

Perez v. Mortgage Bankers: Heralding the Demise of *Auer* Deference?

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Judging solely from the justices' votes, *Perez v. Mortgage Bankers Association* was one of the simplest cases before the Supreme Court this year: the justices unanimously reversed the U.S. Court of Appeals for the D.C. Circuit in a brisk 14-page slip opinion.

Indeed, if one does not look beyond the Court's characterization of the case, then the question presented was so simple that to ask it is to answer it: The Administrative Procedure Act's Section 553(b)(A) expressly exempts "interpretative rules" from the requirements of notice and comment. The Labor Department issued an interpretative rule. Can the D.C. Circuit require the department to undertake notice and comment proceedings for the rule? *Of course not.*¹

But, in fact, the case was not so simple. Indeed, *Mortgage Bankers* raises some of the thorniest issues in modern administrative law: the gap between nominal form and actual substance; the theoretical divide between lawmaking and legal "interpretation"; and, most important, the courts' role in ensuring that unelected agency officials remain accountable to the political branches, the courts, and ultimately the people—through *ex ante* notice-and-comment procedures, *ex post* judicial review, or perhaps even both. These considerations surrounded the *Mortgage Bankers* case, spurring specific discussion from several justices in 30 pages of concurrences, and thus spotlighting the issues to be litigated in future cases.

The place of administrative agencies in our constitutional system has been contentious for nearly a century. The Constitution instructs, in seemingly simple terms, that "[a]ll legislative Powers

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¹ See generally *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206–07 (2015) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978)).

herein granted shall be vested in a Congress,"² that "[t]he executive Power shall be vested in a President,"³ and that "[t]he judicial Power of the United States . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁴ To many, these structural provisions imply that administrative agencies must be part of the executive branch and thus should be subject to plenary presidential control.⁵ But the Supreme Court famously disagreed with that reading of the Constitution, in the New Deal era.⁶ And that disagreement persists today.⁷

Moreover, agencies wield immense powers delegated to them by Congress. The Supreme Court has held that such delegations violate the Constitution only in the most extreme cases—namely, when Congress's grant of power to the agency is so open-ended as to contain no "intelligible principle" guiding and limiting the agency's discretion.⁸ In practice, the Supreme Court has only twice held that statutes violated that requirement, and both of those cases were decided in a single year, eight decades ago.⁹

Thus, regulators unaccountable to the people effectively "make" most of the federal law, either through their regulations or through

² U.S. Const. art. I, § 1.

³ U.S. Const. art. II, § 1, cl. 1.

⁴ U.S. Const. art. III, § 1.

⁵ See, e.g., Stephen G. Calabresi & Christopher S. Yoo, *The Unitary Executive* 3 (2008).

⁶ See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (allowing Congress to make a commission "independent" of the president).

⁷ See, e.g., *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3146–47 (2008) (reiterating that the president's power to remove agency officials "is not without limit," and that therefore "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.").

⁸ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

⁹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935). The Supreme Court's reluctance to hold statutes unconstitutional under the nondelegation doctrine spurred Cass Sunstein to quip in 2000 that the doctrine "has had one good year, and 211 bad ones (and counting)." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000). But see generally C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 *Geo. Mason L. Rev.* 619 (2015) (explaining how the nondelegation doctrine has been used much more often as a canon of construction, narrowing statutes' scopes in order to avoid constitutional problems).

their adjudications. This state of affairs draws vigorous criticism from a band of administrative law scholars,¹⁰ other legal scholars and political scientists,¹¹ and even the occasional Supreme Court justice.¹²

The Administrative Procedure Act (APA) was enacted by Congress in 1946 to impose at least some structure on the workings of the administrative state, in the interests of both democratic accountability and legal legitimacy.¹³ Its provisions included the requirement that agencies subject rulemakings (with some exceptions) to *ex ante* public scrutiny through the notice-and-comment process,¹⁴ and the codification of an *ex post* judicial review process in which courts would “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action,” and set aside rulemakings that fail to satisfy the APA’s standards of review.¹⁵

As noted earlier, the APA does not require *all* rulemakings to undergo the notice-and-comment process. Rather, the APA exempts a number of rulemakings from that requirement, including “interpretative rules.”¹⁶ (The APA does not specifically assign a label to the sorts of rules that *are* subject to notice and comment, but they

¹⁰ See generally, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994) (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”).

¹¹ See, e.g., Philip Hamburger, *Is Administrative Law Unlawful?* 7 (2014) (“Administrative law constrains outside the paths of regular law and adjudication, and in securing legal deference, it also rises above the law and the courts.”); Charles Murray, *By The People* 71–75 (2015) (“To call the regulatory state an extralegal state within the state is not hyperbole but a reasonable description of the facts on the ground.”).

¹² *Morrison v. Olson*, 487 U.S. 654, 726 (Scalia, J., dissenting) (writing that “one must grieve for the Constitution” in light of the Court’s broad endorsement of Congress’s power to restrict the president from removing officers at will).

¹³ Its sponsor, Senator Pat McCarran, called the APA “a comprehensive charter of private liberty and a solemn undertaking of official fairness. . . . It upholds the law and yet lightens the burden of those on whom the law may impinge. It enunciates and emphasizes the tripartite form of our democracy and brings into relief the ever essential declaration that this is a government of law rather than of men.” *Administrative Procedure Act: Legislative History*, S. Doc. No. 79-248, 2d Sess., p. III (1946) (Foreword).

¹⁴ 5 U.S.C. § 553(b).

¹⁵ *Id.* § 706.

¹⁶ *Id.* § 553(b)(A).

have come to be known colloquially as “legislative” or “substantive” rules.¹⁷)

Perhaps the interpretative-rule exception seemed narrow in 1946. But 70 years later, as agencies wield exponentially greater power and become much savvier in avoiding procedural requirements,¹⁸ such exceptions loom much larger.

For years, the D.C. Circuit attempted to prevent that exception from swallowing the rule, beginning with *Paralyzed Veterans of America v. D.C. Arena L.P.*¹⁹ Ultimately that line of D.C. Circuit cases gave rise to—and then was nullified by—*Mortgage Bankers*.

But discussion surrounding *Mortgage Bankers* ultimately came to focus less on notice-and-comment requirements *per se* than on the broader debate over modern doctrines of judicial “deference” to agency interpretations, as evidenced by the amicus briefs filed in the case and, ultimately, by several justices’ concurring opinions. For that reason, *Mortgage Bankers* may be remembered less for the Court’s specific holding on notice-and-comment procedures than for several justices’ concurring opinions considering—or even demanding—the abolition of a major doctrine of judicial deference.

