory meaning before deferring. In other words, the *Auer* doctrine may be developing its own Step Zero, Step One, and Step Two.

The *Auer* standard calls for giving an agency’s interpretation of its own regulations “controlling weight, unless that interpretation is plainly erroneous or inconsistent with the regulation.” Deference under *Auer* has often seemed to emphasize the doctrine’s *controlling weight* requirement, with little regard paid to exactly what might make an agency’s interpretation *plainly erroneous or inconsistent* with a regulation. Like the statutes they interpret, agency regulations are often facially ambiguous, giving rise to the disputed interpretations for which agencies claim deference under *Auer*. Yet, many judicial opinions that have applied *Auer* without question also have been comparatively shallow in their efforts to discern *regulatory* meaning using semantic canons, dictionary definitions, or regulatory history and purpose—in other words, the kinds of analytical tools one might expect to see in a comparable case challenging an agency’s interpretation of a *statute*. And, as the agency regulations at issue in these cases typically are not explicit in addressing the interpretive disagreement, courts could move fairly readily to give an agency’s agency interpretations of those regulations controlling weight. This approach toward *Auer* has presumably contributed to the standard’s high incidence of deference historically.

In *Christopher*, Justice Alito’s majority opinion stated that the *Auer* standard “does not apply in all cases” involving agency interpretations of agency regulations, and he synthesized past applications to offer a laundry list of circumstances in which it would be “undoubtedly inappropriate” or “unwarranted.” For the many circumstances in which Justice Alito suggested that *Auer* deference would be inappropriate, he set up *Skidmore* as an alternative (and theoretically less deferential) standard of review. Since then, several circuit court opinions have described *Christophers* establishing criteria or providing factors for ascertaining whether *Auer* or *Skidmore* provides the appropriate standard for evaluating the agency interpretation at bar—much as *United States v. Mead Corp.* provides its force-of-law requirement for applying *Chevron* rather than *Skidmore* review to agency statutory interpretations.

Additionally, whether or not Justice Alito intended to accomplish as much, several circuit court

opinions since *Christopher* have approached the question of whether an agency's interpretation of a regulation is "plainly erroneous or inconsistent with the regulation" by employing traditional tools of *statutory* construction to analyze—in very *Chevron*-like terms—whether the regulation being interpreted is "ambiguous" or "unambiguous." As in the *Chevron* context, the regulations might unambiguously support the agency's interpretation or might unambiguously be contrary to the agency's interpretation. But the opportunity for giving *Auer*'s "controlling weight" or deference to the agency's interpretation comes up only if the regulation is ambiguous.

Narrowing the scope of *Auer*'s applicability and engaging in more independent judicial analysis to evaluate regulatory meaning both have the effect of reducing the incidence of judicial deference under the *Auer* standard. But although the weaker *Auer* that seems to be emerging from *Christopher* and its progeny might persuade some Justices to honor *stare decisis* instead of overturning *Auer*, doing so comes with its own cost: doctrinal complexity.

Scholars and judges alike complain about the arcane debates over *Chevron*'s scope and operation. But at least the Court has articulated a theoretical basis for *Chevron* rooted in congressional delegation and intent. (Indeed, in a forthcoming article to be published next year in *George Washington University Law Review*, Nicholas Bednar and I argue that congressional delegation of major policymaking discretion to administrative agencies makes some variation of *Chevron* review inevitable.) By comparison, as its critics have argued, the Court has never offered a solid theoretical rationale in support of the *Auer* standard. We already apply *Skidmore* to formats like interpretive rules and amicus briefs when agencies use them to interpret statutes. It is not always so easy to tell when those formats interpret regulations rather than statutes. It certainly would be easier for courts just to apply *Skidmore* in evaluating agency interpretations of agency regulations, and probably more theoretically defensible. So is it really worth retaining *Auer* review if it takes on all of *Chevron*'s trappings? I, for one, am not so sure it is.

