

Auer in Action: Deference After Talk America

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For decades, judges and commentators took for granted that courts should defer to an agency’s interpretation of its own ambiguous regulation, unless that interpretation is plainly erroneous or inconsistent with the regulation. In 2011, however, Justice Scalia announced his growing discontent with Auer deference in Talk America, and the Court has since rolled back Auer’s scope in recent decisions. While Auer’s judicial and academic critics have explored the theoretical dangers inherent in the doctrine, they have paid little attention to how courts apply Auer in practice. This Article adds to the literature on Auer deference by providing the first in-depth analysis of how federal courts of appeals have reacted to the Court’s recent Auer decisions. In the end, the data suggest that there is little to gain (and much to lose) by overruling Auer.

The results, drawn from an original data set of all 190 Auer cases decided by courts of appeals since 2011, reveal Auer is no longer the extremely deferential doctrine it was once considered to be. The rate at which courts grant Auer deference fell from 2011 to 2014 among both Republican and Democratic judges. Overall, deference is most common in traditionally conservative courts of appeals, when the agency is party to the litigation, and when the agency’s interpretation appears in an agency order or public issuance. The results also reveal why courts do—and do not—defer. When courts grant Auer deference, they rarely view the agency’s interpretation as unpersuasive, and when they withhold Auer deference, they typically rely on Auer’s historical boundaries. The data confirm that courts already have and use the necessary tools to reject unreasonable agency interpretations, while overruling Auer would bring substantial costs in lost predictability and reduced political accountability.

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*J.D., Stanford Law School, 2015. I am particularly grateful to Michael Asimow, Scott Angstreich, and Sam Fox Krauss for their insightful comments on early drafts.

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I. INTRODUCTION

For decades, judges and commentators took for granted that courts should defer to agency interpretations of their own regulations. This doctrine, interchangeably called *Auer* or *Seminole Rock* deference, is a staple of administrative law.¹ It instructs that “[w]hen an agency interprets its own regulation, the Court, as a general rule, defers to it ‘unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’”² In contrast to *Chevron* deference, which urges courts to adopt reasonable agency interpretations of the statutes they administer,³ *Auer* deference deals with agency interpretations of the regulations they write. Ultimately, *Auer* leaves defining the scope of an ambiguous regulation largely to the agency that promulgated it.

In recent years, however, some Justices on the Supreme Court have picked up on academic criticism of *Auer*. They have been raising the doctrine’s profile and working to scale it back in a series of recent decisions, leading *Auer* to be described as under siege.⁴ While courts originally deferred to all but plainly erroneous or inconsistent interpretations,⁵ the Court has narrowed *Auer* to withhold deference where the interpretation causes unfair surprise,⁶ or where the underlying regulation parrots the statutory language⁷ or is

¹ *Auer v. Robbins*, 519 U.S. 452, 457 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

² *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) (quoting *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011)).

³ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

⁴ See Jeffrey Pojanowski, *More on Agency Interpretations of Regulations: Taking Deference Seriously*, YALE J. ON REG.: NOTICE & COMMENT (Oct. 8, 2014), <http://www.yalejreg.com/blog/more-on-agency-interpretations-of-regulations-taking-deference-seriously-by-jeffrey-pojanowski> [<http://perma.cc/N692-QPXM>].

⁵ *Auer*, 519 U.S. at 461.

⁶ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

⁷ *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

unambiguous.⁸ Many have urged the Court to overrule *Auer* entirely,⁹ and four members of the Court have announced their willingness to consider it.¹⁰

The debate so far has been largely theoretical, centering on *Auer*'s incentives for agencies, its risks to the separation of powers, and its practical benefits.¹¹ An emerging literature has begun to trace the Court's recent decisions narrowing *Auer*,¹² but little attention has been paid to how lower courts apply *Auer* or the effects of those decisions in lower courts.¹³ As the Court considers overruling *Auer*, it should be aware of how courts of appeals apply the doctrine in practice, and what the Court has already accomplished through its recent *Auer* jurisprudence.

This Article adds to the emerging literature on *Auer* deference by providing a window into how federal courts of appeals apply *Auer* and how they have reacted to the Court's recent *Auer* decisions. Drawing on an original data set of 190 cases, which includes all *Auer* cases decided by courts of appeals since 2011 when Justice Scalia first announced his interest in reconsidering the doctrine,¹⁴ this Article focuses on *Auer*'s practical dimensions. Part II provides a conceptual background for the discussion, offering an overview of common arguments for and against *Auer*, and tracing the Court's recent *Auer* jurisprudence. Part III draws lessons from the data, and Part IV uses these insights to weigh the costs and benefits of overruling *Auer*. The results reveal several important findings:

First, courts of appeals have responded to the Court's recent *Auer* decisions by narrowing their application of the doctrine, leading to a steady decline from 2011 to 2014 in the rate at which courts grant *Auer* deference.

⁸ *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000).

⁹ *See, e.g., Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 898–99 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (2014).

¹⁰ *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment); *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., and Alito, J., concurring); *id.* at 1341 (Scalia, J., concurring in part and dissenting in part).

¹¹ Compare John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 680–81 (1996) (arguing against *Auer*), with Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 112–16 (2000) (arguing in favor of *Auer*).

¹² *See, e.g., Michael P. Healy, The Past, Present and Future of Auer Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 633 (2014).

¹³ The most in-depth treatment to date is a study of *Auer* deference in courts of appeals and district courts, which measured the overall rate of deference during 1999 to 2001 and 2005 to 2007. *See* 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). That study, however, did not explore factors for when or why those courts granted deference, and it did not consider the post-*Talk America* period.

¹⁴ *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

Between 2011 and 2012, courts granted *Auer* deference in 82.3% of cases. Since the Court's 2013 decision in *Decker v. Northwest Environmental Defense Center*,¹⁵ that rate has fallen to 70.6%. For critics concerned that *Auer* is a form of super-deference that requires courts to adopt ill-reasoned agency interpretations, the data show that courts of appeals now have—and use—a variety of tools to reject improper agency interpretations. There is also no evidence that political ideology has driven the change. Rather, deference has fallen over time among judges appointed by both Republican and Democratic presidents.

Second, the data show *when* courts defer and the factors that correspond to the highest rates of *Auer* deference. 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 the court regularly refuses to defer if the 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.

Third, the data reveal two key lessons about *why* courts do or do not defer. First, among courts that grant *Auer* deference, 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 conclude that the agency's position is a reasonable exercise of discretion to decide an unanswered policy question. Second, among courts that reject *Auer* deference, they typically rely on *Auer*'s traditional boundaries. Rather than use one of the Court's new limits on *Auer*, most courts of appeals that withhold deference simply reason that the agency's interpretation is plainly erroneous, inconsistent with the regulation, or not the product of the agency's fair and considered judgment.

It is only a matter of time before the Court decides to revisit *Auer*.¹⁶ When it does, it can draw on these results to better understand the role *Auer* has played since *Talk America*. The results demonstrate 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. In sum, *Auer* already has meaningful limits. Overruling *Auer* would accomplish little beyond removing a useful tool that facilitates judicial

¹⁵ *Decker*, 133 S. Ct. at 1326.

¹⁶ *See id.* at 1339 (Roberts, C.J., concurring) (“The bar is now aware that there is some interest in reconsidering [*Auer*], and has available to it a concise statement of the arguments on one side of the issue.”).

review, increases the predictability of regulatory action, and maintains political accountability in agency decision-making.

II. VIEW FROM THE TOP: AUER DEFERENCE

A. Auer's Critics and Defenders

Since the mid-1990s, *Auer* deference has attracted increasing attention among academics and spurred an emerging literature on its benefits and costs. Underlying much of the discussion is a sense that *Auer* is a forceful form of deference that all but insulates agency action from review, compelling courts to adopt unsupported agency interpretations of their own regulations.¹⁷ That reputation largely stems from a 2008 study that found the Court granted *Auer* deference in 91% of relevant cases, making *Auer* the second strongest form of deference after *Curtiss-Wright* for executive interpretations related to foreign affairs and national security.¹⁸ While the existing literature on *Auer* suggests a less deferential picture in the courts of appeals,¹⁹ courts have called *Auer* “extremely deferential,”²⁰ and academic commentators observe the doctrine remains a “potent tool of policy making.”²¹

Auer's critics have seized on the doctrine's power as a starting point for opposing its continued use. Because *Auer* removes the court's discretion to reject an agency's improper (but permissible) interpretation, they argue, it places decision-making power in the agency and removes the court's ability to independently decide the meaning or application of an agency's regulation.²² Critics offer a formalist objection to *Auer*, contending it offends the core principle of the separation of powers and that constitutional norms should inform how courts interpret ambiguous regulations.²³ The problem, the argument goes, is straightforward: *Auer* allows an agency to both write the law (the regulation) and determine its application by requiring courts to defer to

¹⁷ See, e.g., Healy, *supra* note 12, at 680, 693 (“For many years, courts have employed a very deferential standard of review . . . [that] has been widely accepted and applied . . .”); Manning, *supra* note 11, at 628 (arguing that *Auer* compels the court to adopt the agency's interpretation “unless the agency view is entirely out of bounds”).

¹⁸ 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, 1098, 1101, 1142 (2008) (“[T]he rare invocation of . . . *Seminole Rock* deference . . . virtually assures the agency a legal victory.”).

¹⁹ Pierce & Weiss, *supra* note 13, at 519 (finding courts upheld agency action 76% of the time during 1999 to 2001 and 2005 to 2007).

²⁰ *Alhambra Hosp. v. Thompson*, 259 F.3d 1071, 1074 (9th Cir. 2001).

²¹ Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1229 (2013).

