Saving Auer

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Cass R. Sunstein and Adrian Vermeule, *The Unbearable Rightness of* Auer*,* **U. Chi. L. Rev.** (forthcoming 2016), available at SSRN.

In 1945 the Supreme Court decided the case of Bowles v. Seminole Rock & Sand Co., in which it stated without citation to precedent or other explanation that, when the meaning of the words in an agency's regulation are in doubt, "the administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Over the years, this language has been often quoted by the Supreme Court, including in 1997 by Justice Antonin Scalia in Auer v. Robbins. Subsequently, courts and commentators have usually referred to this doctrine as *Auer* deference, and until recently the doctrine generally occasioned little discussion in the courts except in some cases where there was a suggestion of a possible exception from the doctrine when the regulation in question was itself hopelessly vague. But recently, there has been a frontal attack on the *Auer* doctrine led by the late Justice Scalia and Justice Thomas and apparently viewed sympathetically by Justice Alito and the Chief Justice. Moreover, leaders in the House and Senate have introduced a bill essentially to overrule *Auer*.

Now come Professors Sunstein and Vermeule in *The Unbearable Rightness of* Auer to take up the cudgel in defense of *Auer*. Their article is the starting point for any further discussion of the *Auer* doctrine.

The first intimation of a problem with *Auer* occurred in 2011, when Justice Scalia wrote a concurring opinion in Talk America, Inc. v. Michigan Bell Telephone Co., in which he admitted to having uncritically accepted the doctrine in the past, but he indicated that, while in the case before him no one had asked for reconsideration of the doctrine, in the future he would "be receptive to doing so." He summarized the structural constitutional arguments against the doctrine contained in Professor John F. Manning's 1996 law review article, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules. *Talk America* was quickly followed by Christopher v. SmithKline Beecham Corp., *Decker v. Northwest Environmental Defense Center*, and Perez v. Mortgage Bankers Ass'n. In *SmithKline*, the Court refused to accord *Auer* deference to an agency's interpretation of its regulation when first applied in an enforcement action, citing both to the Manning article and a more recent article by Professor Matthew Stephenson and Miri Pogoriler, Seminole Rock*'s Domain*, suggesting limits to when *Auer* deference should apply.

In *Decker*, Justice Scalia dissented from the Court's deference to the EPA's interpretation of its own regulation, taking up the invitation by the respondent to reconsider the *Auer* doctrine and concluding that it should be overruled. The Chief Justice and Justice Alito noted that, while the respondents had in one sentence in a footnote invited the Court to reconsider *Auer*, the issue had not been briefed or argued. Consequently, although they believed Justice Scalia had raised "serious questions about the [*Auer* doctrine]," they said they would await a case when the issue was fairly raised.

Finally, in *Mortgage Bankers*, Justice Scalia, concurring, again indicated his desire to overrule the *Auer* doctrine, but now his position was joined by Justice Thomas, who wrote separately to explain his constitutional bases for objecting to the doctrine. Justice Alito also wrote separately to indicate his concern with the doctrine, but again he said that he would "await a case in which the validity of

Seminole Rock may be explored through full briefing and argument." And last month, leaders in the House and Senate introduced the Separation of Powers Restoration Act, which would require courts in reviewing agency action to interpret laws and regulations de novo, without showing any deference at all. In short, *Auer* has been under relentless attack recently.

Against this attack, Professors Sunstein and Vermeule provide a response. They begin by positing that there are three possible responses to an ambiguous regulation: first, the agency's interpretation prevails, with certain exceptions; second, judges resolve the ambiguity without any deference to the agency's view; and third, in the face of ambiguity the private sector is allowed to do what it wants. The first response is the current *Auer* doctrine. The second is what Justices Thomas and Scalia have suggested and what the Separation of Powers Restoration Act would require. The third, the authors point out, no one has suggested. It would be sort of a rule of lenity applicable to agency regulations. The third option is something of a strawman, which the authors put away rather quickly, noting that ambiguity does not mean authorization. There might be another option the authors don't mention, which I will discuss later.