From “Considerable Smog” to *Paralyzed Veterans*

What is the difference between an “interpretative” and a “legislative” (or “substantive”) rule? At a certain level of abstraction the difference is simple, as explained by the courts. An “interpretative rule” is a rule that interprets either a statute or a legislative rule,²⁰ but which does not itself have “the force of law” and therefore does not itself have any “binding” effect on the public.²¹ A legislative

¹⁷ See, e.g., Thomas W. Merrill & Kathryn T. Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 467, 477 (2002) (“Such rules are typically referred to as either ‘legislative rules’ or ‘substantive rules’ for short”).

¹⁸ See, e.g., Michael S. Greve & Ashley C. Parrish, Administrative Law Without Congress, 22 Geo. Mason L. Rev. 501, 504 (2015) (criticizing “procedural shell games and manipulation” and “broad regulatory waivers without or in excess of a statutory warrant”).

¹⁹ 117 F.3d 579 (D.C. Cir. 1997).

²⁰ See, e.g., *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (“interpretive rules are statements as to what an administrative officer thinks the statute or regulation means”).

²¹ *Id.* at 1046. An agency’s power to issue legislative rules is defined by Congress: “an agency has the power to issue binding legislative rules only if and to the extent

rule might itself contain an interpretation, but if it has independent binding effect on the public, then it is a legislative rule rather than a merely interpretative rule.

At least that's the basic theory. In practice, distinguishing "legislative" rules from merely "interpretative" rules (or, as they tend to be called today, "interpretive" rules) is often no easy task. Or, as the *en banc* D.C. Circuit observed three decades ago, "the distinction between legislative and nonlegislative rules" is "enshrouded in considerable smog."²² The APA's vague distinction between legislative and interpretative rules has given rise to "decades of less than successful judicial efforts to distinguish between legislative rules and interpretative rules."²³

In the 1990s, two different panels of the D.C. Circuit attempted to lay down relatively specific standards for distinguishing between legislative and interpretative rules. In the first, *American Mining Congress v. MSHA* (D.C. Cir. 1993), the panel identified four factors, any one of which would render a rule legislative rather than interpretative: (1) if the underlying statute would not itself give the agency "an adequate legislative basis" for an "enforcement action or other agency action to confer benefits or ensure the performance of duties"; (2) if the agency has published the rule in the Code of Federal Regulations; (3) if the agency explicitly invokes its legislative authority when promulgating the rule; or (4) if the rule effectively amends a prior legislative rule.²⁴

Just three years after announcing the *American Mining Congress* factors, however, a different D.C. Circuit panel (albeit with one of the three AMC judges) announced another framework to distinguish *truly* interpretative rules from rules that are nominally "interpretative" but that effectively "amend" previous legislative rules and therefore require notice and comment (under 5 U.S.C. § 551(5)).²⁵

Congress has authorized it to do so"; interpretative rules, by contrast, "have no power to bind members of the public, but only the potential power to persuade a court[.]" Richard J. Pierce, Jr., 1 *Administrative Law Treatise* 422 (5th ed. 2010).

²² *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984).

²³ Richard J. Pierce, Jr., 1 *Administrative Law Treatise* 448 (5th ed. 2010).

²⁴ *American Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

²⁵ See 5 U.S.C. § 551(5) (defining "rule making" as any "agency process for formulating, *amending*, or repealing a rule" (emphasis added)).

Specifically, in *Paralyzed Veterans of America v. D.C. Arena*, the D.C. Circuit announced that when the agency has previously provided an “authoritative” interpretation of its own prior legislative rule, then the agency’s subsequent re-interpretation is itself a “legislative” rule, because the new interpretation effectively “amends” the underlying legislative rule—that is, it effectively amends the underlying legislative rule as understood through the prior interpretation.²⁶ Thus, the court held, because a rulemaking that “amends” a prior rule is itself a “rulemaking,”²⁷ notice and comment would be required for a new interpretation that effectively amends the rule.²⁸ In such a case, the court held, the APA’s exemption for merely “interpretative” rules would not apply.²⁹

Paralyzed Veterans arose from a dispute over Washington’s MCI Center, in which wheelchair-bound sports fans argued that the arena’s seating arrangement would make it difficult for them to watch the action, in violation of the Americans with Disabilities Act. The Justice Department (DOJ) had adopted a legislative rule, pursuant to the ADA, requiring sports arenas to provide disabled spectators “a choice of admission prices and lines of sight comparable to those for members of the general public.”³⁰

DOJ issued that legislative rule in 1991, and then it proceeded to further interpret its standards in a series of “Technical Assistance Manuals.” For years, DOJ’s interpretation of its legislative rule on “comparable lines of sight” did not go so far as to require (as advocates urged) that the arena ensure that wheelchair seats provide lines of sight over standing spectators. But in 1994, DOJ abruptly issued a rule announcing that it would henceforth interpret the “comparable lines of sight” standard as requiring unobstructed wheelchair seat sightlines over standing spectators.³¹

The arena argued that DOJ’s 1994 interpretation was a significant enough change that it should be deemed a legislative rule requiring notice and comment. The D.C. Circuit disagreed, finding that DOJ

²⁶ 117 F.3d 579 (D.C. Cir. 1997).

²⁷ 5 U.S.C. § 551(5).

²⁸ 117 F.3d at 586.

²⁹ *Id.*

³⁰ *Id.* at 581.

³¹ *Id.* at 581–82.

had not changed an interpretation, since its earlier manuals' silence on sightlines over standing spectators never explicitly, authoritatively adopted a position that such sightlines are not required. But in dicta, the Court pondered the question of whether an interpretative about-face could actually rise to such a degree as to necessitate notice-and-comment processes.

