Clean Water Act — Auer *Deference* —
Decker v. Northwest Environmental Defense Center

It is a long-settled principle of administrative law that an agency's interpretation of its own regulation receives significant deference from a reviewing court. As the Supreme Court announced in *Bowles v. Seminole Rock & Sand Co.*[1] and unanimously affirmed in *Auer v. Robbins*,[2] such an interpretation is controlling unless it is "plainly erroneous or inconsistent with the regulation."[3] Although long uncontroversial, so-called "*Auer* deference" has recently received scholarly[4] and judicial[5] scrutiny. Last Term, in *Decker v. Northwest Environmental Defense Center*,[6] the Court applied *Auer* deference in the traditional manner, but three Justices signaled an interest in abandoning the doctrine. *Auer*'s days may be numbered. But rather than eliminate *Auer* deference, the Court should consider a compromise: adopting a version of the "one-bite rule" of regulatory interpretation employed by several circuit courts. This development would address *Auer* detractors' concerns about agency incentives while preserving agencies' ability to clarify their regulations after initial promulgation.

Logging companies use roads through Oregon's Tillamook State Forest to harvest timber.[7] The companies typically channel stormwater off these roads using a series of ditches.[8] This runoff often contains sediment and other pollutants, and sometimes reaches rivers and lakes, where it can degrade water quality and harm aquatic life.[9]

The Clean Water Act[10] (CWA) requires companies to secure National Pollutant Discharge Elimination System (NPDES) permits before they discharge pollutants from any "point source" into the navigable waters of the United States.[11] An Environmental Protection Agency (EPA) regulation, the Silvicultural Rule,[12] specifies that certain

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[1] 325 U.S. 410 (1945).

[2] 519 U.S. 452 (1997).

[3] *Id.* at 461 (quoting *Seminole Rock*, 325 U.S. at 414) (internal quotation marks omitted).

[4] *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449 (2011).

[5] *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166–68 (2012); Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring).

[6] 133 S. Ct. 1326 (2013).

[7] *Id.* at 1333.

[8] Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188, 1191 (D. Or. 2007).

[9] *Id.*

[10] 33 U.S.C. §§ 1251–1387 (2006 & Supp. V 2011).

[11] *Id.* §§ 1311(a), 1342(a), 1362(12). The CWA defines a point source, in relevant part, as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." *Id.* § 1362(14).

[12] 40 C.F.R. § 122.27 (2013).

logging-related discharges require permits, unless those sources are otherwise exempted.[13] One such instance is the CWA's exemption of "discharges composed entirely of stormwater," unless the discharge is "associated with industrial activity."[14] Before its amendment in December 2012, a second EPA regulation, the Industrial Stormwater Rule,[15] defined discharges "associated with industrial activity" as those "from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant."[16] The Rule specified that facilities classified under Standard Industrial Classification 24[17] — a classification that includes "[l]ogging"[18] — are considered to be engaged in "industrial activity."[19] It also stated that "[f]or the categories of industries identified in this section, the term ['storm water discharge associated with industrial activity'] includes, but is not limited to, storm water discharges from . . . immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility."[20]

In September 2006, the Northwest Environmental Defense Center (NEDC) filed suit under the CWA's citizen-suit provision[21] against various logging and paper-product companies alleging that defendants violated the CWA by discharging stormwater runoff from Tillamook logging roads into two Oregon rivers without the necessary NPDES permits.[22] The district court dismissed the case for failure to state a claim.[23] It held that NPDES permits were not required under the Silvicultural Rule because the discharges resulted from natural runoff, and thus were not point sources.[24]

The Court of Appeals for the Ninth Circuit reversed.[25] Writing for a unanimous panel, Judge Fletcher[26] found that the Silvicultural Rule

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[13] *Id.* Specifically, those conveyances "related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities" are defined as point sources. *Id.* § 122.27(b)(1).

[14] 33 U.S.C. § 1342(p).