The authors take us over familiar ground with respect to *Chevron v. NRDC*, citing and quoting from a law review article by former Justice Scalia. First, Justice Scalia saw no conflict between affording *Chevron* deference and the text of the Administrative Procedure Act, which states that a "reviewing court … shall interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action." He found it self-evident that Congress could explicitly delegate to an agency the determination of the meaning of a statutory provision. Then, it would be for the courts to determine whether the agency acted reasonably within that delegation, not to determine for themselves the meaning of the provision. When a law is ambiguous, however, it is either because Congress had a particular intent, but failed to express it, or Congress had no particular intent, but meant to leave its resolution to the agency. While the former situation would call for judicial resolution of the ambiguity, the latter would be an implicit delegation to the agency.

The problem was how to tell what type of ambiguity was involved in a particular case. Justice Scalia believed this case-by-case resolution was "a font of uncertainty and litigation." He believed the better approach was *Chevron*, which "represents merely a fictional, presumed intent [to confer discretion on the agency], and operates principally as a background rule of law against which Congress can legislate." Even if this fiction was not 100% accurate, which the prior case-by-case approach certainly had not been, at least it provided a relatively clear rule, relatively easily applied. Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 **Duke L.J.** 511, 516-17. Sunstein and Vermeule agree with Justice Scalia on all these points, "so long as it is understood that the choice of fiction depends on the consequences of adopting one or another." In other words, if one is to adopt a legal fiction, it should be done in a matter that maximizes benefits (or minimizes costs) compared to the alternative. Justice Scalia, at least in 1989 and for years afterward, believed *Chevron* was indeed that best alternative.

In addition, Justice Scalia saw no conflict between *Chevron* and the separation of powers generally, because Congress was always in control. It could eliminate the doctrine by statute if it wished, and it was always able to make clear its intent if an agency, upheld by a court applying *Chevron*, adopted an interpretation not to its liking.

In light of this general agreement with *Chevron*, Professors Sunstein and Vermeule ask: Why isn't *Auer* deference equally justified? First, it seems self-evident that Congress could explicitly authorize an agency to issue interpretations of its regulations with the force of law. Indeed, it does so occasionally without noticeable consternation. *See*, *e.g.*, 12 U.S.C. § 2617(b). As with *Chevron*, however, usually Congress does not explicitly delegate that authority, but then, also like *Chevron*, it has not explicitly

withheld that authority. So, why can't *Auer* deference represent just another fictional, presumed intent? Isn't *Auer* also just the better alternative to independent judicial interpretation?

And the advantages of *Auer* deference are clear and no doubt explain why the doctrine has for so long been unquestioned. The first is the "agency's comparative epistemic advantage as interpreter." That is, the agency is in the best position to know what the agency's intent was underlying the legislative rule. The second is the agency's comparative advantage as policymaker. If the ambiguity is such that it requires an exercise of policymaking to some degree, then just as with *Chevron*, the agency with its at least tangential political responsiveness is better placed to make policy judgments than the courts.

The authors then turn to the bases for the recent critiques. The first is that *Auer* creates an incentive for agencies to adopt legislative rules that are vague and broad so that the agencies may retain the flexibility to interpret them in the future, even with retrospective effect. The authors acknowledge this concern as theoretically valid, but it strikes them "as a phantasmal terror." They say that no one has provided an example in the history of American regulation where an agency has designed a vague and broad regulation *because* of the advantages provided by *Auer* deference. Professor Sunstein notes that in his four years as director of the Office of Information and Regulatory Affairs, in which he dealt with well over two thousand rules, "he never heard even a single person suggest, or come close to suggesting, that a regulation should be written ambiguously in light of *Auer*." I might add that in my three-plus years as the lawyer responsible for an agency's regulations, albeit more than 30 years ago, I can say the same. This concern, the authors say, "is a reflection of a pervasive error within the economic analysis of law, which is to identify the likely *sign* of an effect and then to declare victory, without examining its *magnitude* – without asking whether it is realistic to think that the effect will be significant." The authors dub this error "the sign fallacy."