²² See, e.g., Healy, *supra* note 12, at 680; Stephen M. DeGenaro, Note, *Why Should We Care About an Agency's Special Insight?*, 89 NOTRE DAME L. REV. 909, 915, 919 (2013) (“The deleterious incentives encourage the misuse of interpretive power.”).

²³ See, e.g., Manning, *supra* note 11, at 680–81.

any plausible interpretation the agency offers.²⁴ Courts, rather than agencies, should hold “the ultimate interpretive power,”²⁵ but *Auer* allows agencies to control judicial conclusions.²⁶

Another common criticism is that *Auer* encourages vague agency rulemaking that reduces notice to regulated parties.²⁷ If *Auer* requires deference to an agency’s interpretation of ambiguous (but not unambiguous) regulations, agencies would maximize future flexibility and power by promulgating ambiguous regulations.²⁸ An ambiguous regulation would give the agency greater discretion when deciding which enforcement actions to bring and would increase the variety of positions it could take in subsequent litigation. An agency would be free to interpret or apply the regulation in whatever (plausible) way it considers most advantageous at the time, potentially even if it has offered a different interpretation in the past. Critics worry that the incentive to promulgate vague regulations would lead to predictably more ambiguous regulations, thereby giving regulated parties less notice of prohibited or required conduct.²⁹ When agencies promulgate ambiguous regulations, critics argue, they fail to give regulated parties fair notice of the rules they must follow.³⁰

Critics also seize on the Administrative Procedure Act’s procedural protections, arguing that *Auer* circumvents procedural limitations that Congress placed on agency rulemaking.³¹ The APA directs agencies to follow a number of procedural requirements when promulgating rules that bind regulated entities. Foremost among these are notice and comment, designed to give affected groups fair notice of proposed rulemaking and an opportunity to influence the agency’s position.³² Giving binding effect to the agency’s interpretation, critics argue, effectively allows the agency to promulgate a new rule (or add content to an existing rule), without following the APA’s procedural requirements of notice and comment. Under *Auer*, the agency’s interpretation is treated as part of the rule itself, even though the public was never afforded the opportunity to comment on that particular substantive addition.

²⁴ See Healy, *supra* note 12, at 680–85.

²⁵ *Id.* at 692.

²⁶ See DeGenaro, *supra* note 22, at 915.

²⁷ See, e.g., Manning, *supra* note 11, at 662.

²⁸ See, e.g., Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. 1, 6 (1996); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1461 (2011).

²⁹ See, e.g., Stephenson & Pogoriler, *supra* note 28, at 1461.

³⁰ See *id.* at 1480.

³¹ See, e.g., *id.* at 1463–64.

³² Administrative Procedure Act (APA), 5 U.S.C. § 553(b)–(c) (2012).

In contrast, *Auer*'s defenders primarily stress its functional benefits.³³ Even those skeptical of *Auer* recognize that it “cuts agencies helpful interpretive slack in a world in which life is short, resources are limited, and agencies must address complex issues that have unpredictable twists and turns.”³⁴ As a starting point, agencies are argued to be superior policymakers to courts or (sometimes) Congress because of their greater technical expertise, efficiency, institutional flexibility, and political accountability.³⁵ Accordingly, courts are particularly deferential to agencies when the interpretive question presents a highly technical or policy-oriented issue.³⁶ For example, in *Thomas Jefferson University v. Shalala*, the Court granted *Auer* deference to an interpretation by the Department of Health and Human Services, reasoning that “broad deference is all the more warranted” when a regulation “concerns ‘a complex and highly technical regulatory program,’” requiring “significant expertise and . . . exercise of judgment grounded in policy concerns.”³⁷ These arguments contend that agencies are in the best position to interpret their regulations consistently with their policy goals, and that deferring to the agency allows it to accomplish those goals by determining how its regulations should be applied.³⁸

Auer also creates practical benefits beyond those generated in particular litigation. It increases an agency's flexibility to balance competing interests when promulgating regulations.³⁹ At times, the best regulation may not be the clearest possible formulation because enhanced clarity sacrifices regulatory accessibility and congruence.⁴⁰ An accessible rule is one that can be applied easily to concrete situations, while a congruent rule is one that produces the desired behavior.⁴¹ An agency could try to answer every potential interpretive question, but such clarity would increase the length and complexity of regulations until they were too opaque for regulated parties to understand. Thus, a clear rule might be inaccessible because it is too unwieldy to apply to concrete situations, and it might be incongruous because regulated entities do

³³ See, e.g., Healy, *supra* note 12, at 691 (“Functionalism rather than formalism has, as we have seen, been at the center of the Court's explanation of *Seminole Rock* deference . . .”).

³⁴ Manning, *supra* note 11, at 616–17.

³⁵ See Stephenson & Pogoriler, *supra* note 28, at 1456, 1460.

³⁶ See, e.g., *Atrium Med. Ctr. v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 560, 568 (6th Cir. 2014) (“*Auer* deference . . . is ‘especially [applicable] in areas like Medicare reimbursements’ given the technical complexity of the reimbursement regime.” (second alteration in original) (quoting *Univ. of Cincinnati v. Heckler*, 733 F.2d 1171, 1174 (6th Cir. 1984))).

³⁷ *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

³⁸ See Manning, *supra* note 11, at 630 (citing *BethEnergy Mines*, 501 U.S. at 696–97).

³⁹ See, e.g., Angstreich, *supra* note 11, at 112–16.

⁴⁰ See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 67 (1983).

⁴¹ *Id.*

not know how to conform their behavior to the agency's goals.⁴² *Auer* also allows agencies to wait to elaborate on the precise contours of their regulations until they gain experience implementing particular regulatory programs.⁴³

Auer tells agencies they need not attempt the impossible by anticipating every conceivable question about a regulation's meaning. Instead, *Auer* allows agencies to apply their rules to unanticipated situations that fall within the interstices of the regulatory language.⁴⁴ As with statutory interpretation, regulatory interpretation can involve "interstitial lawmaking" when the regulation is applied to a situation that falls between its clear terms.⁴⁵ Under *Auer*, courts do not ask agencies to repeat the mistakes of Frederick the Great, whose civil code spanned 17,000 specific rules to govern every conceivable fact situation.⁴⁶ As Frederick the Great quickly learned, courts inevitably confront unanticipated interpretive questions, no matter how clearly the rules are written.⁴⁷ *Auer* thus allows agencies to apply their rules when needed, even if a regulation does not speak precisely to the situation at hand.

Auer's defenders also argue that even if the doctrine demands less clarity from agency regulations, it enhances clarity in another way by providing straightforward guidance for litigation. Deferring to the agency's interpretation offers a clear rule that courts can follow to interpret the meaning of an ambiguous regulation, and it is a directive that litigants and agencies can reasonably predict and understand.⁴⁸ There is a growing appreciation that regulatory interpretation is an underdeveloped field of study, with little agreement over how courts should engage in regulatory interpretation, in terms of goals, sources of law, and the relationship among those sources.⁴⁹ Eliminating *Auer* would make regulatory interpretation even less predictable by removing one clear tool that courts have.⁵⁰

Beyond pragmatic arguments for *Auer*, other supporters offer an "originalist" argument that contends the author of the regulation—the agency—has "special insight" into its meaning.⁵¹ Courts defer to the agency because the agency is in the best position to know what its own regulations mean. This position rests on two assumptions: first, that the agency's current interpretation in fact reflects its intentions when it enacted the regulation, and

⁴² *Id.*

⁴³ Stephenson & Pogoriler, *supra* note 28, at 1459.

⁴⁴ *Id.*

⁴⁵ Manning, *supra* note 11, at 629 (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)).

⁴⁶ See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 30 (3d ed. 2007) (discussing the failure of the Prussian Landrecht of 1794).

⁴⁷ *Id.*

⁴⁸ See Manning, *supra* note 11, at 694–95 (acknowledging *Auer*'s certainty benefits but arguing that "issues of determinacy cut both ways").

⁴⁹ See Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 358 (2012).

⁵⁰ See *id.* at 410 n.272.

⁵¹ See, e.g., Stephenson & Pogoriler, *supra* note 28, at 1454, 1457 (noting this rationale is in decline).

second, that the agency's original interpretation should control the present application.⁵² However informal the interpretation, the argument goes, it still reflects the agency's special insight.⁵³ Some courts have granted *Auer* deference relying on this rationale. For example, the Federal Circuit adopted an originalist position when it granted *Auer* deference to an interpretation by the International Trade Commission, asserting *Auer*'s force stems from the fact that the agency "is addressing its own [intentions]," rather than those of Congress.⁵⁴

Finally, *Auer*'s defenders reject arguments that separation of powers principles or the APA dictate an end to the doctrine. Rather, they argue, *Auer* rests on a similar foundation as *Chevron*: Congress has the right to delegate legislative power to administrative agencies,⁵⁵ and when Congress delegates rulemaking authority to an agency, it implicitly delegates power to offer reasonable interpretations that clarify the meaning of those rules.⁵⁶ Relatedly, some argue that *Auer* is necessary to give full effect to *Chevron*'s distribution of interpretive authority, and thus included within Congress's intent to delegate to agencies the power to interpret ambiguous statutes.⁵⁷ This delegation requires courts to verify that agencies "have not exceeded the bounds of the authority delegated,"⁵⁸ rather than replace agencies' policy decisions with their own.⁵⁹

B. Narrowing Doctrine

Following *Auer*'s critics, some Justices recently have begun to urge the Court to revisit the doctrine. The first serious sign came in 2011, when the Court considered the meaning of an FCC regulation in *Talk America, Inc. v. Michigan Bell Telephone Co.*⁶⁰ The Court recognized that no statute or regulation squarely addressed the question at hand, and it deferred to the FCC's interpretation of its regulation contained in its amicus brief, a view the

⁵² *Id.* at 1454.