[15] 40 C.F.R. § 122.26 (2012).

[16] *Id.* § 122.26(b)(14).

[17] As the Court explained in *Decker*, "[t]he Standard Industrial Classifications are a system used by federal agencies to categorize firms engaged in different types of business activity." 133 S. Ct. at 1332.

[18] *Decker*, 133 S. Ct. at 1332 (quoting 2 Joint Appendix at 64) (internal quotation marks omitted).

[19] 40 C.F.R. § 122.26(b)(14)(ii).

[20] 40 C.F.R. § 122.26(b)(14).

[21] 33 U.S.C. § 1365 (2006). This provision "authorize[s] private enforcement of the [Clean Water Act]" via civil suit. U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 613 n.5 (1992).

[22] Nw. Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188, 1190–91 (D. Or. 2007).

[23] *Id.* at 1190.

[24] *See id.* at 1197.

[25] Nw. Envtl. Def. Ctr. v. Brown, 640 F.3d 1063, 1087 (9th Cir. 2011).

[26] Judge Fletcher was joined by Judge Fisher and District Judge Breyer of the Northern District of California, sitting by designation.

was ambiguous regarding whether natural runoff channeled through ditches and culverts was a point source, but that the statutory definition of point source encompassed such runoff.[27] The court also held that the Industrial Stormwater Rule unambiguously did not exempt the runoff at issue, as the roads were both "immediate access roads" and "primarily dedicated for use by [an] industrial facility."[28]

The Supreme Court reversed.[29] Writing for the Court, Justice Kennedy[30] began by rejecting the petitioner's argument that the suit was barred by 33 U.S.C. § 1369(b).[31] He reasoned that § 1369(b) did not bar a citizen suit seeking to enforce compliance with the CWA.[32]

Turning to the merits, the Court began by examining whether the statutory term "associated with industrial activity" unambiguously covered channeled stormwater runoff from logging roads. The Court held that the term "industrial" was ambiguous — plausibly referring either to business activity in general or only to "economic activity concerned with the processing of raw materials and manufacture of goods in factories" — so the statute did not foreclose the agency's interpretation that the term did not encompass outdoor timber harvesting.[33]

The Court also rejected the Ninth Circuit's argument that the defendants' conduct was unambiguously covered by the Industrial Stormwater Rule's requirement of NPDES permits for stormwater discharges from "immediate access roads . . . used or traveled by carriers of raw materials" for the covered industrial activities.[34] In an amicus brief, the EPA had interpreted the Rule to cover only "traditional

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[27] *See* Nw. Envtl. Def. Ctr., 640 F.3d at 1080.

[28] *Id.* at 1084 (quoting 55 Fed. Reg. 47990, 48009 (Nov. 16, 1990)) (internal quotation marks omitted).

[29] *Decker*, 133 S. Ct. at 1338.

[30] Justice Kennedy was joined by Chief Justice Roberts and Justices Thomas, Ginsburg, Alito, Sotomayor, and Kagan in full. Justice Scalia joined Parts I and II of the Court's opinion. Justice Breyer recused himself because his brother, Judge Breyer of the U.S. District Court for the Northern District of California, sat by designation on the Ninth Circuit panel that heard the case.

[31] This section provides for exclusive judicial review in the courts of appeals for "particular actions by the [EPA] Administrator, including establishment of effluent standards and issuance of permits for discharge of pollutants." *Decker*, 133 S. Ct. at 1334 (alteration in original) (quoting Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13–14 (1981)) (internal quotation mark omitted).

[32] *Id.* The Court also held that the EPA's recent amendment to the Industrial Stormwater Rule did not render the case moot. Three days prior to oral argument before the Supreme Court, the EPA issued an amendment to the Industrial Stormwater Rule effectively exempting the defendants' conduct from the NPDES permit requirement. *Id.* at 1332–33. Nevertheless, the Court held that a controversy continued to exist regarding whether petitioners could be held liable under the earlier version of the Rule. *Id.* at 1335–36.

