Counting Out Auer Deference

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Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 **Ohio St. L.J.** 813 (2015), available at SSRN.

Administrative law geeks know that *Auer* deference has been in trouble. This doctrine, which used to go by the much better name of *Seminole Rock* deference, instructs courts to defer to an agency's interpretation of its own rule so long as the interpretation is not plainly erroneous. Its primary supporting intuition is that an agency should be better than anyone else at interpreting a rule that it drafted and implements. During the last five years of his life, Justice Scalia mounted a strong campaign to eliminate this doctrine, which he had come to regard as a terrible affront to separation of powers. Although Justice Scalia is now gone, his critique of *Auer* retains substantial support on the Court. Justice Thomas agrees with it; Justice Alito has expressed strong sympathy; and the Chief Justice might be on board, too.

But, before rushing off to dump *Auer* in the ashbin of administrative law history, those who prefer to take their separation of powers with a dash of functionalism might like to know: Just how are courts applying this deference doctrine these days, anyway? Fortunately, Cynthia Barmore has shed considerable light on this question in her article, *Auer in Action: Deference after Talk America*, which was just published in the Ohio State Law Journal. Her hard work reveals that affirmance rates under *Auer* have declined in recent years and are in line with the rates for other so-called "deference" doctrines. Courts do not, in short, seem to treat *Auer* as granting agencies free rein to abuse regulated parties with aggressive (mis)interpretations of their regulations.

Justice Scalia first expressed doubts concerning the validity of *Auer* deference in his brief concurrence in *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011). The core problem is that it allows an agency both to promulgate and interpret law, and "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, 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." *Id.* (quoting Montesquieu, **Spirit of the Laws** bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl.1949)).

A couple of years later, in *Decker v. Northwest Environmental Ctr.*, Justice Scalia thundered, "[e]nough is enough. For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of deferring to an agency's interpretation of its own regulations." 133 S. Ct. 1326, 1339 (2013) (quotation marks omitted) (concurring in part and dissenting in part). The Chief Justice and Justice Alito conceded that Justice Scalia "raise[d] serious questions" about the validity of *Auer* deference and that "[i]t may be appropriate to reconsider that principle in an appropriate case." *Id.* at 1338 (Roberts, C.J., concurring).

The campaign continued in *Perez v. Mortgage Bankers Ass'n*, in which Justice Scalia argued that *Auer* deference violates the APA by giving agencies the power to imbue their interpretations with the force of law. 135 S. Ct. 1199, 1212 (2015) (concurring). Justice Thomas concurred separately and at some length, praising John Locke and Baron de Montesquieu while condemning *Auer* deference for eroding judicial power and transferring it to the executive. *Id.* at 1217 (Thomas, J. concurring).

Notably absent from these condemnations of *Auer* is any empirical discussion of its practical effects. This gap is especially striking given that various empirical studies suggest that deference doctrines in administrative law may not have much impact on the rates at which courts affirm agencies. The affirmance rates for arbitrariness review, substantial evidence review, *Chevron* deference, and *Skidmore* deference all hover around 60-70%. David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 169 (2009). Admittedly, one study did find that agencies win at a 91% rate

under the *Auer* doctrine at the Supreme Court. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 **Geo. L.J.** 1083, 1142 & tbl.15 (2008). This result has lent *Auer* something of a reputation as a super-potent form of deference. A 2011 study of *Auer* in the lower courts, however, found affirmance rates of about 76% during 1999-2001 and 2005-2007. Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 **Admin. L. Rev.** 515, 519 (2011).

Another notable gap in the conservative justices' condemnations is any recognition that the Court in recent years has tightened *Auer* deference, hemming it in with new limits. For instance, in *Gonzales v. Oregon* the Court declared an "anti-parroting" canon that blocks application of *Auer* to rules "that do little more than restate the terms of the statute itself." 546 U.S. 243, 257 (2006). In *Christopher v. SmithKline Beecham Corp.* the Court held that *Auer* deference should not apply in cases where the new interpretation would sandbag regulated parties by "unfair surprise." 132 S. Ct. 2156, 2167 (2012).

The imposition of these new limits made it all the more important to look again at how lower courts are applying *Auer*. To this end, Cynthia Barmore collected and reviewed 190 opinions in which circuit courts applied *Auer* deference since issuance of *Talk America* in 2011. She found, consistent with the Pierce & Weiss study, an overall affirmance rate of about 75%. More intriguingly, she also found that this affirmance rate declined over time as the Court turned the screws on *Auer.* Between *Talk America* (2011) and *SmithKline* (2012), the affirmance rate was 82.3%; between *SmithKline* (2012) and *Decker* (2013), the affirmance rate was 74.4%; and between *Decker* (2013) and the end of 2014, the affirmance rate was 70.6%.

Shucks, that last number looks an awful lot like the affirmance rate that other deference doctrines typically yield, doesn't it?

Of course, all this data does not interpret itself. On its face, it does, however, suggest that agencies are not, armed with *Auer* deference, roaming the land abusing regulated parties with unreasonable interpretations of regulations. It also suggests that the lower courts are getting the Supreme Court's message to be a bit more careful when applying *Auer.* One should think that data like this should inform the Supreme Court's decision in whatever test case it takes to determine whether to get rid of *Auer* based on centuries-old abstractions concerning separation of powers. Cynthia Barmore is to be applauded for gathering and analyzing this data.

Ms. Barmore has lots more to say both descriptively and prescriptively based on her study. To pique your interest, here are a few of her observations: The court that knows agencies and administrative law the best, the D.C. Circuit, has one of the lowest affirmance rates among the circuits when applying *Auer*—65%. Practice may not make perfect—the Department of Labor and the Bureau of Immigration Affairs were among the agencies that invoked *Auer* most often, but their affirmance rates were among the lowest at 62% and 61%. And, although the good Baron de Montesquieu, were he still with us, might not care for *Auer*, lower courts do not seem to mind applying it. In only one case out of the 190 did a court suggest that *Auer* deference compelled it to accept an interpretation that the court would otherwise reject.

To find out more, by all means check out Cynthia Barmore's article at the link provided above.

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