⁵³ *Id.* at 1456.

⁵⁴ *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1363–64 (Fed. Cir. 2005).

⁵⁵ See Manning, *supra* note 11, at 623 (arguing that "binding deference [under *Chevron*] is the product of Congress's right to delegate legislative authority to administrative agencies").

⁵⁶ Stephenson & Pogoriler, *supra* note 28, at 1457.

⁵⁷ See Angstreich, *supra* note 11, at 112, 132.

⁵⁸ *Id.* at 89.

⁵⁹ *Cf.* Manning, *supra* note 11, at 626 ("[B]ecause it is now generally accepted that the interpretation of an ambiguous text will involve policymaking, *Chevron* makes sense of original constitutional commitments to electoral accountability by presuming that Congress has selected agencies rather than courts to resolve serious ambiguities in agency-administered statutes.").

⁶⁰ *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2257 (2011).

Court described as “more than reasonable.”⁶¹ While the FCC’s interpretation was novel, the Court recognized there was “no danger” that granting *Auer* deference would allow the FCC, “under the guise of interpreting a regulation, to create *de facto* a new regulation.”⁶² Nor was the FCC’s position a post-hoc response to litigation or otherwise not the product of the agency’s “fair and considered judgment.”⁶³ By elaborating the many things the FCC’s amicus position was not, the Court granted *Auer* deference to the FCC while clearly signaling that *Auer* is not a blank check for agencies.

Justice Scalia’s *Talk America* concurrence was the first time that one of the Justices announced an interest in reconsidering *Auer*. While Justice Scalia considered the FCC’s interpretation to be the better reading of the regulation, he took issue with the majority’s reasoning and declared that he was “increasingly doubtful of [*Auer*’s] validity.”⁶⁴ He called *Auer* “contrary to fundamental principles of separation of powers” for uniting legislative and executive power in one body, and warned against the risk to liberty, “lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”⁶⁵ *Auer* promotes arbitrary government, he argued, by encouraging vague rulemaking and post hoc interpretations to fit the agency’s application of the moment. He conclusively announced that when asked to reconsider *Auer*, he “will be receptive to doing so.”⁶⁶

A year later, the majority in *Christopher v. SmithKline Beecham Corp.* cited Justice Scalia’s words approvingly, and narrowed *Auer* to preclude deference when the agency changes its interpretation to create unfair surprise with potentially massive liability for regulated parties.⁶⁷ In *Christopher*, the Court considered the meaning of a regulation by the Department of Labor that covered certain obligations under the Fair Labor Standards Act.⁶⁸ The Court rejected the DOL’s interpretation set forth in its amicus brief because of notice problems, created when “the agency announces its interpretation for the first time in an enforcement proceeding and demands deference.”⁶⁹ The majority left *Auer* on shaky footing, warning that *Auer* “creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit,” thereby undermining rulemaking’s notice and predictability

⁶¹ *Id.* at 2260, 2262.

⁶² *Id.* at 2263.

⁶³ *Id.* (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

⁶⁴ *Id.* at 2265–66 (Scalia, J., concurring).

⁶⁵ *Id.* (quoting MONTESQUIEU, SPIRIT OF THE LAWS bk. XI, ch. 6, 151–52 (O. Piest ed., T. Nugent trans. 1949) (1749)).

⁶⁶ *Talk Am.*, 131 S. Ct. at 2265–66.

⁶⁷ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167–68 (2012).

⁶⁸ *Id.* at 2161.

⁶⁹ *Id.* at 2168.

goals.⁷⁰ “[W]hatever the general merits of *Auer* deference,” the Court concluded, “it is unwarranted here.”⁷¹

Christopher was the culmination of a series of recent decisions that limited *Auer* and precluded deference when the regulation parrots the statutory language⁷² or is unambiguous.⁷³ These decisions added to *Auer*’s traditional boundaries, according to which courts will not defer to interpretations that are post hoc rationalizations, do not “reflect the agency’s fair and considered judgment,” or are otherwise “plainly erroneous or inconsistent with the regulation.”⁷⁴ Some observers thought *Christopher* might be the Court’s opportunity to overrule *Auer* altogether,⁷⁵ but it continued on the more moderate path of narrowing and limiting *Auer*. Reconsidering *Auer* would await another day.

By 2013, Justice Scalia had two more supporters on the Court. In *Decker v. Northwest Environmental Defense Center*, Chief Justice Roberts and Justice Alito indicated their willingness to reconsider *Auer*, but declined to do so because the issue, “a basic one going to the heart of administrative law,” had not been briefed.⁷⁶ In *Decker*, the Court deferred to the Environmental Protection Agency’s amicus brief interpreting its own ambiguous regulation.⁷⁷ As in *Talk America*, the Court reiterated *Auer*’s boundaries, emphasizing situations in which courts can refuse to grant *Auer* deference.⁷⁸ The Court concluded, however, that the agency’s “consistent” interpretation was “rational” and “permissible,” with the regulatory language “lend[ing] support” to the EPA’s interpretation.⁷⁹

Justice Scalia responded with a scathing dissent that focused on *Auer*’s implications for the separation of powers. Calling *Auer* “a dangerous permission slip for the arrogation of power,” he compared it to the evil that

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

⁷³ While this has arguably long been a limit of *Auer* deference, because a court would reject a contrary interpretation of an unambiguous regulation as “clearly erroneous,” this limit was articulated in *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). *See also* Angstreich, *supra* note 11, at 70–71 (arguing that *Auer* deference, while formally stated as a one-step test, implicitly involves a preliminary step to determine whether the regulation is unambiguous).

⁷⁴ *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

⁷⁵ *See* Amanda Frost, *Academic Round-Up*, SCOTUSBLOG (Jan. 24, 2012, 12:27 PM), <http://www.scotusblog.com/2012/01/academic-round-up-83/> [<http://perma.cc/U4YZ-LS9H>].

⁷⁶ *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring).

⁷⁷ *Id.* at 1331 (majority opinion).

⁷⁸ *Id.* at 1337–38 (reiterating that deference is inappropriate for “*post hoc* justification[s] adopted in response to litigation” or “change[s] from prior practice” (first alteration in original)).

⁷⁹ *Id.* at 1337–38.

Blackstone condemned of “resolving doubts about ‘the construction of the Roman laws’ by ‘stat[ing] the case to the emperor in writing, and tak[ing] his opinion upon it.’”⁸⁰ In his dissent, Justice Scalia sought to bring another Justice on board, quoting Justice Thomas’s dissent in *Thomas Jefferson University v. Shalala* that acknowledged *Auer*’s incentives for agencies to issue vague regulations that undermine notice to regulated parties.⁸¹ The principal wrong behind *Auer*, Justice Scalia concluded, is that it “contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.”⁸²

Most recently, this Term in *Perez v. Mortgage Bankers Ass’n*, Justice Thomas joined *Auer*’s critics in calling to revisit the doctrine.⁸³ While the majority found it unnecessary to reach the *Auer* question,⁸⁴ Justices Alito, Scalia, and Thomas filed separate concurring opinions emphasizing their desire to reconsider *Auer*.⁸⁵ This time, Justice Scalia focused on the Administrative Procedure Act, while Justice Thomas’s thirteen-page concurrence made the historical case against *Auer* based on its implications for the separation of powers and checks and balances.⁸⁶

A number of recent petitions for certiorari have invited the Court to reconsider *Auer*, but it has yet to take a case that directly presents that question.⁸⁷ With four Justices on record wanting to revisit *Auer*, it is only a matter of time. As Chief Justice Roberts and Justice Alito noted in *Decker*, “[t]he bar is now aware that there is some interest” in reconsidering *Auer*, and they will “await a case in which the issue is properly raised and argued.”⁸⁸ If and when the Court reconsiders *Auer*, it will be asked to weigh *Auer*’s dangers against its benefits, to decide whether the risks to the separation of powers and agency incentives outweigh the pragmatic needs of regulatory agencies. To help the Court in that calculus, this Article asks how the federal courts of

⁸⁰ *Id.* at 1341 (Scalia, J., concurring in part and dissenting in part) (alterations in original) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 58 (1765)).

⁸¹ *Id.* (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting)).

⁸² *Decker*, 133 S. Ct. at 1342.

⁸³ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment).

⁸⁴ *Id.* at 1208 n.4 (majority opinion).

⁸⁵ *Id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).

⁸⁶ *Id.* at 1213–25.

⁸⁷ *See, e.g., San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 610 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 948, and *cert. denied*, 135 S. Ct. 950 (2015); *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 898 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (2014).

⁸⁸ *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring).

appeals have used *Auer* since *Talk America*, when members of the Court began questioning *Auer* deference.

III. VIEW FROM THE GROUND: AUER IN THE COURTS OF APPEALS

A. Methodology

To create the data set for this Article, I collected all decisions (351 total) by courts of appeals decided since *Talk America* that cite a major decision in the Court's *Auer* jurisprudence, including *Auer v. Robbins* (173 cases),⁸⁹ *Bowles v. Seminole Rock & Sand Co.* (18 additional cases),⁹⁰ *Thomas Jefferson University v. Shalala* (29 additional cases),⁹¹ *Gonzales v. Oregon* (30 additional cases),⁹² *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* (3 additional cases),⁹³ *Talk America, Inc. v. Michigan Bell Telephone Co.* (8 additional cases),⁹⁴ *Christopher v. SmithKline Beecham Corp.* (19 additional cases),⁹⁵ *Decker v. Northwest Environmental Defense Center* (9 additional cases),⁹⁶ *Long Island Care at Home, Ltd. v. Coke* (11 additional cases),⁹⁷ and *Christensen v. Harris County* (51 additional cases).⁹⁸

I eliminated cases that cite the referenced decisions for unrelated propositions,⁹⁹ resulting in a data set of 190 cases. These decisions thus comprise three full populations of *Auer* cases by courts of appeals: (1) 62 cases decided between *Talk America* and *Christopher*; (2) 43 cases decided between *Christopher* and *Decker*; and (3) 85 cases decided between *Decker* and December 2014.¹⁰⁰ These time periods are significant because *Talk America* was the first time a Justice signaled an interest in revisiting *Auer*,¹⁰¹ *Christopher* imposed a major new limitation on *Auer*,¹⁰² and *Decker* added

⁸⁹ *Auer v. Robbins*, 519 U.S. 452, 452 (1997).