[33] *Id.* at 1336 (quoting NEW OXFORD AMERICAN DICTIONARY 887 (3d ed. 2010)) (internal quotation marks omitted).

[34] *Id.* (quoting 40 C.F.R. § 122.26(b)(14) (2006)) (alteration in original).

industrial sources such as sawmills"[35] on the ground that the Rule's reference to "facilities" and the Standard Industrial Classification's reference to "establishments" suggested more permanent sites than an outdoor logging installation.[36] The Court invoked the "well established" *Auer* doctrine and found this interpretation "permissible."[37] Moreover, the Court noted that *Auer* deference was particularly appropriate in this instance because the EPA's interpretation was long held, not "a change from prior practice or a *post hoc* justification adopted in response to litigation."[38] The EPA's interpretation triumphant, the judgment below was reversed and the case remanded.[39]

Chief Justice Roberts concurred, joined by Justice Alito. He acknowledged the questions about *Auer* deference raised in Justice Scalia's subsequent opinion, but declined to address the issue because it had not been fully briefed.[40] Noting that "[t]he bar is now aware that there is some interest in reconsidering" *Auer*, he announced that he "would await a case in which the issue is properly raised and argued."[41]

Justice Scalia concurred in part and dissented in part.[42] He argued that *Auer* deference should be eliminated and that the EPA's interpretation of the regulation should not prevail because it was not "the most natural" reading.[43] Justice Scalia reviewed two justifications for *Auer* deference and found neither persuasive. First, some cases suggest that an agency's interpretation of its own regulation deserves deference because the agency knows what it meant when it drafted the rule.[44] But Justice Scalia dismissed this rationale as off base: the text of the regulation, not the agency's "unexpressed intention," must guide interpretation.[45] Second, other cases argue that the agency deserves deference because it "possesses special expertise in administering its 'complex

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[35] *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at 24–25, *Decker*, 133 S. Ct. 1326 (Nos. 11-338, 11-347)) (internal quotation mark omitted).

[36] *Id.* at 1336–37 (quoting Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 35, at 24–25) (internal quotation marks omitted).

[37] *Id.* at 1337.

[38] *Id.* (citing Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166–67 (2012)).

[39] *Id.* at 1338. On remand, the Ninth Circuit noted that although the Supreme Court had reversed its interpretation of the Industrial Stormwater Rule, it "left intact" the holding that the runoff at issue was "within the meaning" of the CWA's statutory definition of "point source." Nw. Envtl. Def. Ctr. v. Decker, No. 07-35266, 2013 WL 4618311, at *1 (9th Cir. Aug. 30, 2013). The court vacated the district court's opinion and remanded.

[40] *Id.* (Roberts, C.J., concurring).

[41] *Id.* at 1339.

[42] *Id.* (Scalia, J., concurring in part and dissenting in part). Justice Scalia agreed that the cases were not moot and that the district court had jurisdiction. *Id.*

[43] *Id.*

[44] *Id.* at 1340 (citing Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150–153 (1991)).

[45] *Id.*

and highly technical regulatory program.'"[46] Justice Scalia contended that this was a good reason to afford agencies rulemaking power but not subsequent interpretive authority — the goal of interpretation is "to determine the fair meaning of the rule," not to make effective policy.[47]

Justice Scalia also rebutted the argument that *Auer* deference follows a fortiori from *Chevron* deference: if an agency's interpretation of a statute should receive deference, then surely an agency's interpretation of a regulation written by the agency itself should also receive deference.[48] Not so, Justice Scalia argued: the theory of *Chevron* is that Congress implicitly delegates to the agency the power to resolve statutory ambiguities. But no such delegation exists for the agency to resolve subsequent regulatory ambiguities.[49] Indeed, Justice Scalia continued, such a delegation "would violate a fundamental principle of separation of powers," as the power to write law and the power to interpret law would belong to the same branch of government.[50] Moreover, the two deference doctrines create opposite incentives: *Chevron* encourages Congress to write clear statutes, in order to control agency action; *Auer* encourages agencies to write vague regulations to which they can subsequently give meaning without formal rulemaking procedures.[51]