"Under the APA," the court explained, "agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to 'repeals' or 'amendments.'"³² And on this point, the court eschewed formalism for an explicitly functionalist approach: "To allow an agency to make a fundamental change in its interpretation of a substantive regulation obviously would undermine those APA requirements."³³

The Court did not pause in *Paralyzed Veterans* to spell out in precise terms the logic underlying its view of that "obvious" conclusion. But another panel of the D.C. Circuit spelled it out, two years later, in *Alaska Professional Hunters Association v. FAA*. There, the court focused on the FAA's departure from what had been the agency's "authoritative departmental interpretation" of regulations governing Alaskan pilots. Invoking the dictum of *Paralyzed Veterans*, the court held that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something that it may not accomplish without notice and comment."³⁴

The *Paralyzed Veterans* doctrine was not the product of any particular ideological or methodological agenda. Despite Cass Sunstein's and Adrian Vermeule's recent characterization of *Paralyzed Veterans* as an example of "libertarian administrative law" run amok on the D.C. Circuit,³⁵ the six judges who decided *Paralyzed Veterans* and *Alaska Hunters*—Edwards, Henderson, Randolph, Sentelle, Silberman, and Tatel—were appointed by Republican and Democratic presidents alike, reflecting the full spectrum of judicial methodol-

³² 117 F.3d at 586 (emphasis in original).

³³ *Id.*

³⁴ 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("*Alaska Hunters*"). Note that the court spoke in terms of a prior "definitive" interpretation, a term it offered as a synonym for "authoritative" interpretation. *Id.*

³⁵ Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. Chi. L. Rev. 393, 428–31 (2015).

ogies. Yet the six judges embraced the *Paralyzed Veterans* standard unanimously.

While those judges may not have realized it, their instincts echoed the analysis of leading administrative scholars of the APA's founding era who sometimes endorsed the practical point at the heart of the D.C. Circuit's approach in *Paralyzed Veterans*—summarily rejected by the Supreme Court in *Mortgage Bankers*—that sometimes an interpretative rule, with the passage of time, “becomes seasoned . . . something upon which people justifiably rely,” which ought to limit the agency's discretion in so easily changing that interpretation years later.³⁶ Or, as Kenneth Culp Davis later wrote, an “interpretative rule may or may not have the force of law, depending on such factors as . . . whether the rule is one of long standing.”³⁷

Nevertheless, legal scholars were virtually unanimous in their *denunciation* of the D.C. Circuit's approach. Cataloging the array of senior administrative law scholars who had inveighed against the case, Professor Richard Murphy in 2006 noted pithily (and accurately) that “[a]cademic commentary” on the *Paralyzed Veterans* doctrine “has been scathing.” (And then he damned the doctrine with the faintest possible praise: “Student commentary has been mixed.”³⁸) Similarly, in his *Administrative Law Treatise*, Professor Richard Pierce urged the Supreme Court to terminate the doctrine because it “is inconsistent with the APA, unsupported by precedents, inconsistent with scores of precedents, and it has terrible effects”—namely, “it discourages agencies from issuing interpretative rules and encourages them instead to rely entirely on ad hoc adjudication to adopt interpretations of ambiguous language in statutes and legislative rules.”³⁹

³⁶ Erwin N. Griswold, A Summary of the Regulations Problem, 54 Harv. L. Rev. 398, 413–16 (1941).

³⁷ Kenneth Culp Davis, 1 *Administrative Law Treatise* § 5.03 (1st ed. 1958) (emphasis added). The Cato Institute's brief in *Mortgage Bankers* elaborated on this historical point.

³⁸ Richard W. Murphy, Hunters for Administrative Common Law, 58 Admin. L. Rev. 917, 918 (2006).

³⁹ Richard J. Pierce, Jr., 1 *Administrative Law Treatise* 456 (5th ed. 2010). Agencies enjoy broad discretion to choose either rulemakings or adjudications as the form by which they announce policies or interpretations. *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947); see generally M. Elizabeth Magill, Agency Choice in Policymaking Form, 71 U. Chi. L. Rev. 1383 (2004).

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The scholars' criticism was rooted in *Vermont Yankee*, the Supreme Court's seminal 1978 decision prohibiting federal courts from burdening agencies with procedural requirements above and beyond the minimal requirements of the Administrative Procedure Act. "Absent constitutional constraints or extremely compelling circumstances," then-Justice William Rehnquist wrote for the unanimous Court, "the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."⁴⁰ For the same reason, Pierce and his colleagues argue, *Vermont Yankee* forbids the D.C. Circuit's *Paralyzed Veterans* approach, because the court cannot require agencies to use notice-and-comment procedures for interpretative rules when neither the APA nor any "agency rule, statute, or provision of the Constitution . . . even arguably requires an agency to engage in notice-and-comment procedure when it issues an interpretative rule."⁴¹ So long as the APA specifically exempts interpretative rules from notice-and-comment rulemaking and no other law requires it, Pierce and others urged, the D.C. Circuit cannot impose such procedural requirements on an agency's interpretative rules—which, again, are expressly exempt from notice and comment.⁴²

The sheer volume of scholarly criticism of *Paralyzed Veterans* dwarfed that case's actual impact in the courts. One other circuit adopted the D.C. Circuit's rule, while several others rejected it. Indeed, in the 15 years after *Paralyzed Veterans* was decided in 1997, the D.C. Circuit itself invoked the doctrine only *three* times to vacate agency actions. First, as mentioned above, there was the court's unanimous decision in *Alaska Hunters*, holding that the FAA's rule was invalid because it did not undergo notice and comment.⁴³

Second, in 2005 the court applied the doctrine (once again unanimously and bipartisanship) to vacate an EPA rule interpreting a legislative rule regarding standards for monitoring emissions from stationary sources. Specifically, the court held that the agency's interpretation reversed the agency's prior, "definitive" interpretation

⁴⁰ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978).

⁴¹ Richard J. Pierce, Jr., 1 *Administrative Law Treatise* 458 (5th ed. 2010).

⁴² 5 U.S.C. § 553(b)(A).

⁴³ *Alaska Hunters*, 177 F.3d at 1034, 1036.

of the legislative rule, and therefore the new interpretation required notice and comment under *Paralyzed Veterans*.⁴⁴

And third, in 2013, the D.C. Circuit employed it to strike down the Labor Department's revised interpretation of rules governing working conditions for loan officers—and that was the case that finally brought the matter before the Supreme Court: *Mortgage Bankers*.

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In 2010, pursuant to the Fair Labor Standards Act of 1938 (FLSA), the deputy administrator of the Labor Department's Wage and Hour Division announced that mortgage loan officers are entitled to overtime wages because they do not fall within the category of "administrative" employees exempt from overtime benefits. She announced this in an informal "Administrator's Interpretation" issuance, rather than going through full notice-and-comment proceedings.⁴⁵ That was problematic because her interpretation of the FLSA explicitly reversed the agency's 2006 opinion letter—which, the government conceded on appeal, had been a "definitive" interpretation of the FLSA.⁴⁶

The Mortgage Bankers Association, a trade association representing real estate finance companies, promptly sued the Labor Department, arguing that the agency had violated *Paralyzed Veterans* by significantly changing a prior definitive interpretation without notice and comment.