⁹⁰ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 412 (1945).

⁹¹ *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 506 (1994).

⁹² *Gonzales v. Oregon*, 546 U.S. 243, 248 (2006).

⁹³ *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 265 (2009).

⁹⁴ *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2257 (2011).

⁹⁵ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2161 (2012).

⁹⁶ *Decker v. Nw. Envntl. Def. Ctr.*, 133 S. Ct. 1326, 1330 (2013).

⁹⁷ *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 161 (2007).

⁹⁸ *Christensen v. Harris Cty.*, 529 U.S. 576, 578 (2000).

⁹⁹ For example, some cases cite *Auer* as a point of contrast when applying *Chevron* deference to an agency's interpretation of a statute, while others cite the cases for propositions of employment or environmental law.

¹⁰⁰ The data set does not include cases in which courts did not cite a major *Auer* decision but where *Auer* deference was arguably appropriate. Thus, while the data set likely is not the population of all cases in which a court confronted an agency's interpretation of its own regulation, it is the population of cases in which a court directly considered the applicability of *Auer* deference under the Court's controlling jurisprudence.

¹⁰¹ See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

¹⁰² See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

two new Justices interested in reconsidering the doctrine.¹⁰³ Together, the cases show how *Auer* has been used since *Talk America*, and separately they show how *Auer* deference has changed as the Court's skepticism has grown. Because this is the population of *Auer* cases following *Talk America* and the analysis is intended to show how courts have used *Auer* since then, the majority of results, such as the percentage of courts granting *Auer* deference during different periods, does not require statistical significance testing.¹⁰⁴ Where significance testing might be helpful, however, it is included in the analysis.

The data set also includes information about the types of cases in which courts of appeals grant *Auer* deference, including factors that could reasonably be expected to influence the level of deference afforded to the agency's interpretation.¹⁰⁵ These include the date, circuit, agency, political party of the presidents who appointed the majority of panel judges,¹⁰⁶ whether the agency was party to the litigation, and the form of agency interpretation at issue. Agency interpretations came in party briefs, amicus briefs, public issuances, private communications, administrative court decisions, and agency orders.

Finally, the data set identifies the rationale behind courts' decisions to grant or withhold *Auer* deference. Courts that deferred to the agency adopted one of three positions: (1) reluctant deference, where the court clearly indicated that but for *Auer* it would reject the agency's interpretation; (2) expedient deference, where courts ranged from offering little discussion to identifying regulatory ambiguity and the reasonableness of the agency's discretionary choice; or (3) confirmation deference, where the court clearly considered the agency's position to be the best reading of the regulation. In contrast, courts that refused to defer relied on one of four rationales to reject the agency's interpretation: (1) it was plainly erroneous, inconsistent with the regulation, or not the product of the agency's fair and considered judgment; (2) it would impose unfair surprise on regulated parties; (3) the regulation parroted the statutory language; or (4) the regulation was unambiguous.

¹⁰³ *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring).

¹⁰⁴ See Allen Rubin, *Significance Testing with Population Data*, 59 SOC. SERV. REV. 518, 518 (1985).

¹⁰⁵ The data set points towards the existence of a relationship between *Auer* deference and various factors, but I do not attempt to prove it. There are too many relevant variables to prove causation with a population of this size. With this data, I hope instead to show how *Auer* deference has varied across factors, to show what has happened in the post-*Talk America* period without here drawing conclusions about whether, for example, certain agencies are more likely to receive deference in future cases.

¹⁰⁶ While this is admittedly an imperfect measure of a judge's political disposition, it provides an objective indicator of political ideology and is consistent with the methodology used in an earlier study, thereby facilitating comparison. See Pierce & Weiss, *supra* note 13, at 521–23.

B. *What the Court Has Already Accomplished by Narrowing Auer*

The first insight from the data is that the Court has already accomplished a lot by narrowing *Auer* without overruling it. The data show that *Auer* deference has changed significantly since *Talk America*, when Justice Scalia first signaled his growing discontent with the doctrine.¹⁰⁷ Since then, courts of appeals have become less willing to grant *Auer* deference, and there is no evidence that political ideology has driven the change. Rather, the rate at which courts grant *Auer* deference has fallen among judges appointed by Republican presidents and Democratic presidents.

Lesson 1: The rate at which courts grant Auer deference has fallen since Talk America.

Courts of appeals have responded to the Court's recent *Auer* decisions by narrowing their application of the doctrine. While no court of appeals has refused to follow *Auer* since *Talk America*—*Auer* remains good law, and courts treat it as such—many have accepted the Court's invitation to withhold deference when they consider it inappropriate. Accordingly, the rate at which courts grant *Auer* deference to an agency's interpretation of its own regulation has steadily declined since *Talk America*.

Between the Court's decisions in *Talk America* and *Christopher*, courts of appeals granted *Auer* deference at a rate of 82.3%. That rate dropped to 74.4% during the period between *Christopher* and *Decker*, and fell further to 70.6% since *Decker*. Even if the data is considered a sample of the true population, there was a statistically significant decline from 2011 to 2014 in the rate at which courts of appeals grant *Auer* deference.¹⁰⁸ In sum, *Auer* is no longer the extreme form of deference it was once considered to be.¹⁰⁹

¹⁰⁷ *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

¹⁰⁸ Because the data set includes the full population of cases in which courts directly considered the *Auer* question, it is unnecessary to test the statistical significance of this proposition. See *supra* note 104 and accompanying text. Even assuming, however, that the data set is a sample that excludes cases in which the court considered but did not cite *Auer* or related cases, there is a statistically significant difference in the level of deference during the first and third time periods. Using a Bernoulli one-tailed t-test, the difference is significant with a *p*-value of less than 0.05.

¹⁰⁹ See Eskridge & Baer, *supra* note 18, at 1098, 1101.

Table 1: *Auer Deference Since Talk America by Time Period*

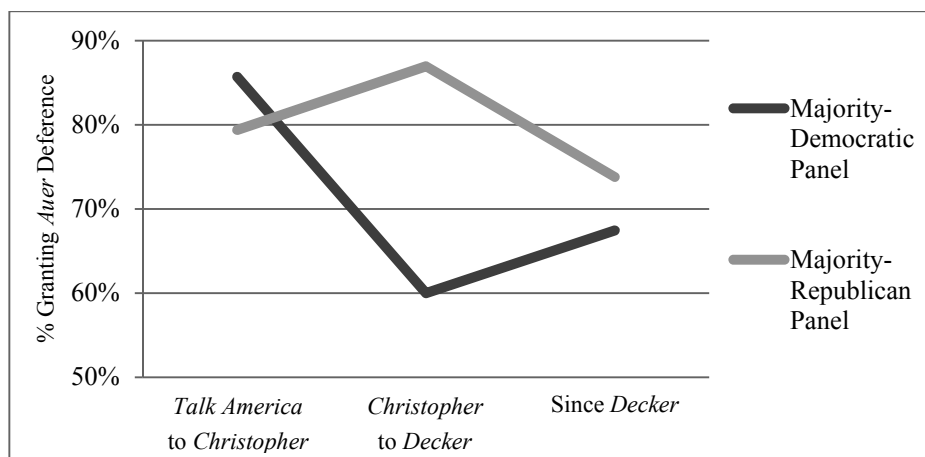
Time Period	% Granting <i>Auer</i> Deference	Total Cases
Decided Between <i>Talk America</i> and <i>Christopher</i>	82.3%	62
Decided Between <i>Christopher</i> and <i>Decker</i>	74.4%	43
Decided Since <i>Decker</i>	70.6%	85

Lesson 2: Political ideology has not driven the change in Auer deference.

Given that anti-*Auer* rhetoric is coming exclusively from more conservative Justices on the Court, it might be expected that judges appointed by Republican presidents could be more receptive to withholding *Auer* deference than their Democratic-appointed counterparts—particularly because all cases in the data set involve an agency’s interpretation offered under a Democratic administration. There is no evidence, however, that political ideology has driven the decline in *Auer* deference over time. Looking at the majority composition of each panel, there is little correlation between political ideology and change in *Auer* deference between 2011 and 2014. Rather, deference has fallen among panels with a majority of judges appointed by both Republican and Democratic presidents.¹¹⁰ The small number of *Auer* cases (43) decided between *Christopher* and *Decker* likely explains the disparity during that period.¹¹¹

¹¹⁰This is consistent with the findings of an earlier study that looked at *Auer* deference before *Talk America*. See Pierce & Weiss, *supra* note 13, at 515–16, 519–20.

¹¹¹N=20 for majority-Democratic panels and N=23 for majority-Republican panels during the period between *Christopher* and *Decker*.

Figure 1: *Auer Deference Since Talk America by Panel Political Composition*

C. When Courts of Appeals Grant or Reject Auer

The data also reveal information about when courts of appeals grant *Auer* deference. While the population size is too small to provide meaningful information about the details of how *Auer* deference changed from 2011 to 2014, the aggregate results reveal the role *Auer* has played since *Talk America*. The data show how deference rates vary by circuit, agency, the agency's participation in the litigation, the form of interpretation at issue, and the political disposition of the deciding panel. While the analysis does not attempt to show which of these variables *cause* agencies to defer more or less often,¹¹² it does offer insights into the types of variation that exist in how courts currently apply *Auer*.

