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Cracks in the Façade – Supreme Court To Consider Reining In Agency Regulatory Interpretations

The playing field in a lawsuit challenging agency action is tilted toward the agency, largely by means of various deference doctrines. One of the most important has been deference to an agency's interpretation of its own regulations.

Courts have been deferring to those interpretations for decades, following a 1940s Supreme Court case, *Bowles v. Seminole Rock & Sand Co.*[1] The ground really shifted in 1997, when in *Auer v. Robbins*[2] the Supreme Court said a court should generally defer to an agency's interpretation developed for the first time in court briefing. The Supreme Court has occasionally walked that back, suggesting that an agency only gets this deference for interpretations that reflect the "fair and reasoned judgment" of the agency. But today, in many courts, the agency can craft a new interpretation of its regulation in litigation, directly targeted to the arguments that arise in the case.

However, the playing field might soon get a bit more level, as this week the Supreme Court accepted a case expressly asking the court to overrule *Auer* and *Seminole Rock*. The case under review involves a Vietnam veteran's claim for retroactive disability benefits for service-related post-traumatic stress disorder (PTSD). The claim had been rejected in 1983 due to an erroneous disqualifying diagnosis, but was reopened in 2006 with new evidence of PTSD. The Board of Veterans' Appeals granted the veteran benefits from 2006 forward, but rejected the claim for retroactive benefits because it deemed additional service records, which had been available in 1983 with the original request, not "relevant." "Relevant" was a key term in the agency's regulations about retroactive benefits, and the board interpreted the term to encompass only evidence that directly addressed the basis of the 1983 decision. The Federal Circuit, denying a challenge to that decision, deferred to the board's interpretation under *Auer*. Now, the Supreme Court will revisit its position that judges should accept an agency's interpretation of its own ambiguous regulation rather interpret the meaning of the regulation on its own.

It was perhaps only a matter of time before the Supreme Court reexamined *Auer* deference, as a number of commentators and judges, not least among them, the late Justice Antonin Scalia, who wrote the *Auer* decision, have recently questioned its place in administrative law: "For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of 'defer[ring] to an agency's interpretation of its own regulations.'"[3] Justice Scalia criticized *Auer* deference because it transfers to agencies the power to "say what the law is,"[4] which is the role of courts, and thus "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."[5] Justice Scalia also noted that *Auer* deference encourages agencies to write vague regulations that they can later tailor to impose additional requirements through their interpretations, thus skirting the important notice and comment process for agency rulemaking. Several other conservative justices, including Chief Justice John Roberts, Justice Clarence Thomas, Justice Samuel Alito, Jr. and Justice Neil Gorsuch, have expressed similar critiques *Auer* deference.[6] With the recent appointment of Justice Brett Kavanaugh, *Auer* and *Seminole Rock* may be on the chopping block.

If the Supreme Court eliminates this form of deference, the consequences for administrative rule-writing will be significant. Scholars have found that the *Auer* doctrine can play a role in rule-drafting decisions,[7] and one of us knows from personal experience that agencies may sometimes leave regulatory questions unanswered because of the comfort of *Auer* deference. If that landscape changes, agencies might take longer drafting regulations and be encouraged to spell out in greater detail the rules governing the behavior of regulated industries. This change in process would not only give regulated companies more opportunities to weigh in on and try to shape the details, but would also reduce instances of surprising interpretations. At a minimum, regulated companies will more often get to learn the law before they do business, rather than discovering it in an agency's brief against them.

1 325 U.S. 410 (1945).

2 519 U.S. 452 (1997).

3 *Decker v. N.W. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part & dissenting in part).

4 *Id.* at 618 (quoting *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).

5 *Id.* at 620-21.

6 See *id* at 615 (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer* deference] in an appropriate case. But this is not the case."); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-1211 (2015) (Alito, J., concurring in part and concurring in the judgment) (discussing various reasons why the doctrine "may be incorrect."); *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1052 (2018) (Thomas, J, dissenting and Gorsuch, J., joining in dissent) ("[*Auer*] deference is constitutionally suspect").

7 Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703 (2014).

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