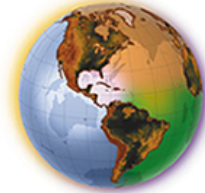


# TRENDS



ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER

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## Despite attacks on judicial deference, reports of Auer's demise are premature

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Conservative critics of federal regulation are questioning doctrines of judicial deference to agency actions. Now that President Trump has taken office, Congress is moving to roll back regulation and to reverse *Chevron* deference—the doctrine establishing that reviewing courts should defer to reasonable agency interpretations of ambiguous statutory provisions. Supreme Court nominee Judge Neil Gorsuch is a leading critic of *Chevron* deference. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

The late Justice Antonin Scalia, joined by Justice Clarence Thomas, campaigned against a different form of judicial deference known as *Seminole Rock* or *Auer* deference—the doctrine that courts should defer to an agency's interpretation of its own ambiguous regulations. This doctrine is rooted in the Supreme Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), reaffirmed in 1997 in *Auer v. Robbins*, 519 U.S. 452 (1997). The doctrine provides that an agency's interpretation of its own ambiguous regulations "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock* at 414.

### Criticisms of Auer deference

Although Justice Scalia wrote the *Auer* decision for a unanimous Court, 15 years later he called for its doctrine of deference to be

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reconsidered. Scalia questioned the constitutionality of *Auer* deference because "it seems contrary to fundamental principles of separation of powers to permit the person who promulgates a rule to interpret it as well." Justice Clarence Thomas maintains that *Auer* deference has two constitutional defects. "It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015).

Justice Scalia also maintained that *Auer* deference effectively gives agencies an incentive to promulgate deliberately vague regulations that later could be clarified through the issuance of interpretive rules without going through another round of notice-and-comment rulemaking. The application of *Auer* deference to these interpretive rules, Scalia maintained, was tantamount to allowing agencies to issue binding regulations without notice and comment.

### Defenses of *Auer* deference

Despite calling for *Auer* to be overturned, even Justice Scalia recognized "undoubted advantages to *Auer* deference." He noted that it "makes the job of a reviewing court much easier," while imparting "certainty and predictability to the administrative process." *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 69 (Scalia, J., concurring).

Defenders of *Auer* argue that agencies are uniquely qualified to say what their own regulations mean. They maintain that agencies are the appropriate entities for resolving regulatory ambiguities also because they are more accountable than the judiciary. By delegating rulemaking authority to agencies, Congress has given them the power to fill gaps and clarify ambiguities. When Congress left a gap in the law, it delegated the power to fill the gap to the agency responsible for implementing the law.

*Auer's* defenders also maintain that it is simply not true that *Auer* deference inspires agencies to write deliberately vague regulations in order to empower them to issue interpretive clarifications later. Empirical studies seem to support this conclusion. Agencies are issuing more interpretive rules and policy statements, as expressly authorized by the Administrative Procedure Act, but not because of *Auer*. Rather it is because the requirements of notice-and-comment rulemaking have become increasingly cumbersome, and agencies have great discretion concerning which procedures to use. *Auer* encourages agencies to clarify the meaning of regulations in a manner that gives more notice to the regulated community than ad hoc adjudication would.

The separation of powers concerns articulated by opponents of *Auer* are really attacks on the constitutionality of the larger administrative state, *Auer's* defenders state. The fact that some agencies can issue, enforce, and adjudicate controversies over

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their regulations is a core characteristic of administrative agencies performing their traditional functions within the executive branch.

### **Will the Supreme Court reconsider *Auer* deference?**

Justice Thomas is the only current Justice who has declared *Auer* deference unconstitutional. Three years ago, Chief Justice Roberts, joined by Justice Alito, noted that the issue lies at “the heart of administrative law” and that it “may be appropriate to reconsider [*Auer*] in an appropriate case.” But in 2015 when the Court reaffirmed *Auer* deference in *Perez v. Mortgage Bankers Association*, Chief Justice Roberts joined the majority opinion in full, while Justices Scalia, Alito, and Thomas continued to question *Auer*.

The Court seems to have no appetite at present to reconsider *Auer*. On October 28, 2016, the Court agreed to hear a challenge to the Education Department’s interpretation of its Title IX regulations when applied to the use of school restrooms by transgender students. The one question by the petitioner, the Gloucester County School Board, that the Justices expressly excluded from their grant of review was the following: “Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?”

### **Consequences of *Auer* for the Trump administration**

Conservative critics of *Auer* may be largely motivated by their desires to restrict agency authority and relax federal regulations. But *Auer* works both ways—it provides deference to agency interpretations whether they make regulations more stringent or less stringent. In both environmental cases in which the Court prominently has employed *Auer*—*Coeur Alaska v. Southeast Alaska Conservation Council*, 128 S. Ct. 2458 (2009), and *Decker v. Northwest Environmental Defense Council*, 133 S. Ct. 1326 (2013)—it was used to uphold agency interpretations that defeated environmental claims. Many forget that the doctrine of *Chevron* deference was born in a case where the Environmental Protection Agency made it easier for industry to comply with Clean Air Act regulations. If *Auer* deference were eliminated, it could work to the detriment of the Trump administration’s efforts to persuade agencies to relax regulations. But for now, with Justice Scalia no longer on the Court, *Auer* deference seems reasonably secure.