Lesson 3: Circuits vary in their application of Auer.

The data reveal distinct variation by circuit, with some circuits granting *Auer* deference more often than others. In contrast to the political disposition of the Justices on the Court calling to revisit *Auer*, the most historically conservative courts of appeals grant *Auer* deference at the highest rates. The Fifth, Eighth, and Eleventh Circuits readily granted *Auer* deference at a rate of 91%, in stark contrast to the historically liberal Ninth Circuit's rate of just 72%. This may be explained simply by the rarity of cases.¹¹³ Interestingly, the

¹¹² See *supra* note 105.

¹¹³ Indeed, this is the opposite of what would be expected. See Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2194 (2008). The relatively small number of cases and variation in factors other than political ideology likely explain the result. See *supra* Figure 1; *infra* Table 6.

D.C. Circuit, known as a leader in administrative law, applied *Auer* at one of the lowest rates—just 65%.

Table 2: *Auer Deference Since Talk America by Circuit*

Circuit	% Granting <i>Auer</i> Deference	Total Cases
Fifth	92%	13
Eighth	90%	10
Eleventh	89%	9
First	86%	7
Sixth	85%	13
Tenth	82%	11
Federal	77%	13
Second	73%	15
Ninth	72%	36
Third	71%	14
Fourth	70%	10
District of Columbia	65%	31
Seventh	50%	8
Total	75%	190

Lesson 4: Courts defer to some agencies more than others, and some agencies use Auer more than others.

There are also variations in how often different agencies invoke *Auer*, and which receive it most often when they do. *Auer* arises most often in cases involving the Department of Labor and the Bureau of Immigration Affairs. Interestingly, courts also defer to those agencies least often, granting *Auer* deference in 62% and 61% of cases respectively. The Department of Health and Human Services (HHS), the Environmental Protection Agency (EPA), and the Department of Justice (DOJ) also frequently invoke *Auer*.¹¹⁴ Courts are highly deferential to HHS, deferring 88% of the time, while DOJ and EPA fall in the middle, with deference rates of 75% and 71% respectively.¹¹⁵ It is difficult to generalize about other agencies given the rarity of cases, but Table 3 displays the deference rates for all agencies.

¹¹⁴ See *infra* Table 3.

¹¹⁵ *Id.*

Table 3: Auer *Deference Since Talk America by Agency*

Agency	% Granting <i>Auer</i> Deference	Total Cases
Federal Communications Commission (FCC)	100%	9
Department of Housing & Urban Development (HUD)	100%	3
Sentencing Commission	100%	4
Department of Transportation (DOT)	100%	6
Department of Agriculture (USDA)	100%	6
Department of Health & Human Services (HHS)	88%	17
Department of Veterans Affairs (VA)	86%	7
Department of Education (DOE)	83%	6
Military-Related*	83%	6
Department of the Interior	83%	6
Department of Justice (DOJ)	73%	11
Environmental Protection Agency (EPA)	71%	14
Social Security Administration (SSA)	71%	7
Department of Commerce (DOC)	67%	3
Defense-Related†	67%	6
Energy-Related‡	67%	9
Internal Revenue Service (IRS)	67%	6
Department of the Treasury	67%	3
Other§	63%	8
Labor-Related**	62%	26
Bureau of Immigration Affairs (BIA)	61%	23
Securities and Exchange Commission (SEC)	50%	4
<p>* Army Corps of Engineers, Coast Guard, National Guard Bureau, and Merit System Protection Board</p> <p>† Department of Homeland Security and Department of Defense</p> <p>‡ Federal Energy Regulatory Commission (FERC) and Nuclear Regulatory Commission (NRC)</p> <p>§ Patent Board, Pension Benefit Guaranty Corp. (PBGC), State Department, Federal Emergency Management Agency (FEMA), Drug Enforcement Administration (DEA), Federal Reserve, and Bureau of Indian Affairs</p> <p>** Department of Labor (DOL), Equal Employment Opportunity Commission (EEOC), and Railroad Retirement Board</p>		

Lesson 5: Courts defer more often when the agency is party to the litigation, but not when the agency's interpretation simply appears in its party brief.

Courts often apply *Auer* deference when reviewing an agency's order or an administrative court decision. In such cases, the agency is party to the litigation, and the court can readily ask the agency its views on a regulation's meaning. Courts defer more often to the agency in these cases, deferring at a rate of 86%.

Table 4: *Auer Deference Since Talk America by Party to Litigation*

	% Granting <i>Auer</i> Deference	Total Cases
Agency Is Party	86%	147
Agency Is Not Party	72%	43

This does not mean, however, that courts readily defer to the agency's views when they are simply expressed in a brief tailored to the litigation at hand—whether the agency appears as a party or amicus. Rather, courts defer less often to the agency when its interpretation is in its party or amicus brief.¹¹⁶ In contrast, Table 5 shows that courts defer most often when the interpretation takes a more formal format, whether contained in the agency's order to a regulated party, or in a public issuance that gives the public a high degree of notice regarding the agency's position.

The Tenth Circuit's decision in *EEOC v. Abercrombie & Fitch Stores, Inc.* is illustrative of how courts often reject an agency's interpretation expressed in its party brief.¹¹⁷ The court began by conceding that *Auer* applies to an agency's legal brief just as it does to other forms of interpretation.¹¹⁸ It rejected the agency's position as “unpersuasive,” however, because even if the regulation were ambiguous, the agency's litigating position conflicted with its earlier position.¹¹⁹ That inconsistency led the court to conclude the agency's brief was not the product of its “fair and considered judgment,” but rather a “convenient litigating position” that was nothing “other than a creature of this proceeding—where it is ‘a party to this case.’”¹²⁰ Other courts spend little time dwelling on the significance of the form of interpretation when rejecting the agency's position. For example, in *Schwab v. Commissioner*, the Ninth Circuit acknowledged that it was rejecting the “interpretation the Commissioner

¹¹⁶ See *infra* Table 5.

¹¹⁷ See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1130–31 (10th Cir. 2013).

¹¹⁸ *Id.* at 1137.

¹¹⁹ *Id.* at 1137–39.

¹²⁰ *Id.* at 1138–39 (quoting *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881 (2011)).

advances in his briefs,” but reasoned simply that it conflicted with the unambiguous text of the regulation.¹²¹

While the Court’s recent *Auer* cases all involve deference to an agency’s amicus brief, agency interpretations take a variety of forms and *Auer* arises far more often in non-amicus situations. *Auer* most commonly arises when the agency is party to the litigation and the court is asked to review the agency’s enforcement or adjudicative decision.¹²² In such cases, the court considers whether to defer to the agency’s interpretation contained in its enforcement order or in the decision of an administrative court. The next most common application of *Auer* is to the agency’s public issuances, such as opinion letters or other public statements that offer regulatory interpretations.¹²³ Courts are rarely asked simply to defer to the agency’s party or amicus brief.

Table 5: *Auer Deference Since Talk America by Form of Interpretation*

Form of Interpretation	% Granting <i>Auer</i> Deference	Total Cases*
Agency Order	85%	52
Public Issuance	80%	50
Amicus Brief	76%	25
Administrative Court Decision	64%	47
Party Brief	59%	17
Private Communications	0%	1
* Two courts relied on multiple forms of interpretation.		

Lesson 6: There is little evidence that political ideology plays a role.

The aggregate data, like the trend data, suggest that a judge’s willingness to grant *Auer* deference typically does not fall along traditional political lines. Panels with a majority of judges appointed by Democratic presidents defer slightly less often (71%) than panels with a majority of judges appointed by Republican presidents (79%). Combined with what we know about the change in deference over time by the panel’s political composition,¹²⁴ the data suggest political ideology plays a minimal role in *Auer* deference.¹²⁵

¹²¹ Schwab v. Comm’r, 715 F.3d 1169, 1176–77 n.11 (9th Cir. 2013).

¹²² See *infra* Table 5.

¹²³ *Id.*

¹²⁴ See *supra* Figure 1.

¹²⁵ This is consistent with the findings of an earlier study that looked at *Auer* deference before *Talk America*. See Pierce & Weiss, *supra* note 13, at 519–20.

Table 6: *Auer Deference Since Talk America by Panel Political Ideology*

Political Ideology	% Granting <i>Auer</i> Deference	Total Cases
Majority Democrat	71%	91
Majority Republican	79%	99

D. *Why Courts of Appeals Grant or Reject Auer*

In addition to revealing when courts of appeals most often grant *Auer* deference, the data also reveal *why* courts do or do not defer. This information is primarily helpful for two reasons. First, it illuminates whether *Auer* truly compels courts to adopt regulatory interpretations they find unconvincing—a central, underlying concern for *Auer*'s critics. Second, it shows which of *Auer*'s limits courts have used most often when withholding deference, illustrating their capacity to reject unreasonable interpretations. The results show that, along with *Auer*'s general decline, courts have begun to turn the doctrine into a generic framework to evaluate the reasonableness of an agency's position.

Lesson 7: When courts defer, they rarely do so reluctantly.

Not all courts use *Auer* in the same way. Some cite *Auer* to bolster their own conclusions, while others use *Auer* as the sole basis for their decisions. Courts of appeals adopt a range of approaches to agency interpretations that span from reluctant to enthusiastic. Those that granted *Auer* deference adopted one of three approaches to embrace the agency's interpretation of its regulation: (1) reluctant deference; (2) expedient deference; or (3) confirmation deference.

