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An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules

Richard J. Pierce, Jr.[1] and Joshua Weiss[2]

Introduction

In a recent essay,[3] one of us (Pierce) described and analyzed ten empirical studies of judicial review of agency actions. With one exception, the studies found that a court's choice among six review doctrines had little, if any, effect on the outcome of cases. Courts at all levels of the federal judiciary uphold agency actions in about seventy per cent of cases, no matter whether the court applies *Chevron*,[4] *Skidmore*,[5] *State Farm*,[6] *Universal Camera*,[7] or de novo review.[8] The one exception was the finding with respect to Supreme Court applications of the *Auer*[9] doctrine. The Supreme Court seems to take an extraordinarily deferential approach when it reviews agency interpretations of agency rules. William Eskridge and Lauren Baer found that the Court upholds 91% of such agency actions.[10]

The studies of judicial review of agency actions leave one important void. No study has previously calculated the rates at which district courts and circuit courts uphold agency interpretations of agency rules. Thus, we have no way of knowing whether all courts apply the *Auer* doctrine in the same extraordinarily deferential way that the Supreme Court does, or whether applications of *Auer* by district courts and circuit courts

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[3] Richard J. Pierce, Jr., What Do the Studies of Judicial Review of Agency Actions Mean? ___ Ad. L. Rev. ___.
[4] Chevron v. NRDC, 467 U.S. 837 (1984).
[5] Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[6] Motor Vehicle Manufacturers' Ass'n v. State Farm Automobile Ins. Co., 463 U.S. 29 (1983).
[7] Universal Camera v. NLRB, 340 U.S. 474 (1951).
[8] Pierce, supra. note 3, at ___.
[9] Auer v. Robbins, 519 U.S. 452 (1997).
[10] William Eskridge & Lauren Baer, The Continuum of Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 Geo. L. J. 1083, 1142 (2008).

reflect instead the seventy per cent affirmance rate that seems to be the norm for all other doctrines. The main purpose of this article is to fill that void and to answer that question.

In *Auer*, the Court announced that an agency's interpretation of an agency rule "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation . . . ." [11] The Court issued its opinion in *Auer* in 1997, but it quoted from its oft-cited 1945 opinion in *Seminole Rock* and applied the *Seminole Rock* test to the interpretation that was at issue in *Auer*.[12] Thus, *Seminole Rock* and *Auer* announce the same test. Courts have been applying the *Auer*/*Seminole Rock* test for sixty-five years. Many judges and scholars have characterized the *Auer*/*Seminole Rock* test as analogous to the more recent *Chevron* test except, of course, that *Chevron* applies to agency interpretations of statutes, while *Auer*/*Seminole Rock* applies to agency interpretations of rules.[13]

Judicial deference to agency interpretations of agency rules might be supported on at least three grounds. First, deference might be supported by the belief that the agency is more likely than a court to know what it intended when it issued a rule. We think that is a weak justification for deference, however. In many cases, the interpretation at issue was announced so long after the rule was issued that it is unlikely that the agency decision makers who issued the interpretation played any role in the decision making process that led to the issuance of the rule. Moreover, most courts, including the Supreme Court, confer *Auer*/*Seminole Rock* deference on agency interpretations of agency rules when the

[11] 519 U.S. at 461.
[12] Bowles v. Seminole Rock, 325 U.S. 410, 414 (1945).
[13] See Richard J. Pierce, Jr., I Administrative Law Treatise §§3.3 and 6.11 (5th ed. 2010).

agency changes its interpretation as long as the agency acknowledges that it is making a change and gives plausible reasons for the change.[14]

The second reason for deference is stronger. Deference is justified because the agency understands better than a court which interpretation will allow the agency to further its statutorily-assigned mission. This is the familiar expertise-based comparative institutional advantage that has long been the primary justification for most doctrines that instruct courts to defer to agencies. We think this justification for deference is strong, but we can think of no reason why this justification for deference is more powerful in the context of agency interpretations of agency rules than in the context of agency interpretations of agency-administered statutes, agency policy decisions, or agency findings of fact. Yet, the Supreme Court's pattern of decisions suggests that the Court confers more deference on agency interpretations of agency rules than on any other type of agency action.

