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New Light on Auer/Seminole Rock Deference

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by Steve R. Johnson

We have been engaged in an extended exploration of doctrines under which courts may defer to positions and interpretations by state and local tax agencies. The immediately prior installment of this column[1] discusses such deference under state equivalents of what is known as the *Auer* or *Seminole Rock* principle, under which courts *usually* defer to agency interpretations of the agencies' own ambiguous regulations.[2]

About two weeks after publication of that installment, the U.S. Supreme Court handed down a major new decision on the *Auer* principle: *Talk America, Inc. v. Michigan Bell Telephone Co.*[3] *Talk America* bids fair to be influential in future *Auer*-type cases — at the state and local levels as well as at the federal level because Supreme Court decisions often are carefully analyzed by and are cited by state and local courts.[4]

In state and local tax cases, the *Auer* rule typically is asserted by the revenue agency and is opposed by the taxpayer. *Talk America* offers ammunition to both sides. The first part of this column describes the opinion for the Court in *Talk America*. The second part considers Justice Antonin Scalia's concurrence and an important law review article cited by that concurrence. The last part offers preliminary thoughts on the possible future significance of *Talk America* in state and local cases.

Opinion of the Court

Talk America involved the Federal Communications Commission but, of course, the teaching of the case is applicable to all agencies. Two private companies disagreed on the meaning of an order issued by the FCC.[5] When the case reached the Supreme Court, the FCC filed an amicus curiae brief stating its view about the meaning of its order. The U.S. Solicitor General, joined by counsel for the FCC, represented to the Court that the amicus brief "reflects the Commission's considered interpretation of its own rules and orders."[6]

The Supreme Court unanimously adopted the view expressed in the FCC's amicus brief.[7] The Court first examined the statute interpreted by the order and found the statute to be ambiguous. "In the absence of any unambiguous statute or regulation, [the Court turned] to the FCC's interpretation of its regulations in its *amicus* brief."[8] The Court noted that, in its *Chase Bank* decision in January 2011, it had reaffirmed its adherence to *Auer*.[9] Plainly, that the Court — twice, very recently, and without any dissenting opinions — reaffirmed *Auer* will give comfort to those tax and other agencies that want to rely on the rule.

However, there is help as well for taxpayers and others who would oppose application of the rule in

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[1]Steve R. Johnson, "Deference to Tax Agencies' Interpretation of Their Regulations," *State Tax Notes*, May 30, 2011, p. 665, *Doc 2011-9625*, or *2011 STT 104-4*.

[2]The principle goes back at least as far as *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). These days, the principle is more often described by reference to *Auer v. Robbins*, 519 U.S. 452 (1997).

[3]131 S. Ct. 2254 (June 9, 2011).

[4]*See, e.g.*, Steve R. Johnson, "*Chevron* Deference to State Tax Agencies," *State Tax Notes*, Jan. 24, 2011, p. 285, *Doc 2010-27202*, or *2011 STT 15-2* (describing the influence of the Supreme Court's *Chevron* decision on state and local tax cases).

[5]Many agencies — including tax agencies in some states — promulgate binding rules either through orders or regulations, the former being a quasi-judicial process and the latter being quasi-legislative. In general, deference doctrines treat orders and regulations essentially equivalently.

[6]131 S. Ct. at 2257 n.l.

[7]The opinion for the Court was written by Justice Clarence Thomas. Justice Elena Kagan took no part in consideration or decision of the case.

[8]131 S. Ct. at 2260-2261.

[9]*Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871 (Jan. 24, 2011). Justice Sonia M. Sotomayor wrote the *Chase Bank* opinion for a unanimous court.

> Deferring to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive. By contrast, deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking and promotes arbitrary government.[25]

The concurrence cites an article (mentioned in the prior installment) by Prof. John Manning, remarking that the article "fully explore[s]" both the defects of *Auer* and alternatives to it.[26] Scalia was right to do so. Manning's article is, in my estimation, the best article written to date on *Auer*. In particular, it develops in detail the concerns set out in the four stages above.