First, some deference is clearly reluctant. In such a case, the court indicates that but for *Auer*, it would reject the agency's proffered interpretation. Some consider all true "deference" to be reluctant, in the sense that the court would have reached a different conclusion but for the agency's interpretation—otherwise the court is not "deferring" to the agency, it is just agreeing with it.¹²⁶ For *Auer*'s critics, this is the most worrisome type of deference, because it compels courts to accept what they clearly believe is not the best interpretation. Since *Talk America*, only one court of appeals has granted *Auer* deference while clearly indicating it disagreed with the agency's

¹²⁶ See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting) ("To defer is to subordinate one's own judgment to another's. If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement."); Scott H. Angstreich & Cynthia Barmore, *Regulated Firms, Auer, Skidmore, and Court-Invited Amicus Briefs*, ADMIN. & REG. L. NEWS, Winter 2015, at 13, 13 (2015); Healy, *supra* note 12, at 647–48.

interpretation. In that case, *Qwest Corp. v. Colorado Public Utilities Commission*, the Tenth Circuit reluctantly deferred to the FCC's amicus brief, declaring it "would not necessarily reach the same result if not required to defer."¹²⁷

More commonly, courts use deference as a shortcut in their reasoning.¹²⁸ In these cases, *Auer* is an expedient form of deference, and courts use *Auer* in a range of ways to streamline their analyses. This type of deference accounts for 78% of decisions granting *Auer* deference. At one end of the spectrum, courts invoke *Auer* as a shortcut, simply citing *Auer* and engaging in little analysis of the regulation. In one case, for example, the Third Circuit accepted the agency's interpretation in a single sentence to quickly reject a federal prisoner's argument.¹²⁹ In the middle of the spectrum, the court examines the regulatory ambiguity but quickly concludes that *Auer*'s exceptions do not apply. For example, the Ninth Circuit granted *Auer* deference to the Department of Labor by reasoning that "[i]n the face of regulatory ambiguity, the DOL's determination . . . was reasonable" and there was "no indication" of "unfair surprise."¹³⁰ "Therefore," the court concluded, "we defer to the DOL's interpretation."¹³¹ At the other end of the spectrum, courts conclude that the regulation leaves a discretionary question of policy unanswered, and they defer to the agency's reasonable choice. This type of reasoning usually involves extensive regulatory analysis to find the regulation ambiguous, and the court concludes that the agency is best suited to resolve the policy question at issue. For example, the Seventh Circuit adopted an interpretation by the EPA because it was an "eminently reasonable way to balance . . . competing interests."¹³²

Finally, some deference is not really "deference" at all.¹³³ While less common,¹³⁴ some courts use *Auer* as an additional reason for the result but

¹²⁷ *Qwest Corp. v. Colo. Pub. Utils. Comm'n*, 656 F.3d 1093, 1101 (10th Cir. 2011).

¹²⁸ See Angstreich & Barmore, *supra* note 126, at 13 ("[C]ourts of appeals often apply *Auer* simply as a shortcut to a result the court would have reached on its own, without giving any additional weight to the agency's view.").

¹²⁹ See *Patel v. Zenk*, 447 Fed. App'x 337, 339–40 (3d Cir. 2011) ("The BOP acted within its authority in interpreting Code 108, and Patel has not shown that its interpretation that a cell phone constitutes a 'hazardous tool' is 'plainly erroneous' or 'inconsistent' with Code 108." (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

¹³⁰ *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 899 (9th Cir. 2013). The Ninth Circuit similarly accepted an interpretation offered in an invited amicus brief, reasoning there was no indication it was anything other than the agency's fair and considered judgment. *Andersen v. DHL Ret. Pension Plan*, 766 F.3d 1205, 1212 (9th Cir. 2014) ("Insofar as the government's brief interprets [the regulation], we defer to it.").

¹³¹ *Rivera*, 735 F.3d at 899.

¹³² *United States v. P.H. Glatfelter Co.*, 768 F.3d 662, 673 (7th Cir. 2014).

¹³³ See Angstreich & Barmore, *supra* note 126, at 13 ("In a sense, *all* deference by an appellate court to an agency's interpretation is reluctant. If the court would have come to the same conclusion on its own—or without according the agency's view any special

clearly indicate that the agency's reading is the best interpretation of the regulation. This form of deference accounts for 20% of decisions granting *Auer* deference. The First Circuit's decision in *Kolbe v. BAC Home Loans Servicing* is illustrative.¹³⁵ After the court deferred to the U.S. Department of Housing and Urban Affairs, it stressed that "*Auer* deference is not necessary to our conclusion."¹³⁶ Rather, the court reasoned that the agency's interpretation "was persuasive of its own force," and concluded it "would agree with the United States' interpretation even if we gave it no deference at all."¹³⁷ In these cases, *Auer* is often treated as an afterthought, cited to supplement the court's own conclusion.

Table 7: *Reasons for Granting Auer Deference Since Talk America*

Reason	% of Grants	Total Cases
Expedient Deference*	78%	112
Confirmation Deference†	20%	30
Reluctant Deference‡	1%	1
<p>* The court ranges from offering little discussion to concluding the agency's position is a highly reasonable exercise of discretion. † The court clearly indicates the agency's interpretation is the best reading. ‡ The court clearly indicates that, but for <i>Auer</i>, it would reject the agency's interpretation.</p>		

Lesson 8: When courts refuse to defer, they most often rely on Auer's traditional boundaries.

As the Court rolled back *Auer* in recent years, it offered courts a variety of new tools to reject an agency's inappropriate interpretation of its own regulation. For instance, *Auer* no longer applies if the agency's interpretation causes unfair surprise,¹³⁸ or if the regulation parrots the statutory language¹³⁹

weight because it is the agency's view (as opposed to the argument of a private party)—'deference' is not dictating the outcome.").

¹³⁴ Because the data set includes the full population of cases in which courts directly considered the *Auer* question, it is unnecessary to test the statistical significance of this proposition. See *supra* note 104 and accompanying text. Even assuming, however, that the data set is a sample that excludes cases in which the court considered but neglected to cite *Auer* or related cases, there is a statistically significant difference between the prevalence of expedient deference and confirmation deference. Using a Bernoulli two-tailed t-test, the difference is significant with a *p*-value of less than 0.01.

¹³⁵ See *Kolbe v. BAC Home Loans Servicing*, LP, 738 F.3d 432, 453 (1st Cir. 2013).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167–68 (2012).

¹³⁹ *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

or is unambiguous.¹⁴⁰ While courts have rejected *Auer* more frequently since those decisions, they still rely on *Auer*'s traditional limitations more often than the Court's recently created ones.¹⁴¹ Most courts that refuse to grant *Auer* deference reason that the agency's interpretation is plainly erroneous, inconsistent with the regulation, or not the product of the agency's fair and considered judgment. Similarly, about a third of courts find the regulation unambiguous, a limit that the Court articulated in *Christensen v. Harris County* but that has long been considered a boundary on *Auer* deference.¹⁴²

The Eleventh Circuit's decision in *Zhou Hua Zhu v. U.S. Attorney General* is illustrative of the reasoning courts typically use when withholding *Auer* deference.¹⁴³ There, the court held that the Board of Immigration Appeals (BIA) did not have power to make de novo factual findings.¹⁴⁴ The BIA argued that its regulation—which forbid its “de novo review of findings of fact determined by an immigration judge”—nevertheless allowed the BIA to review an asylum applicant's likelihood of being tortured de novo, because that presented a mixed question of fact and law for removal.¹⁴⁵ In refusing to give *Auer* deference to the administrative court's precedential decisions as “plainly erroneous and inconsistent with the regulation's unambiguous and obvious meaning,” the court looked to the language of the regulation and the Attorney General's explanatory comments, analogizing to torts, contracts, and immigration cases, and relying on the reasoning of other courts of appeals.¹⁴⁶ In short, the court was unconvinced that the agency was right, and it rejected the agency's interpretation by using common tools of judicial analysis and review.

¹⁴⁰ *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000).

¹⁴¹ Because the data set includes the full population of cases in which courts directly considered the *Auer* question, it is unnecessary to test the statistical significance of this proposition. See *supra* note 104 and accompanying text. Even assuming, however, that the data set is a sample that excludes cases in which the court considered but neglected to cite *Auer* or related cases, there is a statistically significant difference between the prevalence of the first and second rationale in Table 8. Using a Bernoulli two-tailed t-test, the difference is significant with a *p*-value of less than 0.05.

¹⁴² See *supra* note 73.

¹⁴³ See *Zhou Hua Zhu v. U.S. Att'y Gen.*, 703 F.3d 1303, 1305 (11th Cir. 2013).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1308–09.

¹⁴⁶ *Id.* at 1309–14.

Table 8: *Reasons for Withholding Auer Deference Since Talk America*

Reason*	% of Refusals	Total Cases
1. Plainly erroneous, inconsistent with the regulation, or not the product of fair and considered judgment	66%	31
2. Unambiguous regulation	32%	15
3. Parroting language	9%	4
4. Unfair surprise	6%	3
* Some decisions cite multiple reasons.		

IV. IMPLICATIONS FOR REVISITING *AUER*

The data provide a window into what *Auer* means in practice. It is not an everyday aspect of administrative law¹⁴⁷—perhaps agency regulations are seldom ambiguous—but it is an important tool for courts tasked with interpreting agency regulations. When deciding whether to overrule a staple of administrative law, it is worth first asking the size of the problem to be solved, and then comparing it to the costs of the solution proposed. This Part considers those two questions. The data suggest that there would be little benefit to overruling *Auer*, while the costs of replacing it with a different deference regime would be significant.

