

The Legal Intelligencer

Supreme Court Willing to Reconsider Deference to Administrative Agencies

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Stephen A. Miller and Jeffrey M. Monhait

2013-04-24 12:00:00 AM

Most of the federal government's authority is exercised, on a day-to-day basis, through its administrative agencies. Central to the efficiency of those agencies — such as it is — is the judiciary's substantial deference to agency decision-making. Without that deference, people and corporations would often have an incentive to try to impair (or at least delay) agencies' actions through court challenges.

Justices of the U.S. Supreme Court recently suggested their willingness to reconsider this bedrock principle of administrative law. In *Decker v. Northwest Environmental Defense Center*, 568 U.S. ___, No. 11-338 (Mar. 20, 2013), the Supreme Court followed its own precedent and deferred to a particular Environmental Protection Agency (EPA) interpretation of the Clean Water Act (CWA), 33 U.S.C. § 1365, and its implementing regulations. Justice Anthony Kennedy wrote the 7-1 majority opinion holding that the CWA does not require logging companies to secure permits for water pollution resulting from stormwater runoff of logging roads.

The "action" was not in the majority opinion. In separate opinions, two justices openly signaled a willingness to scale back the deference afforded to agencies interpreting their own regulations. Justice Antonin Scalia's dissent expressed his desire to overturn *Auer v. Robbins*, 519 U.S. 452 (1997), which mandates judicial deference to an agency's interpretation of its regulations. For Scalia, the *Decker* case highlighted a fundamental unfairness wrought by *Auer* — namely, allowing an agency both to create and to interpret the law. Chief Justice John Roberts Jr., concurring in the judgment, also expressed his interest in revisiting *Auer* but concluded that this case did not properly raise the issue. The justices' invitations will likely precipitate just such a legal challenge, which might result in a sea change in administrative law — an area of law not exactly renowned for drama.

Interpretation of the CWA

Decker presented a question regarding permit requirements under the CWA and its implementing regulations. Specifically, the case addressed whether logging companies required permits for any pollution caused by stormwater runoff from logging roads. The answer turned on the interpretation of the CWA and the implementing regulations promulgated by the EPA: (1) whether the logging activities constituted a "point

source" under the EPA's Silvicultural Rule, and (2) whether the resulting stormwater discharges were "associated with industrial activity" under the EPA's Industrial Stormwater Rule. Affirmative answers to both questions meant that the CWA required the logging companies to obtain certain permits to engage in this type of activity.

The Supreme Court held that the CWA covered the logging activities and discharges at issue. In doing so, the court deferred to the EPA's interpretation of its own regulations, which excluded the logging activities at issue from the industrial activities for which the CWA required permits. Applying *Auer*, the majority noted that courts must defer to an agency's interpretation of its own regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." According to Kennedy, the EPA's reading was "permissible," and there was "no indication that [the EPA's] view is a change from prior practice or a post hoc justification adopted in response to litigation." Under the facts of the case, and the principle of deference set forth in *Auer*, the court deferred to the EPA's interpretation of its regulation and reversed the U.S. Court of Appeals for the Ninth Circuit.

Calls to Reconsider Auer

Roberts' concurring opinion — joined by Justice Samuel Alito Jr. — signaled a willingness to reconsider the level of deference owed to agency decision-making. The two justices acknowledged that it "may be appropriate to reconsider that principle in an appropriate case," but concluded that the issue was not ripe for decision in *Decker*. The *Decker* plaintiff had only dedicated a single footnote in its brief to the issue of overturning *Auer*, and the logging companies had dedicated only a footnote in their reply brief to the issue.

In a moment of significant transparency, however, the concurrence stated that "the bar is now aware that there is some interest in reconsidering those cases." The opinion issued an open invitation to *Auer's* opponents to bring a case before the court that will squarely present the issue for determination.

Scalia authored the *Auer* opinion, but he dissented in *Decker* because he was ready to overturn *Auer* immediately. Scalia addressed three particular problems with *Auer* deference: (1) a search for agency intent is subject to the same fallacies as a search for legislative intent; (2) an agency's "special expertise" — the justification for deference — only supports having the agency draft regulations, not interpret them; and (3) allowing agencies to interpret regulations that they draft violates the separation of powers by placing both the creation and interpretation of the law in the same hands. As Scalia wrote, "He who writes a law must not adjudge its violation."

Scalia took care to emphasize that he was not calling for a total reconsideration of all deference to agency decision-making. He noted that *Chevron U.S.A. v. Natural Resources Defense Council* deference does not raise the same separation-of-powers concerns as *Auer* because it simply allows the executive, rather than the judiciary, to "work out" the ambiguities Congress leaves in statutes. By contrast, *Auer* allows an agency to sort out the ambiguities in the regulations that it writes — and indeed, that power encourages the agencies to draft broad, vague regulations that create ambiguities to later provide the agency flexibility in application of those regulations without the burden of the formal notice and comment rulemaking process. *Chevron* does not produce the same perverse incentive, because Congress must speak clearly or else it will not have the chance to interpret ambiguities in its statute. Placing the courts in the position of interpreting ambiguous regulations would produce an incentive for agencies to write clear regulations.

Coming years

At least three justices have openly called for reconsideration of the deference afforded to an administrative agency's interpretation of its own regulation. The well-known "rule of four" requires only one more justice to be sufficiently interested in this issue to grant a writ of certiorari in an appropriate case. In the coming years, therefore, we should expect opponents of certain agency enforcement actions to highlight the problems discussed in Scalia's dissent and, eventually, obtain a reconsideration by the full court of *Auer*. •

Stephen A. Miller practices in the commercial litigation group at Cozen O'Connor's Philadelphia office. Prior to joining Cozen O'Connor, he clerked for Justice Antonin Scalia on the U.S. Supreme Court and

served as a federal prosecutor for nine years in the Southern District of New York and the Eastern District of Pennsylvania.

Jeffrey M. Monhait *also practices in the commercial litigation group at the firm in Philadelphia. He graduated from Haverford College and Harvard Law School.*

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