Justice Scalia acknowledged that *Auer* has the "beneficial pragmatic effect" that the public can generally rely on an agency's interpretation of its own regulation, rather than wait for a definitive interpretation by the Supreme Court after a lengthy litigation process.[52] But, he noted, the agency can always promulgate an amended regulation should a court endorse a different interpretation.[53] Moreover, mere "efficiency gains" cannot cure a violation of the separation of powers.[54]

Therefore, in the case at hand, Justice Scalia would have found the stormwater discharges to require NPDES permits. First, he agreed with the Ninth Circuit that manmade ditches fell within the statutory definition of point sources.[55] Second, he found that the discharges were associated with industrial activity because Standard Industrial Classification 24, incorporated into the Industrial Stormwater Rule's definition of "industrial activity," expressly includes "[l]ogging."[56]

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[46] *Id.* (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).
[47] *Id.*
[48] *Id.* at 1341.
[49] *See id.* at 1340–41.
[50] *Id.* at 1341.
[51] *See id.*
[52] *Id.*
[53] *Id.* at 1341–42.
[54] *Id.* at 1342.
[55] *Id.* at 1342–43.
[56] *Id.* at 1343 (quoting 2 Joint Appendix at 64) (internal quotation marks omitted). Justice Scalia also criticized the majority's argument that "establishments" could mean only fixed and permanent

It seems that *Auer*'s days may be numbered. One Justice has launched a direct assault on the doctrine, and two others have signaled that they would welcome the opportunity to reconsider it. After the Court arguably restricted the doctrine in a case last Term,[57] the trend seems clear.[58] Scholars have suggested cabining[59] or eliminating[60] *Auer* deference. But rather than altering the degree of judicial deference owed to agency interpretations, the Court should consider limiting agencies' ability to revise those interpretations by adopting the so-called "one-bite rule." This rule would restrict agencies' ability to promulgate new, contradictory interpretations of regulations without using notice-and-comment rulemaking. Such a compromise would draw on the purpose of the *Auer* doctrine — deference to administrative expertise — by channeling new interpretations through the rigor of the notice-and-comment process. This system would also encourage agencies to write more specific regulations and discourage later, contradictory reinterpretations. Such an arrangement would provide a more stable regulatory environment, but would still allow agencies a measure of flexibility in adapting their regulations to unforeseen circumstances. Moreover, such a shift would comport with recent developments in the Court's treatment of the *Auer* doctrine.

Auer deference has several key pragmatic benefits. The doctrine respects comparative institutional competence by giving agency experts wide latitude to resolve technical regulatory ambiguities.[61] To the extent that such interpretations fundamentally involve policy choices,[62] *Auer* leaves these decisions primarily to the politically accountable executive branch.[63] Moreover, as Justice Scalia conceded, *Auer* promotes efficiency, avoiding the need for lengthy litigation to resolve every regulatory ambiguity.[64]

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sites: the Standard Industrial Classifications elsewhere refer to establishments for "producing wood chips in the field," implying a site no more fixed and permanent than the logging operations at issue in this case. *See id.* at 1344 (quoting 2 Joint Appendix at 64) (internal quotation marks omitted).

[57] *See The Supreme Court, 2011 Term — Leading Cases*, 126 HARV. L. REV. 176, 357, 358 (2012) (arguing that *Christopher* imposed a retroactivity constraint on the *Auer* doctrine).

[58] The then–Chief Judge of the Second Circuit, in dissent, has already cited Justice Scalia's *Decker* opinion in arguing that *Auer* deference should not be extended to an agency interpretation that is not "the most natural" reading. Berlin v. Renaissance Rental Partners, LLC, No. 12-2213-CV, 2013 WL 1859140, at *7 (2d Cir. May 6, 2013) (Jacobs, C.J., dissenting) (quoting *Decker*, 133 S. Ct. at 1339 (Scalia, J., concurring in part and dissenting in part)).