A. *The Size of the Problem: Thinking About Auer's Practicalities*

Critics of *Auer* deference primarily worry about incentives: incentives for agencies to draft vague regulations, to interpret unclear rules unfairly against regulated parties, and to maximize their power in ways that structural guarantees in the Constitution are designed to prevent through the separation of powers and checks and balances. While the data do not shed light directly on the actions of agencies—whether the clarity of their regulations have increased or decreased with *Auer*'s decline, or how agencies have otherwise responded to *Talk America*, *Christopher*, and *Decker*¹⁴⁸—it does offer some insights into whether courts use *Auer* in problematic or benign ways.

First, the most worrisome type of *Auer* deference is rare, and there is every reason to think it will only become rarer with time. The fundamental concern

¹⁴⁷ For comparison, courts of appeals cited *Auer* 173 times and *Chevron* 762 times during the period studied.

¹⁴⁸ While these questions are beyond the scope of this Article, it would be worthwhile for researchers to interview rulemaking officials and explore whether *Auer* has incentivized them to adopt vague regulations. A new study by Chris Walker suggests that at least some agency officials view their interests as better served by writing clear rules for regulated entities to follow. See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1065–66 (2015).

about *Auer* is that it compels courts to accept bad interpretations offered by the agency. Since *Talk America*, however, only one court clearly indicated that *Auer* compelled it to adopt what it considered to be a worse interpretation of a regulation, but one that was still within *Auer*'s bounds. As courts increasingly withhold *Auer* deference, their growing willingness to find the agency's interpretation "plainly erroneous" may eventually render extinct courts' acceptance of ill-reasoned agency interpretations.

There are two likely explanations for the rarity of overtly reluctant deference. The first is simple: agencies often offer reasonable, well thought-out interpretations of their regulations, and courts may be content to defer because they would reach the same conclusion as the agency. Even when courts do not decisively indicate that the agency's interpretation is the best one, their reasoning often reflects that impression when they grant *Auer* deference. Many of the cases in the data set that are labeled "expedient deference" would likely fall into the category of "confirmation deference" if the court were forced to engage in more lengthy regulatory analysis. For example, in one case the D.C. Circuit described an interpretation offered by the Drug Enforcement Administration as "eminently reasonable," and reasoned it could find "nothing in the record that could move" it to hold against the agency.¹⁴⁹ Similar examples abound.¹⁵⁰ In these cases, *Auer* is not imposing a cost by requiring the court to reach a worse outcome, but rather is lightening the court's burden and facilitating judicial review.

The second explanation for the rarity of reluctant deference is that the Court's recent *Auer* jurisprudence has given lower courts a variety of tools to reject interpretations that they consider unreasonable. Courts of appeals may have picked up on some Justices' skepticism of *Auer*, as suggested by *Auer*'s decline from 2011 to 2014. As courts become more aware of *Auer*'s pitfalls, they may be more willing to apply *Auer*'s traditional boundaries in ways that resemble a test for reasonableness, as they do for an agency's interpretation of an ambiguous statute under *Chevron*.¹⁵¹ When courts refuse to defer because the regulation is plainly erroneous, the analysis often looks like just that.

The Ninth Circuit's decision in *Stephens v. U.S. Railroad Retirement Board* is illustrative.¹⁵² In that case, the court reviewed a decision by the U.S.

¹⁴⁹ *Ams. for Safe Access v. Drug Enf't Admin.*, 706 F.3d 438, 452 (D.C. Cir. 2013).

¹⁵⁰ *See, e.g., Kutty v. U.S. Dep't of Labor*, 764 F.3d 540, 548 (6th Cir. 2014) ("This court must give the DOL's interpretation of its own regulation 'controlling weight unless plainly erroneous or inconsistent with the regulation,' which it clearly is not." (citation omitted) (quoting *Elaine's Cleaning Serv., Inc. v. U.S. Dep't of Labor*, 106 F.3d 726, 729 (6th Cir. 1997)); *O'Bryan v. McDonald*, 771 F.3d 1376, 1380 (Fed. Cir. 2014) ("[T]his interpretation is not 'plainly erroneous or inconsistent with the regulation.' In fact, the interpretation is reasonable. It makes sense for the VA to interpret 'defect' . . . [as it did]." (citations omitted) (quoting *Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009))).

¹⁵¹ Under *Chevron*, courts ask whether the agency's interpretation of an ambiguous statute is a "permissible" or "reasonable" construction. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 866 (1984).

¹⁵² *See Stephens v. U.S. R.R. Ret. Bd.*, 704 F.3d 587, 590–91 (9th Cir. 2012).

Railroad Retirement Board, an administrative court, denying an application for benefits under the Railroad Retirement Act.¹⁵³ The Board had interpreted its regulations to hold that the petitioner's work history precluded his ability to recover benefits.¹⁵⁴ The regulations provided that certain monthly earnings will "ordinarily" disqualify an applicant from receiving benefits, but the Ninth Circuit concluded that the regulation's "plain language" prevented the Board from exclusively relying on the applicant's earnings history to reject his claim.¹⁵⁵ Over a lengthy dissent,¹⁵⁶ the court reasoned that the Board's decision was contrary to Ninth Circuit precedent and the remedial purposes of similar legislation, and highlighted the petitioner's medical evidence, education, and work history that supported his claim.¹⁵⁷

Thus, *Auer*'s limits already allow courts to avoid problematic outcomes and reject agency interpretations that they consider unreasonable. As *Auer*'s strength declines, courts are using its limits to focus on the reasonableness of an agency's interpretation, in ways that resemble *Chevron* deference in application. Courts have proven willing and able to reject unreasonable interpretations of regulations, particularly when offered in informal formats that suggest less reason to defer.¹⁵⁸ While courts *do* defer more often to an agency when that agency is party to the litigation, those courts are not simply deferring to the agency's party brief. Rather, Table 5 shows that courts defer *least* often when asked to defer to the agency's party brief. Courts are similarly skeptical of interpretations made by administrative courts and embrace a more traditional role of appellate review. These variations suggest courts already are weighing carefully the reasonableness of an agency's proffered interpretation, and rejecting it when it is unreasonable.

The data suggest that *Auer*'s role in the wake of *Talk America* has been relatively benign. A central worry among *Auer*'s critics is that agencies will insulate their policies from judicial review by offering ad hoc interpretations of vague regulations in response to litigation, but courts already have—and use—a variety of tools to reject such interpretations. While *Auer* may entail other costs in terms of agency decision-making and incentives, today it does not bind courts to accept unreasonable agency positions. The size of the problem to be solved does not appear that great.

¹⁵³ *Id.* at 588.

¹⁵⁴ *Id.* at 589.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 591–95 (Smith, J., dissenting) (arguing substantial evidence supported the Board's conclusions).

¹⁵⁷ *Id.* at 590–91 (majority opinion).

¹⁵⁸ *See* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (holding that interpretations contained in opinion letters and other informal formats are not entitled to *Chevron* deference).

B. *The Costs of the Solution: Skidmore as an Alternative to Auer*

To be sure, *Auer*'s full costs may be higher than the data reveal given potential incentives for agency behavior, and it is worth considering the costs of replacing *Auer* with a less deferential regime. After all, if there is a better alternative to *Auer*, the Court could easily avoid the risks associated with the status quo. Among critics asking the Court to overrule *Auer*, a common suggestion is to replace it with *Skidmore* deference.¹⁵⁹ Under *Skidmore*, a court will defer to an agency's opinion if the court considers it persuasive.¹⁶⁰ *Skidmore* urges courts to accept an agency's view as a "body of experience and informed judgment" that offers a source of "guidance," depending on 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."¹⁶¹ If the Court were to overrule *Auer*, replacing it with *Skidmore* would be a natural choice; courts already apply *Skidmore* deference to an agency's interpretation of its regulation if they withhold *Auer* deference.¹⁶²

Replacing *Auer* with *Skidmore*, however, would not be without cost. *Skidmore*'s greatest flaw is its unpredictability, and substituting it for *Auer* would likely entail a major loss in predictability for regulated parties.¹⁶³ Even Justice Scalia, *Auer*'s greatest critic, has recognized that *Skidmore* deference is "incoherent, both linguistically and practically," and "does nothing but confuse."¹⁶⁴ *Skidmore*'s current formulation involves so many factors—"the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position"—that it largely resembles the totality of the circumstances test "most feared by litigants who want to know what to expect."¹⁶⁵

Skidmore urges deference when the agency's interpretation has power to persuade, but there is little consistency in how courts apply that standard, or in the factors they find persuasive. For example, one study found that 19% of

¹⁵⁹ See, e.g., Healy, *supra* note 12, at 679–93; Manning, *supra* note 11, at 681.

¹⁶⁰ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹⁶¹ *Id.*

¹⁶² See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168–69 (2012) (applying *Skidmore* deference after holding that *Auer* deference was unwarranted).

¹⁶³ See Angstreich, *supra* note 11, at 85, 117–18 (arguing that determining "[e]xactly what *Skidmore* entails as a standard of deference to an agency is difficult" and eliminating *Auer* would reduce incentives for regulated entities to identify ambiguities during notice and comment). *But see* Manning, *supra* note 11, at 694–96 (arguing that while replacing *Auer* with *Skidmore* would create more uncertainty when there is a clear interpretation of a vague regulation, net clarity under *Skidmore* would be greater because agencies would draft clearer regulations).

¹⁶⁴ *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting).