* I do not think I am exaggerating for the sake of argument in supposing this outcome. I am at least sympathetic to arguments that *Auer* deference is inconsistent with separation of powers principles. Yet, overturning a standard of review that dates back more than seventy years and has been applied in hundreds of cases is not something the Court is likely to take lightly. And a quick survey of the Court further suggests that the separation of powers rationale for repudiating *Auer* deference is unlikely to garner five votes. The late Justice Scalia, the leading voice against the *Auer* standard, is no longer with us to lead that charge. Justice Thomas clearly stated his own objections to *Auer* deference in *Perez v. Mortgage Bankers Association*, though he stopped short of calling unequivocally for overturning *Auer*. Chief Justice Roberts and Justice Alito have also expressed willingness to reconsider *Auer* given adequate briefing of the issue. Indeed, in *Mortgage Bankers*, Justice Alito described the arguments of Justices Scalia and Thomas as "offer[ing] substantial reasons why the [*Auer*] doctrine may be incorrect." But in *Christopher v. SmithKline Beecham Corp.*, Justice Alito arguably weakened *Auer* deference without killing it outright, which suggests that he might be satisfied with the curtailment of *Auer* as described in that case. And Chief Justice Roberts's interest in repudiating *Auer* deference seems even squishier, as he expressed merely that reconsideration "may be appropriate . . . in an appropriate case" in *Decker v. Northwest Environmental Defense Center*, and he did not join any of the opinions calling for reconsideration in *Mortgage Bankers*. Meanwhile, none of Justices Kennedy, Breyer, Ginsburg, Kagan, or Sotomayor has joined in any of the calls to reconsider the validity of the *Auer* standard. Among that group, some obviously care little about the nuances of judicial deference doctrine, while others will simply have a completely different view of separation of powers principles from Justices Scalia and Thomas. Given this combination of equivocation, likely disagreement, and outright disinterest, I expect *stare decisis* to prevail and the *Auer* standard to survive.

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After Auer?

Jeffrey Pojanowski

I planned to post solely about how judicial review would operate without *Auer* deference. I recently ruminated in a forthcoming *Missouri Law Review* symposium [paper](#) about a future without *Chevron*, and I think post-*Auer* and post-*Chevron* futures offer interestingly different implications. But along the way I found myself thinking about the origins of *Auer* deference. This led me to appreciate how *Bowles v. Seminole Rock*, which gave rise to what we now know as *Auer* deference, is plainly correct, given its circumstances and the era's doctrinal backdrop and assumptions about interpretation. That conclusion further suggests, however, that doubts about *Auer* doctrine in its current form flow from its expansion beyond that constraining context. To be more concrete, *Seminole Rock* looks like a sound application *Skidmore* deference that has been generalized and extended beyond the context in which it originally made sense. This conclusion, moreover, sheds light on what animates the current push against *Auer* deference and what a world without *Auer* might look like.

Let me explain. Before there was *Seminole Rock/Auer* deference, let alone *Chevron* deference, there was *Skidmore v. Swift & Co.* Handed down in 1944, the unanimous opinion addressed how much credence reviewing courts should give to administrative agencies' legal interpretations. *Skidmore* tells us that the "weight of [the agency's] judgment...will depend upon 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." Today, in the context of reviewing agencies' interpretations of *statutes*, courts invoke *Skidmore* when the more deferential *Chevron* framework does not apply. One alternative to *Auer* deference is applying *Skidmore* to agency regulations as well. What would that look like? *Seminole Rock* may show us just that.

Seminole Rock, decided in 1945, concerned the proper interpretation of a 1942 price control regulation. The opinion stated that "the ultimate criterion" in deciding the case was "the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." The Court cited no authority for this bold proposition. But let's think about *Seminole Rock* as a sub silentio application of *Skidmore* deference. *Skidmore*, which the Court handed down the previous year, was more an expression of conventional wisdom about judicial review than a path-breaking announcement of a new standard. The *Skidmore* framework and its assumptions were plainly in the air—and in the briefs. Thanks to Professor Aditya Bamzai's digging, we now know that Henry Hart's [brief](#) for the government in *Seminole Rock* explicitly relied on *Skidmore*.

When thinking of *Seminole Rock* as a *Skidmore* case, let's also think about the context of interpretive theory at the time. Mainstream statutory interpretation in the mid-1940's was far more intentionalist than today. *Skidmore* and *Seminole Rock* come way before textualism's critique of the validity—or even the cogency—looking to the original intentions of an historical legal author. The cases also predate the consolidation at the Supreme Court of the Legal Process focus on a *hypothetical* reasonable legal author pursuing reasonable purposes reasonably. This is

not to say everyone on the Court was an old-fashioned intentionalist, but repair to historical intent was far more likely to be a first-order working assumption than it is now.

With that in mind, consider how a run-of-the-mill intentionalist would approach *Seminole Rock* under *Skidmore*. Here we have the legal author offering a reading of its recent regulation. If the intent of the author is central, the agency's account is certainly something that "has the power to persuade" under *Skidmore*. The account need not be decisive: an author's hasty, poorly reasoned, inconsistent, or plainly countertextual claim about the meaning of its legal pronouncement would raise suspicions about the sincerity or reliability of the narrator. Those would also be the very kinds of flaws that, under *Skidmore*, would deprive the agency's interpretation of its power to persuade. Nothing in the *Seminole Rock* 8-1 opinion suggests the Court saw any of these flaws in the agency's reportage.