The other basis for the recent critique of *Auer* involves a question of the separation of powers. Basically, *Auer* "produces a constitutionally suspect combination of power to make law with the power to interpret law." In Justice Scalia's words, concurring in part and dissenting in part in *Decker*, "He who writes a law must not adjudge its violation." In this way he can distinguish *Chevron*, where Congress enacts and agencies adjudge the violation, compared to *Auer*, where the agency adopts a regulation and then adjudges its violation. The authors spend some time on this critique, but their argument boils down to the fact that such a critique of *Auer* is a critique of almost all administrative law, which epitomizes the combination of functions the separation of powers is supposed to keep apart. Large numbers of agencies write binding rules, bring enforcement actions, and adjudicate violations. It is to combat that combination of functions that administrative law erects procedural requirements to mitigate the combination and provides judicial review of the administrative results. The authors recognize that Justice Clarence Thomas's recent adoption of Professor Philip Hamburger's thesis would indeed sweep away most of the modern administrative state, but aside from Justice Thomas they see little inclination or reason to overthrow a century of administrative law. In other words, *Auer* is a very little tail on the dog of a combination of functions and should not overcome its agreed-upon and identified real benefits.

Professors Sunstein and Vermeule end up stressing that *Auer* deference, no more than *Chevron* deference, is not an abandonment of judicial review. There is still a real check on agency interpretations of its own regulations. First, as Justice Scalia wrote with respect to *Chevron*, where the lawmaker has made a clear line, the agency cannot go beyond it in interpreting regulations, and where the lawmaker has left an ambiguous line, the agency cannot go further than the ambiguity will allow. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013). The same applies to *Auer* deference. Moreover, as the authors point out, "the Court emphasized in Perez v. Mortgage Bankers, the 'most notable' constraint on agency decisionmaking is 'the arbitrary and capricious standard,' which serves to promote 'procedural fairness' by requiring agencies to give good reasons for their procedural choices – and, of course, for their interpretations." And it is well to reiterate that *Auer* may not even be applicable

when an agency's regulation merely parrots the statute. *See*, *e.g.*, Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

All well and good. A frontal attack on *Auer* in the Supreme Court would not be likely to prevail, even if Justice Scalia were still on the Court. But wait. There still may be some smoldering embers below the smoke. What is missing from the Sunstein and Vermeule article is a different critique of *Auer*, one that has some empirical basis. An agency faced with the recognition that one of its regulations is ambiguous has options. It may issue an amendment to the regulation, clarifying it. Or it may issue an interpretive rule clarifying the regulation. If the agency is challenged in court, it does not matter which option the agency takes. In either case it will receive strong deference: *Chevron* deference under the former option, *Auer* deference under the second option. But it will be infinitely faster and easier for the agency to use the second option. It will avoid the requirements for notice-and-comment rulemaking under the APA and any requirements of the Regulatory Flexibility Act. It will as a practical matter avoid the requirements for regulatory review under E.O. 12866 and the requirements of the Congressional Review Act. 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 altogether 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. Does *Auer* deference play a role? Yes, because there is no cost associated with adopting the clarification as an interpretive rule, rather than as a legislative rule.

What this may suggest is 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?

Professors Sunstein and Vermeule have provided a valuable service in starting the defense of *Auer* deference. They have provided convincing rebuttals of the critiques of *Auer* that have appeared in recent Supreme Court opinions and pointed out the obvious benefits of deference to an agency's interpretation of its own regulations. Perhaps the only piece missing in the puzzle now is the effect of strong *Auer* deference on an agency's choices of whether to clarify regulations by notice-and-comment rulemaking or by interpretive rule.

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