[59] *See, e.g.*, Manning, *supra* note 4, at 681–82; Stephenson & Pogoriler, *supra* note 4, at 1504.

[60] *See, e.g.*, Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 6 (1996).

[61] *See* Stephenson & Pogoriler, *supra* note 4, at 1456.

[62] The Court has long recognized the intertwined nature of interpretation and policymaking in the context of agency statutory interpretations. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984).

[63] Stephenson & Pogoriler, *supra* note 4, at 1456–57.

[64] *See Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

However, the doctrine is not without flaws. As Justice Scalia identified, *Auer* strains the separation of powers and creates perverse incentives for agencies to promulgate vague regulations, which can later be interpreted expansively by the agency itself. In addition, scholars have criticized *Auer* deference for enabling an unpredictable regulatory environment and depriving regulated entities of fair notice.[65]

Two aspects of administrative law facilitate *Auer*'s practical shortcomings: the ex ante ease with which agencies can interpret their own regulations and the ex post lenience of the *Auer* standard upon judicial review. The Administrative Procedure Act[66] (APA) exempts "interpretative rules" from the traditional notice-and-comment procedures.[67] These rules, which construe preexisting regulations or statutes, are often inexpensively published in guidance manuals or on agency websites.[68] And if the interpretive rule interprets a regulation, the interpretation will receive generous *Auer* deference from reviewing courts. Thus, once an agency goes through notice-and-comment rulemaking to create a regulation, it is free to tweak the meaning of that regulation endlessly through subsequent interpretive rules, whose adherence to the original regulation is not carefully scrutinized by the courts.

In the context of agencies' interpretations of statutes, the Supreme Court has created a tradeoff between the ex ante procedure an agency follows and the ex post judicial deference it receives. In *United States v. Mead Corp.*,[69] the Court held that the use of adjudication or notice-and-comment rulemaking — the procedures from which interpretive rules are specifically exempted — acts as a gateway to greater judicial deference.[70] As some academics have put it, agencies interpreting a statute must either "pay now" by following the lengthier and costlier procedures or "pay later" by enduring greater judicial scrutiny.[71] This tradeoff makes sense: a regulation that has run the notice-and-comment gauntlet has already been subject to a good deal of scrutiny,[72] which serves as a check against arbitrary or ill-conceived agency

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[65] *See, e.g.*, Manning, *supra* note 4, at 654–56.

[66] Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[67] 5 U.S.C. § 553(b)(A) (2012).

[68] *See* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322–23 (2001); OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS 11 (2011), *available at* https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf. Agency interpretations can also be provided through low-cost amicus briefs, as in *Decker*. *See* 133 S. Ct. at 1331.

[69] 533 U.S. 218 (2001).

[70] *See id.* at 226–27.

[71] *E.g.*, Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1721 (2007); Stephenson & Pogoriler, *supra* note 4, at 1464.

[72] This includes both public scrutiny through the comment process and review by the Office of Information and Regulatory Affairs if the action is significant. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

action. But when interpreting their own regulations, agencies get a free lunch: deferential review without rigorous procedure. Thus, agencies can "deliberately draft . . . rule[s] broadly and vaguely, and then later resolve all the controversial points by issuing interpretive rules" that are upheld "so long as they satisfy a minimal reasonableness standard."[73] As the D.C. Circuit colorfully remarked, this setup provides agencies with "perverse incentives" that could lead them "to promulgate mush" in an attempt to "circumvent . . . the notice and comment procedures of the APA."[74]

Lower courts have noticed this imbalance. In order to check agency reinterpretations of their own vague regulations, several circuit courts have adopted the "one-bite rule."[75] Originally adopted by the D.C. Circuit in *Alaska Professional Hunters Ass'n v. FAA*,[76] this approach requires agencies to follow notice-and-comment procedures for any interpretive rule that contradicts an earlier definitive interpretation.[77] The theory behind this restriction is that a change in a longstanding interpretation of a regulation is effectively an amendment to that regulation.[78] The APA dictates that "amending . . . a rule" falls within the definition of "rule making,"[79] and that rulemaking requires notice and comment.[80] Although the one-bite rule rests on a debatable interpretation of the APA,[81] it has been adopted by the Third, Fifth, and Sixth Circuits.[82]

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[73] Stephenson & Pogoriler, *supra* note 4, at 1464.