This understanding of *Seminole Rock* as an easy 1945 *Skidmore* case coheres with the era's doctrinal framework and interpretive mood. Furthermore, it sheds further light on why, as Bamzai has discovered and explained in [this symposium](#), Justice Murphy's first draft of *Seminole Rock* found congressional intent irrelevant to the inquiry. The primary matter is the intent of the agency author, so long as it bears other indicia of credibility. Similarly, this reading of *Seminole Rock* resounds with Henry Hart's briefing in the case for the government, which also focused on the intent of the author and [cited](#) *Skidmore*, but not the proto-*Chevron* 1941 decision *Gray v. Powell*. Finally, this reading helps explain why nobody at the time seemed to think *Seminole Rock* was a big deal. If *Seminole Rock* conferred extensive lawmaking authority to agencies in the way we think about it today, one would expect a fulsome dissent about separation of powers along the lines of Justice Jackson in *Chenery II*. (Justice Jackson, I might add, authored *Skidmore*.) Here, we only have Justice Roberts issuing a one-line dissent agreeing with the court of appeals that interpretation was implausible.

If you are sympathetic with old-fashioned intentionalism and think of judicial review in terms of *Skidmore*, *Seminole Rock* is a run-of-the-mill 8-1 case. Things look quite different, however, if you pluck out and abstract *Seminole Rock*'s "plainly erroneous" verbiage beyond this context, such as interpretations the long antedate the regulation's original promulgation. Furthermore, if you drop the *Skidmore* contextualism and *Chevron*-ize the doctrine by reading it as a strong, general rule of deference grounded in law-making (not law-reporting) authority, the doctrine looks even more radical. Finally, drop any faith in intentionalism, and the doctrine begins to look incomprehensible in the eyes of a 1940's interpreter.

In short, the move from the *Seminole Rock* case to "Auer deference"—understanding *Auer* as a *Chevron*-like deference rule presupposing delegated authority to make policy in the gaps—creates an entirely different doctrine than envisioned in 1945. It is this retheorization, moreover, which raises the worries many have about *Auer* today. If an agency is using delegated legal authority when it interprets unclear regulations, some will worry about separation of powers, subdelegation, and the like. But if presumptive deference is grounded in authorial competence, that changes the game. The agency is reporting what preexisting law means, not making new law in the gaps it created.

Alasdair MacIntyre, in his controversial and magisterial book *After Virtue*, argued that moral argument today is incoherent and interminable because we use terms and concepts that were at home in an Aristotelian understanding of human nature and human goods that we can no longer accept or even comprehend. A parallel pattern may have unfolded with our deference doctrine, which was once rooted in an intellectual milieu less skeptical of intentionalism and less likely to understand legal uncertainty as a policy space. (Again, this is a generalization: not everyone in 1945 was an intentionalist, and legal realists had weakened many thinkers' faith in legal craft. Similarly, there are some attempts today to revive intentionalism *in general* and to think about it more rigorously in the *Auer context*.) *Auer* deference, in this light, is a fragment from an earlier legal era detached from the original suppositions which made *Seminole Rock* unremarkable in the first place. Small wonder, then, that the Court's abstraction and expansion of the doctrine in a different jurisprudential climate has proven controversial.

One takeaway from my *Missouri symposium paper* is that the press to abandon *Chevron* is motivated by a return to more classical legal cast of mind, one which less readily accepts administrative law's dogma that resolving uncertain interpretive questions is a matter of policy choice as opposed to legal craft. The parallels play out here with respect to *Auer* deference as well. Professor Richard Ekins argues in the opening chapter of *The Nature of Legislative Intent* that, until the latter half of the 20th Century, intentionalist interpretation was the coin of the realm in Anglo-American jurisprudence. Little surprise, then, that a jurist more amenable to classical legal thought might be willing to defer to agency interpretations in limited circumstances of authorial reliability, while rejecting deference wholesale. *After Auer*, a return to *Seminole Rock*.

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Conclusion

Aaron Nielson

Our symposium on *Seminole Rock* deference has now come to an end. I will take a few moments, however, to thank all of the participants. By my count, 30 different contributors posted as part of this symposium. We are fortunate that so many folks, with so many different perspectives, were willing to take the time to share their knowledge. Going forward, I hope that future scholarship on *Seminole Rock* will begin with this symposium. And more broadly, I expect that as legal scholarship evolves, there will be many more events like this one.

I also wish to thank the wonderful editors of the *Yale Journal on Regulation*—with particular thanks to Ravi Bhalla, Zachary Ramirez-Brunner, and Yume Hoshijima. This symposium could not have happened without them. These editors work hard and never complain (even when I give them cause to do so). They do great work.

In short, we appreciate all those who made this event possible. I thought I understood *Seminole Rock* before; now I know there is a lot more to think about. Hopefully, dear readers, you too have learned something new.