Before the D.C. Circuit, the issue was not whether to keep the *Paralyzed Veterans* doctrine but merely how to apply it. As noted above, the court required agencies to undertake notice-and-comment rule-making before making a "significant change" to a prior "definitive" or "authoritative" interpretation. But the intervening years produced dicta implying that the Court had added a third criterion to *Paralyzed Veterans*: namely, that parties challenging the reversal also demonstrate sufficient "reliance" on the previous interpretation.⁴⁷

⁴⁴ *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 997–98 (D.C. Cir. 2005).

⁴⁵ *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966, 968 (D.C. Cir. 2013).

⁴⁶ *Id.*

⁴⁷ See, e.g., *Alaska Hunters*, 177 F.3d at 1035 (discussing guide pilots' and lodge operators' reliance on the prior interpretative rule).

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Presented with that narrow issue, the D.C. Circuit disposed of the case swiftly. In a short opinion, it held that “reliance” was not a stand-alone criterion in the *Paralyzed Veterans* framework—instead, regulated parties’ reliance on an agency’s interpretation is but one indicator that the interpretation was “definitive.” Definitiveness could be proven even without reliance, the D.C. Circuit unanimously held, and the court remanded the case to the district court to re-apply *Paralyzed Veterans*’ two-step framework.⁴⁸

But the case would not return to the district court. Instead, the government seized upon the case as an opportunity to finally achieve what Professor Pierce and his colleagues long had sought: a Supreme Court reversal of *Paralyzed Veterans*.

Petitioning for certiorari, the Obama administration attacked *Paralyzed Veterans* head-on, asking the Court to decide “[w]hether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.”⁴⁹ Embracing the categorical distinction between interpretation and legislation, the administration’s merits brief argued that when an agency alters a rule it “no more ‘amends’ a legislative regulation than a judicial interpretation ‘amends’ the source of law it interprets.”⁵⁰ And the agency’s interpretation, unlike the underlying legislative rule, “do[es] not have the force and effect of law.”⁵¹

In this case, the government urged, the deputy administrator’s action was an interpretative rule, not a legislative one. But the government did not argue this point so much as assert it, telling the Court that “[t]here is no dispute between the parties that the 2010 [interpretation] is an interpretative rule.” And given that premise, the government urged, the case before the Court was an easy one. The APA “categorically exempts” interpretative rules from the APA’s notice-and-comment requirements, and under *Vermont Yankee* that is the end of the matter because courts may not “require more than

⁴⁸ Mortgage Bankers Ass’n, 720 F.3d at 971–72.

⁴⁹ Gov’t Petition for Writ of Certiorari at I, *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015) (No. 13-1041).

⁵⁰ Gov’t Opening Br. at 12, *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015) (Nos. 13-1041, 13-1052).

⁵¹ *Id.* at 11.

the APA's 'minimum' procedural requirements for rulemaking in 5 U.S.C. 553."⁵²

Perhaps recognizing that some of the justices might pause before categorically exempting a class of rules from notice and comment, the government argued that Congress included that exemption in the APA for one "plain" reason: administrative efficiency and convenience. "Congress presumably determined that it would be an unwarranted encroachment," the government argued in its opening brief, "to force agency decisionmakers to dedicate limited agency time and resources to undertake notice-and-comment rulemaking simply to inform the public about the agency's own views on the meaning of relevant statutory and regulatory provisions."⁵³ To that end, the government quoted portions of the APA's legislative history in which members of Congress argued that an agency "should be as free as it can be" to issue interpretative rules, "for the simple reason that those types of regulations are the kind that agencies should be encouraged to make" in order to apprise the public of the agency's current interpretations of the law.⁵⁴

The government's characterization of the APA's purpose contrasted sharply with the characterization offered by the Mortgage Bankers Association in their merits brief defending *Paralyzed Veterans*. The "overriding goal" of the APA was not administrative efficiency but "procedural fairness in agency dealings." And the *Paralyzed Veterans* doctrine "plays a critical role in enforcing the APA's mandate of procedural fairness by restraining agencies from abruptly changing positions without at least providing notice and an opportunity to comment on the contemplated agency action."⁵⁵

Moreover, *Paralyzed Veterans* vindicates not just the spirit of the APA, the Mortgage Bankers continued, but also the letter, because when an agency significantly revises its definitive interpretation of a regulation "it has effectively amended the regulation itself—and the APA requires notice and comment before an agency can do that."⁵⁶

⁵² *Id.* at 6, 27.

⁵³ *Id.* at 21.

⁵⁴ *Id.* at 22 (quoting Administrative Procedure: Hearings on the Subject of Federal Administrative Procedure Before the House Judiciary Comm., 79th Cong., 1st Sess. 30 (1945)).

⁵⁵ Br. for Respondent at 16–17, *Perez*, 135 S. Ct. 1199 (2015) (Nos. 13-1041, 13-1052).

⁵⁶ *Id.* at 20–21.

Fully embracing a realist's view of legal interpretation, the Mortgage Bankers argued that, "once clarified by a definitive interpretation," the "regulation is no longer ambiguous—and the definitive interpretation becomes part of the regulation itself."⁵⁷

But the brief that attracted the most attention was not one filed by the government, the private petitioners, the Mortgage Bankers Association, or the various amici supporting the association. Rather, it was the short brief filed by Richard Pierce and 71 other administrative law scholars in support of the government's petition. The brief reiterated quite bluntly the criticism that scholars had aimed at *Paralyzed Veterans* from the very beginning: that the D.C. Circuit's doctrine added new procedural requirements above and beyond those required by the APA, in violation of *Vermont Yankee*. But perhaps the brief's most significant impact was not its characterization of the law so much as its characterization of the legal academy:

*All scholars and most courts have reacted critically to the Paralyzed Veterans doctrine. . . . We are not aware of a single scholar who agrees with the doctrine. Indeed, when counsel for amici circulated a draft of this brief, not a single scholar declined to join it on the ground that the position of the D.C. Circuit was correct.*⁵⁸

In the end, the scholars' virtual unanimity foreshadowed an even more important unanimity—that of the justices themselves, all nine of whom voted in *Perez v. Mortgage Bankers* to reverse the D.C. Circuit and end the *Paralyzed Veterans* doctrine. In the opinion for the Court (although not for Justices Antonin Scalia and Clarence Thomas, who concurred only in the judgment and wrote separately), Justice Sonia Sotomayor cut swiftly through the issues. The deputy administrator's action was without question an interpretative rule—even the Mortgage Bankers Association conceded this claim, the Court asserted. And the APA explicitly exempts *all* interpretative rules from the notice-and-comment requirement, the Court explained; true, the APA's definition of "rule making" includes those that "repeal" or "amend" an existing rule, but that does not detract from the fact

⁵⁷ *Id.* at 20–21.