The third reason is rooted in the differences in the jurisdictional reach of agency interpretations and judicial interpretations. Since an agency's jurisdiction is national and a circuit court's jurisdiction is regional, a high degree of judicial deference to agency interpretations of agency rules furthers the goal of maximizing national uniformity in implementing national statutes.[15] Conversely, a low degree of deference would reduce national uniformity, since circuit courts are likely to adopt differing interpretations of agency rules. We also think this justification is strong, but it is no stronger in the context of agency interpretations of agency rules than in the context of agency interpretations of

[14] Id. at §6.11.
[15] Pierce, supra. note 13, at §3.4.

agency-administered statutes. Indeed, Peter Strauss relied on this reasoning to support his argument for a strong version of *Chevron* deference in 1987.[16]

John Manning has argued that courts should not defer to agency interpretations of agency rules.[17] Since agencies are the source of the rules they interpret, Manning argued that deferring to agency interpretations of ambiguous agency rules encourages agencies to maximize the ambiguities in the rules they issue. This incentive is powerful because an agency must use the resource-intensive and time-consuming notice and comment process to issue a rule, while it is not required to use any procedures to interpret a rule.[18] Thus, the agency has an incentive to issue a broadly worded rule capable of bearing a wide range of interpretations and then to use the process of interpreting the rule to make most important decisions, thereby avoiding the cost, delay, and risks of using the notice and comment process in that recurring context.

The ninety per cent plus rate at which the Supreme Court upholds agency interpretations of agency rules suggests that the Court has not found Manning's criticism of judicial deference to agency interpretations of rules persuasive. The Court provided at least a partial response to Manning's concern in its 2006 opinion in Gonzales v. Oregon,[19] however. The Court announced and applied an antiparroting canon in the context of agency interpretations of their own rules. If an agency issues a rule that merely parrots the relevant statutory language, the agency's interpretations of the rule do not receive *Auer*/*Seminole Rock* deference.

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[16] Peter Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Actions, 87 Colum. L. Rev. 1093 (1987).
[17] John Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612 (1996).
[18] Pierce, supra. note 13, at §6.4.
[19] 546 U.S. 243 (2006).

The antiparroting canon applies to rules that go beyond mere parroting of statutory language. Indeed, the rule at issue in *Gonzales* went beyond the statutory language in some respects, as the dissenting Justices pointed out.[20] Thus, the antiparroting canon deprives agencies of *Auer*/*Seminole Rock* deference unless the rule the agency is interpreting goes beyond the language of the statute by particularizing or clarifying the statutory language to some significant but uncertain extent. The antiparroting canon still leaves the agency with some degree of discretion to engage in the practice that concerns Manning, however. The agency still has an incentive to use the notice and comment procedure to issue a broadly-worded rule that contains many ambiguities, as long as the rule clarifies or particularizes the statutory language to the extent necessary to avoid the "parroting" characterization. The agency could then use the interpretive process to make most important decisions.

We think the case for judicial deference to an agency's interpretation of an agency rule is strong notwithstanding Manning's critique. However, we are unable to identify any reason why courts should accord greater deference to agency interpretations of agency rules than to agency interpretations of agency-administered statutes, agency policy decisions, or agency findings of fact. Thus, we are puzzled by the Supreme Court's apparent practice of conferring much more deference on agency interpretations of rules than on any other type of agency action.

The Study and Findings

[20] Id. at 278-80.