[74] Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997); *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 552 (2003) ("[T]he problem [with the *Seminole Rock* doctrine] might be understood as an end-run around rulemaking in the extreme.").

[75] *See* STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW 201 (11th ed. 2011).

[76] 177 F.3d 1030 (D.C. Cir. 1999).

[77] *See* STRAUSS ET AL., *supra* note 75, at 201–02.

[78] *See* Richard W. Murphy, Hunters *for Administrative Common Law*, 58 ADMIN. L. REV. 917, 924 (2006).

[79] 5 U.S.C. § 551(5) (2012) (internal quotation marks omitted).

[80] *See id.* § 553. Rulemaking can also be accomplished through the less-used formal rulemaking procedures of §§ 556 and 557.

[81] *See* United States v. Magnesium Corp. of Am., 616 F.3d 1129, 1139–40 (10th Cir. 2010) (noting that the APA section detailing rulemaking procedures "makes perfectly clear" that such procedures "just don't apply to 'interpretative rules'" (quoting 5 U.S.C. § 553(b)(A))); Jon Connolly, Note, Alaska Hunters *and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155, 172–73 (2001). This approach is also in some tension with the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), holding that courts may not impose procedural requirements on agency rulemaking beyond those prescribed by the APA. *See* Funk, *supra* note 68, at 1329–30. However, the D.C. Circuit's argument in *Alaska Hunters* — that subsequent contradictory interpretations are not properly considered interpretations but rather new rules — could provide the grounds for distinguishing *Vermont Yankee*. *See* Murphy, *supra* note 78, at 928.

[82] *See* SBC Inc. v. FCC, 414 F.3d 486, 498 (3d Cir. 2005); Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 682 (6th Cir. 2005); Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 629 (5th

The *Alaska Hunters* rule strikes a balance between the virtues of agency discretion and regulatory stability.[83] The "one bite" allows agencies an opportunity, within limits, to clarify the meaning of their rules after promulgation. Subsequent, low-cost interpretation of regulations is an essential agency tool, as regulations (like statutes) can never be sufficiently specific to cover every circumstance.[84] Requiring agencies to repeat the notice-and-comment process for any clarification would grind the regulatory apparatus to a halt. However, allowing agencies to contradict themselves is unfair to regulated entities, particularly when later interpretations receive scant judicial scrutiny.

The one-bite rule would also address one of Justice Scalia's primary concerns: incentives for regulatory vagueness. By restricting the ability of an agency to offer endless contradictory clarifications, the one-bite rule would require the agency increasingly to "bear[] . . . [the] risk of its own opacity or imprecision,"[85] thereby encouraging it to be precise in its initial regulations and definitive interpretations.

Moreover, the one-bite rule would channel regulatory interpretations through procedures specifically designed to maximize two of the virtues underlying *Auer* deference: agency expertise and political accountability.[86] The process ensures that all relevant information is considered and all interested voices are heard, and it parallels the Constitution's structural constraints on legislative lawmaking.[87] Interpretations that emerge from such a process are precisely the type that deserve deference from undemocratic and inexpert courts.