⁵⁸ Br. of Administrative Law Scholars as Amici Curiae in Support of the Petitions at 9, *Perez*, 135 S. Ct. 1199 (2015) (Nos. 13-1041, 13-1052) (emphasis added).

that the APA “exempts interpretive rules”—*all* interpretive rules—“from the notice-and-comment requirements that apply to legislative rules.”⁵⁹

And that, the Court held, is the end of the matter. An agency is not required to use notice-and-comment proceedings to promulgate its initial interpretation, and it faces no additional procedural requirements to revise its interpretation. The D.C. Circuit’s attempt to impose a new “judge-made procedural right” violates *Vermont Yankee*: imposing requirements above and beyond the APA’s procedures “may be wise policy,” or “it may not,” but “[r]egardless, imposing such an obligation is the responsibility of Congress or the administrative agencies, not the courts.”⁶⁰ Simply put, the Court found the question presented supremely easy to answer.

Perhaps too easy. For it must be noted that the Court’s brisk analysis rested on a factual premise that was not quite as obvious as the Court insisted—namely, whether the deputy administrator’s action was, in fact, an “interpretative rule.” The Court assumed that the Mortgage Bankers Association had conceded that the action was an interpretative rule. “From the beginning,” the Court insisted, “the parties litigated this suit on the understanding that the Administrator’s Interpretation was—as its name suggests—an interpretative rule.”⁶¹

But a review of the Mortgage Bankers Association’s briefs suggests the very opposite. In its merits brief, it stressed that, “[c]ontrary to the government’s contentions . . . the Association did not ‘acknowledge’” in the lower courts that the agency’s action “was an interpretative rule.”⁶² To be sure, the association “did acknowledge that it was an ‘interpretation,’” but that did not itself make the rule an *interpretative rule*.⁶³

Indeed, the Court’s very characterization of *Paralyzed Veterans* reflected the same questionable assumption: the Court suggested that “if [the Mortgage Bankers Association] did not think the Administrator’s Interpretation was an interpretative rule, then its decision to

⁵⁹ *Id.* at 1206.

⁶⁰ *Id.* at 1207.

⁶¹ *Id.* at 1210.

⁶² Br. for Respondent, *supra* note 55, at 46 n.8.

⁶³ *Id.* (emphasis added).

invoke the *Paralyzed Veterans* doctrine in attacking the rule is passing strange.⁶⁴ “After all,” the Court concluded, “*Paralyzed Veterans* applied only to interpretative rules.”⁶⁵ But that is not obviously true either: the D.C. Circuit explained in *Alaska Hunters* that an agency’s significant change to a definitive interpretation requires notice and comment because the agency “has in effect amended its rule”—suggesting that the D.C. Circuit viewed such re-interpretations as *legislative* rules.⁶⁶ Indeed, even Richard Pierce, the doctrine’s staunchest critic, had written in his treatise that *Paralyzed Veterans* was a test that the D.C. Circuit “use[s] to distinguish between legislative rules and interpretative rules.”⁶⁷

But in the end, these criticisms of the Court’s decision are of limited significance. The justices plainly saw *Paralyzed Veterans* as a doctrine that adds procedural requirements to interpretative rules, something that lower courts simply cannot do under *Vermont Yankee* and the APA. The Court saw it as a simple case, and made it so.

Were *Mortgage Bankers* simply a case about the APA’s notice-and-comment requirements, it would have attracted little attention beyond insular administrative-law circles. Given the nearly two decades of overwhelming scholarly criticism of the *Paralyzed Veterans* doctrine there seemed little reason to doubt that the Supreme Court would reverse the D.C. Circuit. And given that the D.C. Circuit virtually never applied *Paralyzed Veterans* anyway, the issue’s practical impact seemed minuscule. As the Mortgage Bankers Association suggested in its brief opposing certiorari, the notice-and-comment issue before the Court “arises infrequently and has limited practical importance.”⁶⁸

But *Mortgage Bankers* took on much greater practical importance due to a broader and more fundamental administrative law debate that came to surround and, ultimately, permeate the case—namely, the debate over modern judicial deference to agencies’ interpretations of their own regulations.

⁶⁴ *Mortgage Bankers*, 135 S. Ct. at 1210.

⁶⁵ *Id.*

⁶⁶ *Alaska Hunters*, 177 F.3d at 1034.

⁶⁷ Richard J. Pierce, Jr., 1 *Administrative Law Treatise* 454 (5th ed. 2010) (emphasis added).

⁶⁸ Br. in Opp’n to Cert. at 19, *Mortgage Bankers*, 135 S. Ct. 1199 (2015) (Nos. 13-1041, 13-1052).

Deference's Discontents

Throughout *Mortgage Bankers*—indeed, throughout nearly two decades of debate over *Paralyzed Veterans* and interpretative rules—it was said repeatedly that interpretative rules do not bind the public but merely advise the public. Whether that was true as a matter of theoretical legal formalities, it seems much less obvious as a matter of practical reality. Courts not only give utmost deference to an agency's interpretation of its own regulations such that agencies interpretative rules will very rarely be struck down, but in the *Mortgage Bankers* litigation the same administration that told the Supreme Court that its interpretation was not “binding” had told the lower courts that the interpretation was “controlling” with respect to the courts.⁶⁹ Such *Auer* deference (or, as it is sometimes called, “*Seminole Rock* deference”⁷⁰) is an increasingly controversial doctrine that ultimately came to be deeply intertwined with the legal arguments before the Court in *Mortgage Bankers*.