The main purpose of this study was to determine whether the Supreme Court is alone in its practice of conferring extreme deference on agency interpretations of rules or whether district courts and circuit courts also accord some form of super deference to agency interpretations of rules. Additionally, we designed the study to allow us to estimate the extent to which judicial applications of the *Auer*/*Seminole Rock* doctrine are affected by the political or ideological perspectives of the judges who apply the doctrine. For that purpose, we studied the 34 cases in which district courts applied *Auer*/*Seminole Rock* and the 57 cases in which circuit courts applied *Auer*/*Seminole Rock* between January 1, 1999 and December 31, 2001, and the 74 cases in which district courts applied *Auer*/*Seminole Rock* and the 54 cases in which circuit courts applied *Auer*/*Seminole Rock* between January 1, 2005 and December 31, 2007.

We chose these two time frames because the first period was likely to involve review of rule interpretations adopted by a Democratic Administration, while the second was likely to involve review of rule interpretations adopted by a Republican Administration. That choice of time periods, in turn, allowed us to make some judgment with respect to the effect that the political or ideological preferences of judges had on the degree of deference they accord agency interpretations of agency rules.

The sample of cases we studied—219—is large enough to give us confidence that our findings are representative of the pattern of decisions in the total population of cases in which lower courts apply *Auer*/*Seminole Rock*. Courts upheld agency interpretations in 76.26% of the cases we studied. There was no significant difference between the rate at which district courts upheld agency interpretations (75.93%) and the rate at which circuit courts upheld agency interpretations (76.58%).

There also was no statistically significant difference between the rate at which judges voted to uphold interpretations of rules adopted by agencies headed by members of the same party as the judge versus the rate at which judges voted to uphold interpretations adopted by agencies headed by members of the other party. Republican judges voted to uphold interpretations adopted by a Republican Administration in 77.94% of cases, while Democratic judges voted to uphold interpretations adopted by a Republican Administration in 78.57% of cases. Republican judges voted to uphold interpretations adopted by a Democratic Administration in 74.51% of cases, while Democratic judges voted to uphold interpretations adopted by a Democratic Administration in 74.42% of cases.

What Do the Findings Mean?

Our finding that district courts and circuit courts upheld agencies in 76% of cases in which they applied the *Auer*/*Seminole Rock* doctrine contrasts starkly with Eskridge and Baer's finding that the Supreme Court upholds agencies in 91% of such cases.[21] The Supreme Court appears to be alone in the extreme deference it accords agency interpretations of rules. Our finding suggests that district courts and circuit courts apply *Auer*/*Seminole Rock* deference in about the same manner as they and the Supreme Court apply the other deference doctrines that have been subjected to empirical study. The prior studies of judicial applications of the other deference doctrines produced findings of affirmance rates in the following ranges: *Chevron*-64 to 81%; *Skidmore*-55 to 71%; *State*

[21] Eskridge & Baer, supra. note10, at 1142.

Farm-64%; and, *Universal Camera*-64 to 71%.[22] The overall rate at which district courts and circuit courts upheld agency actions through application of the *Auer*/*Seminole Rock* doctrine, 76%, is within the range of the findings of the studies of other doctrines albeit at the high end of that range.

Our findings with respect to the overall rate at which district courts and circuit courts upheld agency interpretations of agency rules fit well with David Zaring's finding that courts uphold agency actions in about 70% of cases no matter what review doctrine the court applies.[23] Our findings are also consistent with the normative case for judicial deference to agency interpretations of agency rules we discussed in the introduction to this essay.[24] The case for deference to agency interpretations of agency rules is strong, but it is no stronger than the case for judicial deference to agency interpretations of agency-administered statutes, agency policy decisions, and agency findings of fact.

Our finding that the ideological and political preferences of judges had no significant effect on their votes in cases in which they were called upon to review agency interpretations of agency rules differs from the findings of many of the studies of judicial review of other types of agency actions. Many of the studies of judicial review of agency statutory interpretations and agency policy decisions found that between 15% and 31% of votes could be explained with reference to the ideological or political preferences of the reviewing judges.[25] By contrast, David Zaring's study of 678 votes of judges in cases in which courts reviewed agency findings of fact produced the same result as our study of

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[22] Pierce, supra. note3, at ___.
[23] David Zaring, Reasonable Agencies, 96 Va. L. Rev. 2317, 2351-55 (2010).
[24] See text at notes 13-20 supra.
[25] E.g., Thomas Miles & Cass Sunstein, The Real World of Arbitrariness Review, 75 U. Chi. L. Rev. 761, 788 (2008); Thomas Miles & Cass Sunstein, Do Judges Make Regulatory Policy? 73 U. Chi. L. Rev. 823 2006); Frank Cross & Emerson Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal, 107 Yale L. J. 2155, 2171 (1998).