¹⁶⁵ *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (alteration in original) (quoting majority opinion at 228).

courts of appeals apply an “independent judgment model” to *Skidmore* that treats the agency’s views as relevant, but upholds the interpretation only if the court independently agrees it is the best reading.¹⁶⁶ In contrast, nearly 75% apply a “sliding-scale model,” looking at contextual factors like consistency and thoroughness of consideration to determine whether to follow the agency’s guidance.¹⁶⁷ Even among courts that apply a sliding scale model, there is no uniformity in how they do so, and they have different views about what *Skidmore* means.¹⁶⁸

Of course, replacing *Auer* with *Skidmore* likely would not change the outcome in the majority of cases, given the limits inherent in both doctrines and the similarities in how courts apply them.¹⁶⁹ Some courts of appeals use an independent judgment model when applying both standards, and a shift from *Auer* to *Skidmore* would entail little change for those courts.¹⁷⁰ Other courts apply a sliding scale model under both deference regimes, and many adopt the agency’s interpretation only after concluding the agency’s position is persuasive and reasonable. After all, *Auer* does not apply where the court finds the agency’s interpretation to be inconsistent with the regulation or poorly reasoned, and a court that finds an agency’s position invalid under *Auer* would similarly find it so under *Skidmore*. Even where courts ostensibly apply *Auer*, the reasoning can strongly resemble *Skidmore* at times.¹⁷¹ For these courts, the shift in doctrine would mean little to the ultimate outcome.

The greatest cost of replacing *Auer* with *Skidmore*, however, would be the loss in predictability for regulated parties and agencies.¹⁷² Even when the outcome would be the same, the predictability of that outcome would vary. *Auer* is more predictable for two main reasons: the agency prevails at a higher rate under *Auer*, and *Auer* makes the agency’s view an easily understood guidepost for agencies and litigants. Without more direction about how courts should apply *Skidmore*, substituting it for *Auer* would bring substantial

¹⁶⁶ See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1271 (2007).

¹⁶⁷ *Id.* at 1271, 1285.

¹⁶⁸ *Id.* at 1238.

¹⁶⁹ See Angstreich, *supra* note 11, at 86 (“[I]n many cases it will not matter whether a court selects *Skidmore* rather than *Chevron* or *Seminole Rock*.”).

¹⁷⁰ See *id.* (“A court will reject an interpretation at odds with the plain meaning of a statute or regulation under any of the doctrines. Further, if the agency’s interpretation is either the most persuasive or unreasonable, then a court will reach the same result under all three doctrines” (footnote omitted)). Compare *supra* Table 7 (finding 20% of courts granting *Auer* deference reason that the agency’s interpretation is the best reading of the regulation), with Hickman & Krueger, *supra* note 166, at 1271 (finding nearly 19% of courts perform independent analysis under *Skidmore*).

¹⁷¹ See, e.g., *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 281–84, 288–91 (2009); Healy, *supra* note 12, at 673 (arguing that the Court’s application of *Auer* in *Coeur Alaska* was equivalent to *Skidmore* review).

¹⁷² Angstreich, *supra* note 11, at 120–24.

confusion about the weight to give an agency's views about the meaning of its ambiguous regulation.¹⁷³

First, *Auer* increases predictability partly because courts adopt the agency's view more often under *Auer* than *Skidmore*. Under *Auer*, regulated parties can be more confident that the court will adopt the agency's view during litigation because courts more often do so under *Auer* than *Skidmore*. Tables 1 and 2 show that courts of appeals granted *Auer* deference in about 75% of relevant cases since *Talk America*, with the rate falling to 71% since *Decker*. In contrast, a recent study revealed that courts of appeals accept the agency's interpretation in 60% of *Skidmore* cases.¹⁷⁴

Second, agencies and regulated parties can anticipate deference more easily under *Auer* than *Skidmore* because *Auer* presents a clearer rule for judicial administration. *Auer* is simply better understood by everyone involved and provides greater certainty before litigation begins.¹⁷⁵ While the difference in actual deference rates enhances *Auer*'s relative predictability, *Auer* also involves fewer balancing factors and gives courts a clearer rule to follow when confronted with an agency's permissible interpretation of its ambiguous regulation. The agency prevails in the majority of cases whether the court applies *Auer* or *Skidmore*, but parties' ability to anticipate that outcome varies with the clarity of the rule.¹⁷⁶

The Ninth Circuit's decision in *Independent Training & Apprenticeship Program v. California Department of Industrial Relations* is illustrative of the confusion that replacing *Auer* with *Skidmore* would bring.¹⁷⁷ In that case, the court withheld *Auer* deference from an interpretation offered by the Department of Labor in its amicus brief, reasoning that the agency's position would create unfair surprise for regulated parties.¹⁷⁸ The court then *adopted* the agency's interpretation under *Skidmore*, treating that surprise as irrelevant to its ultimate conclusion.¹⁷⁹ In another case, the D.C. Circuit similarly withheld *Auer* deference only to adopt the agency's interpretation under *Skidmore* as "eminently reasonable."¹⁸⁰

¹⁷³ See Angstreich & Barmore, *supra* note 126, at 14 ("Considerable uncertainty would . . . likely attend a shift from *Auer* to *Skidmore*, making it more difficult for regulated firms to predict the force that an adverse or favorable agency interpretation will carry.").

¹⁷⁴ Hickman & Krueger, *supra* note 166, at 1275.

¹⁷⁵ See Manning, *supra* note 11, at 694–95 (acknowledging *Auer*'s certainty benefits but arguing that "issues of determinacy cut both ways").

¹⁷⁶ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Predictability . . . is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.").

¹⁷⁷ See *Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Relations*, 730 F.3d 1024, 1035–36 (9th Cir. 2013).

¹⁷⁸ *Id.* at 1035.

¹⁷⁹ *Id.* at 1036.

¹⁸⁰ *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.—MDL No. 1993*, 709 F.3d 1, 18–19 (D.C. Cir. 2013).

The choice between *Auer* and *Skidmore* matters most at the margins, when the outcome of the case is least predictable.¹⁸¹ Where the regulation or statute provides a clear answer, *Auer* and *Skidmore* compel the same result, and that clarity allows parties to anticipate the outcome regardless of the deference standard used. At the margins, however, the agency's interpretation is either (1) a worse (but defensible) reading of the regulation, or (2) a permissible exercise of discretion to fill in the gaps of regulatory language or answer a difficult policy question. The central concern is whether marginal *Auer* cases usually fall in the first or second camp. As explained in Part II, the first category is the most concerning to critics, but there is little evidence that courts have accepted unreasonable interpretations in their decisions. Rather, *Auer* typically arises in the second category, and often implicates an agency's discretionary policy choice.

Replacing *Auer* with *Skidmore* would thus entail substantial costs in political accountability. Even proponents of replacing *Auer* with *Skidmore* acknowledge that "a post-*Seminole Rock* world would sometimes require courts to make interpretive policy judgments now reserved for relatively accountable administrative agencies."¹⁸² The data show just how prevalent policy questions are in *Auer* cases. Courts granting *Auer* deference commonly reason that the interpretive question is one of policy that involves balancing competing interests—a task best left to the administrative agency that Congress charged with implementing the regulatory scheme in question.

The Seventh Circuit's decision in *United States v. P.H. Glatfelter Co.* is illustrative.¹⁸³ There, the court reviewed an interpretation offered by the Environmental Protection Agency contained in the preamble to its regulation.¹⁸⁴ The EPA's interpretation of its ambiguous regulation required it to balance the public's need for information against the agency's need to implement its programs expeditiously, and the court saw no reason to conclude that the EPA's resolution of those competing interests was not the product of its "fair and considered judgment."¹⁸⁵ Rather, the court reasoned, the EPA's interpretation was an "eminently reasonable way to balance . . . competing interests."¹⁸⁶ Similar examples abound.¹⁸⁷ Given that policy choices account

¹⁸¹ See Angstreich, *supra* note 11, at 87–88 (“[T]he set of unpersuasive but reasonable interpretations of ambiguous regulations and statutes is relatively large and, in a case involving such an interpretation, the choice of doctrine is outcome determinative.”).

¹⁸² Manning, *supra* note 11, at 691.

¹⁸³ See *United States v. P.H. Glatfelter Co.*, 768 F.3d 662, 672–73 (7th Cir. 2014).

¹⁸⁴ *Id.* at 673.

¹⁸⁵ *Id.* (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

¹⁸⁶ *Id.*

¹⁸⁷ See, e.g., *Rodysill v. Colvin*, 745 F.3d 947, 950 (8th Cir. 2014) (deferring to the agency's interpretation of its ambiguous regulation setting forth the agency's "policy"); *Suburban Air Freight, Inc. v. Transp. Sec. Admin.*, 716 F.3d 679, 683 (D.C. Cir. 2013) (“It is TSA's job—not Suburban's or ours—to strike a balance between convenience and security . . .”).

for a substantial part of the work that *Auer* does, a shift to *Skidmore* would entail major costs to the political accountability of agency decision-making.

V. CONCLUSION

When the Court decides to revisit *Auer*, it will face compelling theoretical arguments on both sides of the issue. *Auer* raises problematic incentives for agencies that could undermine notice to regulated parties, and it carries the troubling idea of allowing a governmental body to interpret the rules it writes. Additionally, if *Auer* is held to violate the Administrative Procedure Act, its practical benefits will not save it. As the Court weighs concerns from critics, however, it should keep in mind the way these risks have played out and *Auer*'s benefits in practice. While *Auer* itself entails risks, it is important to measure the costs of a solution against the size of the problem at hand.

Ultimately, the costs of overruling *Auer* likely outweigh the risks of retaining it. The data suggest that replacing *Auer* with *Skidmore* would entail substantial costs in reduced certainty for regulated parties and agencies and decreased political accountability. In comparison, courts of appeals have proven willing and able to reject the kind of agency interpretations that critics find most problematic. The Court already has placed significant limits on *Auer*, and courts of appeals have responded in the wake of *Talk America* by withholding deference from unreasonable agency interpretations. *Auer*'s critics raise a number of compelling concerns about how the doctrine could be misused, but there is no evidence that those concerns have materialized in practice. If the debate comes down to incentives, the data suggest there is little to gain (and much to lose) by rolling back *Auer* further.