For all the deference that courts give agencies' interpretations of Congress's statutes, they give ever more deference to agencies' interpretations of the agencies' own regulations. As the Court explained in *Auer v. Robbins* (1997), an agency's interpretation of its own regulation is “controlling” unless “plainly erroneous or inconsistent with the regulation.”⁷¹

Unlike its explanations of *Chevron* deference, the Court has been less comprehensive in attempting to justify *Auer* deference. But the primary justification is one of agency expertise. “Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives,” the Court has explained, “we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.”⁷² Elsewhere, the Court had justified *Auer* deference in terms of the agency's political accountability, or

⁶⁹ Defs.' Reply to Pls.' Opp. to Defs.' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment at 9, *Mortgage Bankers Ass'n v. Solis*, (No. 11-73, Doc. 20) (D.D.C. May 17, 2011) (emphasis added).

⁷⁰ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

⁷¹ 519 U.S. 452, 461 (1997).

⁷² *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991).

the agency's superior historical familiarity with the particular regulation at issue.⁷³

Whatever its underlying justification, the existence of *Auer* deference forecloses the vast majority of challenges to agency regulatory interpretations. According to the 2008 study of Supreme Court litigation by Professors William Eskridge and Lauren Baer, the government wins more than 90 percent of cases that enjoy *Auer* deference.⁷⁴ (The government likely has even greater success in the lower courts, where the cases tend to be more technically esoteric, and less controversial, than those attracting Supreme Court attention.)

For a long time, *Auer* or *Seminole Rock* deference was relatively uncontroversial. Indeed, in *Auer*, Justice Scalia wrote for a unanimous Court, giving overwhelming deference to an interpretation the agency had offered, not in a rulemaking but in an amicus brief in that very case.

But the justices' complacent embrace of *Auer* deference changed abruptly in 2011 when Scalia published a startling concurrence in *Talk America v. Michigan Bell Telephone Co.* He shared the Court's ultimate conclusion in that case that the FCC's interpretation of a regulation was the best interpretation, but he took care to stress that he would have reached that conclusion even *without* the application of *Auer* deference. And then he expressed his first public doubts on the doctrine that he had for so long embraced:

[W]hile I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity. On the surface, it seems to be a natural corollary—indeed, an a fortiori application—of the rule that we will defer to an agency's interpretation of the statute it is charged with implementing. . . . But it is not.⁷⁵

⁷³ See, e.g., Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 *Geo. Wash. L. Rev.* 1449, 1461 (2011); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612, 627–31 (1996).

⁷⁴ 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, 1104 (2008).

⁷⁵ *Talk America, Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (Scalia, J., concurring).

The difference, Scalia continued, lay in structural considerations. On questions of *statutory* interpretation, the agency is interpreting a law written by another branch of government; thus the lawmaker is distinct from the law-interpreter. But on questions of *regulatory* interpretation, the agency is interpreting a law written by the agency itself, thus making the agency both the lawmaker and the law-interpreter.

This “seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well,” Scalia stressed.⁷⁶ Such an arrangement runs afoul of Montesquieu’s famous warning that when “the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.”⁷⁷ But it also creates perverse incentives for the agency:

[D]eferred to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.⁷⁸

Scalia did not hesitate to credit a law review article authored by his former clerk, Professor John Manning, for these insights.⁷⁹ A year later, a majority of justices—specifically, the more conservative wing of the Court—acknowledged Scalia’s and Manning’s concerns in dicta, in *Christopher v. SmithKline Beecham Corp.*, but did not need to reach the issue.⁸⁰

But in 2013, Scalia moved from mere concerns to outright condemnations. In *Decker v. Northwest Environmental Defense Center* he dissented from the Court’s deference to an EPA regulatory interpretation:

For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under

⁷⁶ *Id.*

⁷⁷ XI Montesquieu, *Spirit of the Laws* 151–52 (O. Piest ed., T. Nugent Transl. 1949).

⁷⁸ *Talk America*, 131 S. Ct. at 2266.

⁷⁹ *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612 (1996).

⁸⁰ 132 S. Ct. 2156, 2168 (2012).

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the harmless-sounding banner of ‘defer[ring] to an agency’s interpretation of its own regulations.’ . . . [But] however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.⁸¹

Scalia’s remarkable about-face on *Auer* deference coincided with a rising tide of criticism of judicial deference more broadly. Recent years have witnessed significant and widespread reconsideration of judicial deference among conservative and libertarian legal scholars⁸²—even when much of that deference originated in, or was reinforced by, Reagan-era judges and scholars critical of the then-liberal courts’ efforts to stymie President Reagan’s deregulatory agenda.⁸³

To be clear, *Mortgage Bankers* was not a case that turned on *Auer* deference. The question before the Court was not the substance of the Labor Department’s new interpretation but the procedure by which the Labor Department arrived at that interpretation. Nevertheless, the gathering storm surrounding *Auer* deference quickly came to overshadow the narrow procedural issue decided by the Court, because advocates—and, ultimately, several justices—recognized that the question of *ex ante* procedure was tied closely to *ex post* deference. If *Auer* deference is problematic in and of itself, it is all the more problematic when agencies receive *Auer* deference for interpretations that were not subjected to notice and comment in the first place, such as in interpretative rules. As Scalia had highlighted in his scathing *Decker* dissent:

Auer deference encourages agencies to be “vague in framing regulations, with the plan of issuing ‘interpretations’ to create the intended new law without observance of notice

⁸¹ 133 S. Ct. 1326, 1339, 1342 (2013) (Scalia, J., concurring in part and dissenting in part) (citing *Talk America*, 131 S. Ct. at 2265 (Scalia, J., concurring)).

⁸² See, e.g., Philip Hamburger, *Is Administrative Law Unlawful?* 316 (2014) (arguing that judicial deference to an agency’s statutory interpretation “is an abandonment of judicial office”).