441 votes of judges in cases in which courts reviewed agency interpretations of rules. Zaring found that the political and ideological preferences of judges had no significant effect on their pattern of voting in cases in which courts reviewed agency findings of fact.[26]

It is possible that the difference between the findings of studies such as Zaring's and ours--that judges' political preferences had no significant effect on their voting patterns--and the findings of studies that found that judges political preferences had a significant effect on their voting patterns simply reflects reality. In other words, judges may not be influenced by their ideological and political preferences when they review agency interpretations of agency rules and agency findings of fact even though they are influenced by their political and ideological preferences when they review agency interpretations of statutes and agency policy decisions. We are skeptical of that explanation, however. We believe that all judges attempt to engage in review of agency actions without allowing their political and ideological preferences to influence their decisions. We can think of no reason why they would be more successful in pursuing that laudable goal in the process of reviewing some aspects of the agency decision making process than in the process of reviewing other aspects of that process.

There is another plausible explanation for this difference between our findings and those of many of the prior studies. Most studies that found a strong connection between judges' political and ideological views and their votes in agency review cases relied primarily on a methodology different from ours. In those studies, the researchers first classified each agency action as "liberal" or "conservative" and then compared the number of Republican judges who voted to uphold "liberal" and "conservative" actions

[26] David Zaring, Reasonable Agencies, 96 Va. L. Rev. 2317, 2361-62 (2010).

with the number of Democratic judges who voted to uphold "liberal" and "conservative" actions.[27]

We decided not to use that methodology because we lacked confidence that we could classify accurately as "liberal" or "conservative" all of the agency actions that fell within the large sample of agency actions we studied. We chose instead to use a methodology that did not require us to characterize the actions we studied. We categorized agency actions as Democratic or Republican based on the political party that controlled the executive branch at the time the agency adopted the interpretation at issue. Our methodology was simple to apply, and our findings are easy for other researchers to verify or refute. Our methodology is based on the implicit assumption that agencies in Republican Administrations tend to adopt interpretations of rules that are consistent with the political and ideological preferences of Republicans and that agencies in Democratic Administrations tend to adopt interpretations of rules that are consistent with the political and ideological preferences of Democrats. We recognize that the assumption we indulged is not universally true, but we believe it is generally true

We are not prepared to argue that our methodology is superior to the methodology used in the studies that found that the political and ideological preferences of judges had a significant effect on their pattern of voting in cases in which they reviewed agency actions. At least in theory, the methodology used in those studies is better than the methodology we chose. The studies that found a significant difference in voting patterns based on judges' political preferences attempted to measure the political and ideological content of each agency action directly rather than to rely on the imperfect surrogate for

[27] E.g., Miles & Sunstein, note 25 supra., at 788; Miles & Sunstein, note 25 supra., at 846; Cross & Tiller, note 25 supra., at 2168.

the political and ideological content of an agency action we chose – identity of the political party that controlled the executive branch at the time an agency adopted an interpretation of a rule.

Zaring has expressed concern that at least some of the difference in voting patterns that other researchers have attributed to the political preferences of judges may instead be attributable to errors in the inherently difficult process of characterizing agency actions as liberal or conservative.[28] We are not in a position to evaluate that possibility, but our finding that the political preferences of judges had no significant effect on their voting patterns in cases in which courts reviewed agency interpretations of agency rules raises the same question that troubles Zaring.

[28] Zaring, supra. note 26, at 2364-65.