How are the advantages and disadvantages of *Auer* to be balanced? The concurrence ends on the following note: "We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so."[27]

Possible Impact of *Talk America*

Will Scalia's call to reexamine the doctrine lead ultimately to abrogation of *Auer*? The weight of Scalia's intellect and rhetoric are great indeed. He surely is among the most influential of American jurists in the modern era. His effect on statutory interpretation approaches, for example, has been enormous.[28] In other areas, however, such as *Chevron*[29] and the negative commerce clause,[30] his influence has been less noticeable.

As always, history matters. Before *Chase Bank* and *Talk America*, several members of the Court — including three current members — gave indications of less than enthusiastic support for *Auer*. Their concerns were not as strongly put as were Scalia's in *Talk America*, but their opinions did cast doubt on *Auer's* doctrinal underpinnings.[31]

Do the other justices share Scalia's willingness to reexamine *Auer*? One could argue no, because one of them, Justice Ruth Bader Ginsburg, concurred in both *Chase Bank* and *Talk America* and another, Justice Clarence Thomas, concurred in *Chase Bank* and authored *Talk America*. On the other hand, their actions may be explained by the fact, noted by Scalia, that none of the parties to those cases asked the Court to reconsider the viability of *Auer*.

The Manning article cited by Scalia has been cited hundreds of times by federal decisions, state decisions, administrative positions, commentary, and briefs. Citing Manning, the Minnesota Supreme Court stated in a nontax case: "Continued adherence to *Seminole Rock* has come under strong criticism."[32] Briefs filed in state cases have also cited Manning's article.[33]

In short, the pot has been seething for a while. It remains to be seen whether *Talk America* will bring it to a boil. I hope that, sooner or later, it does. I believe that the disadvantages of *Auer* and its state equivalents outweigh their advantages and that those doctrines should be abrogated. ☆

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[25]131 S. Ct. at 2266 (Scalia concurring).

[26]John F. Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96 *Colum. L. Rev.* 612 (1996).

[27]131 S. Ct. at 2266 (Scalia concurring).

[28]*See, e.g.*, William N. Eskridge, Jr., "The New Textualism," 37 *UCLA L. Rev.* 621 (1990) (identifying Scalia as the principal influence in a revamped textualist style of statutory interpretation).

[29]Scalia's pleas for a brighter-line approach to *Chevron* have failed to move the Court off a mushier facts-and-circumstances approach. Compare *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 1003-1005 (2005) (Breyer, J., concurring) *with id.* at 1014-1020 (Scalia dissenting) & *United States v. Mead Corp.*, 533 U.S. 218, 235-238 (2001) *with id.* at 239-256 (Scalia dissenting). See generally William N. Eskridge Jr. and Lauren E. Baer, "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*," 96 *Geo. L.J.* 1083, 1159-1161 (2008) (contrasting Scalia's and Justice Stephen G. Breyer's views on deference).

[30]Scalia's oft-voiced position that the negative commerce clause is unfounded constitutionally has yet to become a majority position. *See, e.g., Department of Revenue v. Davis*, 553 U.S. 328, 359-60 (2008) (Scalia concurring in part); *General Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia concurring); Steve R. Johnson, "What *Davis* Means for Constitutional and Statutory Interpretation," *State Tax Notes*, June 16, 2008, p. 877, *Doc 2008-11842*, or *2008 STT 117-3*.

(Footnote continued in next column.)

[31]*See Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 102-14 (1995) (O'Connor dissenting, joined by Scalia, Souter, and Thomas); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 518-531 (1994) (Thomas dissenting, joined by Stevens, O'Connor, and Ginsburg). These cases are discussed by Manning, *supra* note 26, at 615-616.

[32]*Anderson v. State Dep't of Natural Resources*, 693 N.W.2d 181, 191 n.7 (2005).

[33]*See, e.g., Kinnaird v. Indiana Family & Social Services Admin.*, Brief of Appellant (Ind. App.), 2004 WL 3217166, at * 14 (July 16, 2004); *Hy-Vee Food Stores, Inc. v. State Dep't of Health*, Reply Brief of Appellant (Minn.), 2005 WL 3133789, at * 3 (Mar. 8, 2005).