⁸³ See, e.g., Adam J. White, *The Regulatory Court*, *Weekly Standard*, Aug. 26, 2013, at 20–25 (describing the history of the D.C. Circuit and the development of deference doctrines).

and comment procedures.” . . . [It is] a dangerous permission slip for the arrogation of power.⁸⁴

After several amicus briefs supporting the Mortgage Bankers Association highlighted the connection between the Labor Department’s avoidance of notice-and-comment proceedings and its claimed *Auer* deference for the resulting interpretation, justices pressed the issue at oral argument.⁸⁵ “I understand [that the *Auer* issue is] not before the Court,” Scalia told the deputy solicitor general, “but my perception of what is before the Court would be altered if I didn’t think that courts had to give deference to these flip-flops.”⁸⁶

Similarly, Justice Samuel Alito questioned the Labor Department’s argument that its new interpretation did not “bind” anyone (and thus was merely “interpretative”), given the amount of deference that the agency’s interpretation would receive. “In this case,” Alito asked, “didn’t the government say explicitly that its interpretation would be entitled to controlling deference?” And “if it has controlling deference, does it have the force of law?” When the deputy solicitor general replied that despite *Auer* deference the courts would still ultimately be the ones responsible for reviewing the interpretation, Alito suggested that his formalistic description of the Court’s role paled in comparison to the “practical” reality.⁸⁷

Other justices were noticeably less eager to bring the *Auer* issue into the heart of the case. “We needn’t go into those matters in this case,” Justice Stephen Breyer offered, “and I surely hope we don’t.”⁸⁸

Ultimately, the *Auer* issue did not affect any of the justices’ votes—all nine sided with the Labor Department and against the *Paralyzed Veterans* doctrine—but several of them wrote separately to further stress their concerns about *Auer* deference. Scalia reiterated and expanded the themes he previously raised in *Talk America* and *Decker* and rejected the formalistic distinction drawn by the administration

⁸⁴ 133 S. Ct. at 1341.

⁸⁵ The Cato Institute’s brief was among the amicus briefs that highlighted the problem of courts giving *Auer* deference to agency rules that have not undergone notice and comment.

⁸⁶ Transcript of Oral Argument at 10–11, *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015) (Nos. 13-1041, 13-1052).

⁸⁷ *Id.* at 11–12.

⁸⁸ *Id.* at 21.

(and by Sotomayor’s opinion for the majority)—namely, that an interpretative rule enjoys *Auer*’s “controlling” deference yet does not “bind” the public because ultimately the Court, not the agency, has the final say. “After all,” Scalia wrote,

if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules . . . Interpretive rules that command deference *do* have the force of law. The Court’s reasons for resisting this obvious point would not withstand a gentle breeze.⁸⁹

Justice Thomas, too, concurred in the judgment and wrote at length to criticize *Auer* deference. “This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.”⁹⁰

Justice Alito did not go quite so far. He wrote separately to acknowledge the “substantial reasons” offered by Scalia and Thomas to end *Auer* deference: he “await[s] a case in which the validity of [the doctrine] may be explored through full briefing and argument”—an openness that he had signaled in his opinion for the Court in *SmithKline*, which had acknowledged Scalia’s initial *Talk America* concerns.⁹¹ Indeed, Chief Justice Roberts and Justice Anthony Kennedy had joined that majority in *SmithKline*, indicating that there are at least five judges strongly entertaining the notion of ending *Auer* deference, including the firmly committed Justices Scalia and Thomas.⁹²

“Pay Me Now, or Pay Me Later”

Thus, the *Mortgage Bankers* litigation cast in stark relief the increasingly tenuous status of *Auer* deference in modern administrative law; and with a spotlight shining on that issue, litigants will no doubt be encouraged to tee up a case that ultimately presents *Auer* deference squarely before the Court.

⁸⁹ *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

⁹⁰ *Id.* at 1213 (Thomas, J., concurring in the judgment).

⁹¹ *Id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment).

⁹² See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

But *Mortgage Bankers* also highlighted something else: the government's utterly one-sided characterization of the Administrative Procedure Act's purpose and history. Throughout the litigation the government asserted that the Congress that enacted the APA had exempted interpretative rules from notice-and-comment requirements for one and only one reason: administrative convenience.

The government's opening brief offers a particularly stark example of this narrative:

The reason for exempting interpretive rules from notice-and-comment rulemaking is plain. . . . Congress presumably determined that it would be an unwarranted encroachment to force agency decisionmakers to dedicate limited agency time and resources to undertake notice-and-comment rulemaking simply to inform the public about the agency's own views on the meaning of relevant statutory and regulatory provisions.⁹³

But that rationale and the selective legislative history that the government quoted to support that narrative tell only half the story—if that. For while bureaucratic efficiency was indeed *one* of Congress's reasons for categorically exempting interpretative rules from the burdens of notice and comment, Congress's *other* reason, which the government neglected to mention, was no less important.⁹⁴

Specifically, the APA's framers chose to exempt interpretative rules from the APA's notice-and-comment requirements because they fully expected the courts to conduct robust, "plenary" judicial review of those interpretative rules. Judicial review of interpretative rules would provide *ex post* protection for the public that would offset the absence of *ex ante* procedural protection. Legislative rules, by contrast, were not expected to face such intense judicial review, and therefore the *ex ante* protection of notice-and-comment rulemaking was necessary.⁹⁵

⁹³ Gov't Opening Br., *supra* note 50, at 20–21.

⁹⁴ See, e.g., Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, 2d Sess., p. 18 (1946) (Staff of S. Comm. on the Judiciary, 79th Cong. (Comm. Print 1945)).

⁹⁵ See, e.g., *id.* The fact that the APA's framers expected legislative rules to enjoy significant judicial deference might lend credence to the theory that *Chevron* deference for statutory interpretations is more consistent with the APA than *Auer* deference. Cf. *United States v. Mead*, 533 U.S. 218, 242–43 (2001) (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the [APA], which it did not even bother to cite. But it was in accord with the origins of federal-court judicial

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The APA's sponsor, Senator Pat McCarran, put this point well, stressing both the presence of plenary judicial review *and* the value of administrative efficiency in justifying the exemption.

The pending bill exempts from its procedural requirements all interpretative . . . rules, because under present law interpretative rules, being merely adaptations of interpretations of statutes, are subject to a more ample degree of judicial review, and because the problem with respect to the other exempted types of rules is to facilitate their issuance rather than to supply procedures.⁹⁶

Similarly, Attorney General Robert H. Jackson's influential 1941 committee report on administrative law made this point, explaining that agencies' interpretations "are ordinarily of an advisory character," and that they "are not binding upon those affected for, if there is disagreement with the agency's view, the question may be presented for a determination by a court," where the judges may "be influenced though not *concluded* by the administrative opinion."⁹⁷ (As with its descriptions of legislative history, in *Mortgage Bankers* the government's description of the attorney general's committee report neglected to mention his focus on rigorous judicial review.)

The scholars of that era expressly recognized the dangers of depriving the public of both the *ex ante* protections of public participation and the *ex post* protections of judicial review. Writing in 1938, Professor Ralph Fuchs (who would later serve as a member of the attorney general's aforementioned committee) explained that if a regulation "is subject to challenge in all of its aspects after its promulgation, the need of advance formalities is reduced or eliminated." But when "a regulation presents affected parties with . . . only limited opportunity or none at all to challenge its correctness [after it is

review. . . . Statutory ambiguities, in other words, were left to reasonable resolution by the Executive."), cited in *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring) ("the rule of *Chevron*, if it did not comport with the APA, at least was in conformity with the long history of judicial review of executive action").