Finally, the one-bite rule is a workable compromise that comports with the Court's recent *Auer* jurisprudence. The one-bite rule's check on arbitrariness would appeal to those Justices concerned about undue agency discretion;[88] the retained deference to an agency's first interpretation would appeal to those Justices concerned about preserving agency flexibility. Justices Ginsburg and Thomas both joined a dissent in 2000 that cited the D.C. Circuit in describing "the APA's requirement of new rulemaking when an agency substantially modifies its in-

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Cir. 2001). The First and Ninth Circuits have rejected the one-bite rule. *See* Erringer v. Thompson, 371 F.3d 625, 632 (9th Cir. 2004); Warder v. Shalala, 149 F.3d 73, 81–82 (1st Cir. 1998).

[83] *See* Murphy, *supra* note 78, at 927 (discussing the relative merits of interpretive stability and agency discretion in the context of *Alaska Hunters*).

[84] *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 553 (2000).

[85] Manning, *supra* note 4, at 655.

[86] *See* Gersen, *supra* note 71, at 1714 (noting that "notice and comment rulemaking serves both technocratic and democratic aims").

[87] *See, e.g.*, Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 170–71 (7th Cir. 1996); Manning, *supra* note 4, at 660; *see also* Murphy, *supra* note 78, at 933 ("[T]he relatively open nature of [the notice-and-comment] process arguably lends to it a kind of political legitimacy akin to that enjoyed by the true legislative process.").

[88] *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting).

terpretation of a regulation."[89] And Justice Alito endorsed the *Alaska Hunters* principle while on the Third Circuit.[90]

Moreover, the Court has previously gestured toward constraining agencies' ability to reverse earlier interpretations. Last Term, the Court declined to extend *Auer* deference to an agency interpretation that had shifted during the course of litigation.[91] In the dicta of *Decker*, Justice Kennedy approvingly noted that the EPA's interpretation was not a "change from prior practice or a *post hoc* justification adopted in response to litigation."[92] Rather than eliminate *Auer*, the Court could ensure that agencies provide fair notice by requiring that interpretive reversals emerge through notice and comment.

The *Alaska Hunters* approach has its fair share of weaknesses. In addition to its contested doctrinal foundation,[93] it does not cure *Auer*'s formal separation of powers defects. But *Auer* respects the comparative institutional advantages of the judiciary and executive. A de novo standard of review might satisfy Montesquieu but would force generalist, unaccountable judges to confront technical and policy-laden interpretive issues regularly. With the one-bite rule, agency abuse could be restrained without completely sacrificing *Auer*'s promotion of agency expertise, accountability, and efficiency.[94]

Following the Chief Justice's unmistakable call for litigation challenging *Auer*, the Court will likely have an opportunity to address this doctrine in the near future. If *Auer*'s final hour is indeed drawing near, the Court should instead consider the compromise position of *Alaska Hunters* to address the practical concerns of *Auer*'s detractors while retaining the doctrine's pragmatic advantages.

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[89] Geier v. Am. Honda Motor Co., 529 U.S. 861, 912 (2000) (Stevens, J., dissenting) (citing Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997)).

[90] Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront, 174 F.3d 166, 177 (3d Cir. 1999) ("[I]f an agency's new interpretation will result in significantly different rights and duties than existed under a prior interpretation, notice and comment is required."), *vacated*, 193 F.3d 730 (3d Cir. 1999).

[91] Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166–68 (2012).

[92] *Decker*, 133 S. Ct. at 1337; *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994) (stating in dicta that an agency's interpretation of a regulation that conflicts with a prior interpretation receives "considerably less deference" (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987))).

[93] *See* sources cited *supra* note 81 and accompanying text.

[94] The *Alaska Hunters* approach also creates a peculiar inconsistency with the *Chevron* doctrine. Under *Chevron*, an agency is free to change over time its interpretation of an ambiguity in a governing statute. But under *Alaska Hunters*, the same flexibility would be denied to an agency once it has definitively resolved an ambiguity in its own regulation. *See* Murphy, *supra* note 78, at 928–30; Stephenson & Pogoriler, *supra* note 4, at 1479. This outcome is defensible from a pragmatic perspective: in each instance, the lawmaker (legislature or agency) is incentivized to be clear, leading to a fairer and more stable regulatory environment.