⁹⁶ Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, 2d Sess., p. 313 (1946).

⁹⁷ Report of the Attorney General's Committee on Administrative Procedure in Government Agencies 27 (1941).

promulgated], the need is evident for an antecedent opportunity to influence its content or be heard in regard to it.”⁹⁸

Indeed, Kenneth Culp Davis, one of the era’s leading administrative law scholars, recognized precisely the danger that *Auer’s* forerunner, *Seminole Rock*, threatened to the public if courts were to extend their deference to interpretative rules. “It would be *absurd* to hold that the courts must subordinate their judgment as to the meaning of a statute or regulation to the mere unsupported opinion of associate counsel in an administrative department,” he observed in a footnote to his seminal text, *Administrative Law* (1951).⁹⁹

Today, scholars refer to these considerations as the “pay me now or pay me later” principle.¹⁰⁰ (Or, as President Franklin Roosevelt’s influential “Brownlow Committee” put it a bit more colorfully in 1937, rulemaking procedures are “prenatal safeguards,” while judicial review is the “postnatal” safeguard.)¹⁰¹ When the APA was enacted, lawmakers and scholars widely recognized that administrative law must hold agencies fully accountable either at the beginning of the rulemaking process or at its end. If *Mortgage Bankers* is indicative, judges seem to be recognizing it again.

But this return to the APA’s legislative history is instructive for another crucial reason. In recent years, Congress has repeatedly considered legislation to reform administrative law: by supplementing the APA with additional procedures (as in the Regulatory Accountability Act), by making Congress more directly responsible for agencies’ rulemakings (as in the REINS Act), or by other measures. Some of these measures have even been passed by the House of Representatives, although none has yet become law.¹⁰² Such proposals to reform the APA tend to be met by a specific criticism: namely, they

⁹⁸ Ralph F. Fuchs, Procedure in Administrative Rule-Making, Faculty Publications, Paper 1595, 271–72 (1938).

⁹⁹ Kenneth Culp Davis, *Administrative Law* 202 n.72 (1951).

¹⁰⁰ See, e.g., Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 *Geo. Wash. L. Rev.* 1449, 1464 (2011).

¹⁰¹ The President’s Committee on Administrative Management, Report of the Committee: With Studies of Administrative Management in the Federal Government 337 (1937).

¹⁰² E.g., Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. (2015) (passing the House but under review by the Senate); Regulations from the Executive in Need of Scrutiny Act of 2015, H.R. 427, 114th Cong. (2015) (passing the House but under review by the Senate).

impose too much burden on regulators and will incentivize regulators to devise ways to evade those new requirements by eschewing rulemaking for other regulatory avenues.¹⁰³

Our debate over these proposals should be informed by the approach that Congresses, scholars, and other experts of the mid-20th century took in framing the original APA. First, they recognized that it was appropriate to place at least some burdens on regulators through administrative law. For as important as regulatory efficiency might be, the APA's framers also recognized that it was but one value at stake in administration; affording the public an opportunity to participate and to challenge the agency, either *ex ante* or *ex post*, was no less important.

Thus, when faced with the criticism that added procedures might prove unduly burdensome or even counterproductive, we should take such considerations seriously—but we should also keep in mind that such considerations are not dispositive. Indeed, the addition of such burdens is not inherently bad. For, as Professor Manning put it in his influential article, “even if [the] rejection” of *Auer* or *Seminole Rock* deference “marginally increased agency reluctance to rely on rulemaking . . . that result would be attributable to the fact that agencies would finally be internalizing the cost of adopting unobvious or vague regulations.”¹⁰⁴

And the APA's history should remind us that its framers were not simply theorists. They were practical lawmakers. In crafting the APA they studied the actual workings of the administrative state as it then existed, and they crafted rules responsive to those practical realities, not to abstract theories.¹⁰⁵

¹⁰³ See, e.g., Letter from Law Professors to Rep. Lamar Smith and Rep. John Conyers, Jr. (Oct. 24, 2011) (“We seriously doubt that agencies would be able to respond to delegations of rulemaking authority or to congressional mandates to issue rules if this bill were to be enacted. Instead it would likely lead to rulemaking avoidance by agencies—increasing use of underground rules, case-by-case adjudication, or even prosecutorial actions, to achieve policies without having to surmount the additional hurdles presented by the new Section 553. Executive officials would find it practically impossible to use rulemaking either to create new regulations or to undo old regulations.”).

¹⁰⁴ John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612, 694 (1996).

¹⁰⁵ The Cato Institute's brief in *Mortgage Bankers* discussed the history of the APA—both the APA's legislative history and the scholarly and political debates that preceded and followed its enactment—in detail.

We should expect no less practical an approach in our time. To the extent that administrative agencies and processes have evolved to a point where particular provisions of administrative law no longer serve their original purpose, or to a point where administrators see the APA less as a substantive check on their discretion than as a collection of mere formalities, then those parts of the administrative law should be reformed in the same spirit that animated the framers of the original Administrative Procedure Act.

To that end, Congress must take seriously the extent to which the APA fails to impose meaningful constraints upon agency discretion—the extent to which agencies can effectively bind the public with rules not subjected to notice-and-comment rulemaking, and the extent to which such rules receive deference from the courts. As matters currently stand, the APA increasingly fails to deliver on either of its original promises: to make agencies more accountable to the people, and to ensure that agencies' actions are subjected to meaningful judicial review.

The Regulatory Accountability Act, which at this writing has already passed the House by a significant majority and now awaits action in the Senate, would amend the APA to prohibit courts from deferring to interpretative rules that were not subjected to notice and comment.¹⁰⁶

But it should not require congressional action to solve a problem of the Court's own making. The Court should abolish *Auer* deference and subject agency interpretations to more significant judicial review—at the very least, it should withhold *Auer* deference from an agency interpretation that had not been subject to the *ex ante* protections of notice and comment.

¹⁰⁶ H.R. 185, 114th Cong. § 7 (amending 5 U.S.C. § 706); 161 Cong. Rec. H271–72 (Jan. 13, 2015) (passing H.R. 185 in Roll Call No. 28, by a vote of 250–175).