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Citation to Publisher Kovacs, Kathryn E. (2015). Abandoning Administrative Common Law in Mortgage Bankers. *Boston University Law Review Annex* 95(1), 1-8. <http://www.bu.edu/bulawreview/files/2015/01/KOVACS.pdf>.

Citation to this Version: Kovacs, Kathryn E. (2015). Abandoning Administrative Common Law in Mortgage Bankers. *Boston University Law Review Annex* 95(1), 1-8. Retrieved from [doi:10.7282/T3KP855M](https://doi.org/10.7282/T3KP855M).

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ABANDONING ADMINISTRATIVE COMMON LAW IN *MORTGAGE BANKERS*

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INTRODUCTION

*Perez v. Mortgage Bankers Association*¹ presents the Supreme Court with the opportunity to eliminate a rule of administrative common law that conflicts with the Administrative Procedure Act (“APA”).² When Congress enacted the APA, it deliberately chose to exempt interpretive rules from the Act’s notice-and-comment requirements.³ The D.C. Circuit nonetheless invalidated a Department of Labor interpretive rule because it did not undergo notice and comment.⁴ The Supreme Court should respect the public deliberation reflected in the APA’s text and eliminate the D.C. Circuit’s administrative common law.

Mortgage Bankers also raises questions about another doctrine of administrative common law: the Supreme Court doctrine of deferring to agency interpretations of their own regulations. But the briefing does not address whether that longstanding doctrine conflicts with the APA and whether it has received Congress’s imprimatur. The Court need not and should not address that doctrine until those questions are answered.

I. *PEREZ V. MORTGAGE BANKERS ASSOCIATION*

Mortgage Bankers concerns the Department of Labor’s interpretation of a regulation, which in turn interprets a provision of the Fair Labor Standards Act (“FLSA”).⁵ The FLSA requires employers to pay overtime to employees who work more than 40 hours per week, but it exempts from that requirement “any employee employed in a bona fide executive, administrative, or professional capacity.”⁶ The Department of Labor’s regulations implementing that provision specify that “an employee whose primary duty is selling financial

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¹ *Mortg. Bankers Ass’n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom.*, *Perez v. Mortg. Bankers Ass’n*, 134 S. Ct. 2820 (2014).

² Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

³ 5 U.S.C. § 553(b)(A) (2012).

⁴ *Mortg. Bankers*, 720 F.3d at 968.

⁵ Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended in scattered sections of 29 U.S.C.).

⁶ 29 U.S.C. §§ 207(a), 213(a)(1) (2012).

products does not qualify for the administrative exemption.”⁷ In 2006, the Administrator of the Wage and Hour Division in the Department of Labor issued an opinion letter concluding that mortgage loan officers fall within the exemption and thus are not entitled to overtime pay.⁸ Four years later, the Administrator withdrew that letter and issued an “Administrator’s Interpretation” reaching the opposite conclusion.⁹

The Mortgage Bankers Association challenged the 2010 Administrator’s Interpretation, contending that it was procedurally invalid because the agency issued it without notice and comment and substantively invalid because it is inconsistent with the regulations.¹⁰ The district court rejected both contentions and entered judgment for the government.¹¹ On appeal to the D.C. Circuit, the Mortgage Bankers Association raised only its procedural objection and prevailed.¹² The court of appeals held that, following its decision in *Paralyzed Veterans of America v. D.C. Arena L.P.*,¹³ the agency could not change its interpretation without going through notice-and-comment procedures.¹⁴ Although the APA exempts interpretive rules from section 553’s notice-and-comment requirements,¹⁵ the court in *Paralyzed Veterans* and its progeny reasoned that, when an agency has given a regulation a “definitive interpretation,” changing the interpretation constitutes amending the regulation itself, and thus requires notice and comment.¹⁶

In the certiorari briefs, the government challenged the *Paralyzed Veterans* doctrine,¹⁷ and the Mortgage Bankers Association defended it.¹⁸ In its merits brief, however, the Mortgage Bankers Association not only defended the *Paralyzed Veterans* doctrine, but it also advanced a distinct argument for the first time: that the Administrator’s new interpretation was actually a legislative rule.¹⁹ The Mortgage Bankers Association reasoned that, because the agency

⁷ 29 C.F.R. § 541.203(b) (2012).

⁸ See *Mortg. Bankers*, 720 F.3d at 968.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Mortg. Bankers Ass’n v. Solis*, 864 F. Supp. 2d 193, 210 (D.D.C. 2012), *rev’d and remanded sub nom.* *Mortg. Bankers Ass’n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom.*, *Perez v. Mortg. Bankers Ass’n*, 134 S. Ct. 2820 (2014).

¹² *Mortg. Bankers*, 720 F.3d at 967.

¹³ 117 F.3d 579 (D.C. Cir. 1997).

¹⁴ *Mortg. Bankers*, 720 F.3d at 968.

¹⁵ 5 U.S.C. § 553(b)(A) (2012).

¹⁶ 720 F.3d at 967 (quoting *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)).

¹⁷ See Petition for a Writ of Certiorari at 11, *Perez v. Mortg. Bankers Ass’n*, No. 13-1041 (U.S. Feb. 28, 2014).

¹⁸ Consolidated Brief in Opposition at 23, *Perez v. Mortg. Bankers Ass’n*, Nos. 13-1041, 13-1052 (U.S. May 2, 2014).

¹⁹ Consolidated Brief of Respondent at 13-14, 37-48, *Perez v. Mortg. Bankers Ass’n*,

asserted in an amicus brief that its new interpretation is entitled to deference under *Auer v. Robbins*,²⁰ the new interpretation has the force of law and thus cannot be issued without notice and comment.²¹ The Court heard oral argument on December 1, 2014.

II. ADMINISTRATIVE COMMON LAW

A. Paralyzed Veterans *Doctrine*

The *Paralyzed Veterans* doctrine should be abandoned.²² It is not simply an interpretation of ambiguous terms in the APA, and it is not the sort of administrative common law that the APA anticipated and allowed.²³ It is common law that exceeds the boundaries of the APA's text and contradicts Congress's intent.²⁴ As the government explained in its opening brief, Congress provided expressly in the APA that interpretive rules are exempt from section 553's notice-and-comment requirements, regardless of whether the agency is issuing a new interpretation or revising a pre-existing interpretation.²⁵

Perhaps in another case we would forgive the D.C. Circuit for supplementing an almost-seventy-year-old statute that Congress has not kept up to date. As Justice Kagan pointed out at the oral argument in *Mortgage Bankers*, there is a perception that agencies rely more on interpretive rules and other subregulatory documents to make policy than Congress anticipated when it passed the APA in 1946.²⁶ Since Congress has not addressed that issue, perhaps we should not fault the D.C. Circuit for stepping into the breach.²⁷

Nos. 13-1041, 13-1052 (U.S. Oct. 9, 2014) [hereinafter Consolidated Brief of Respondent].

²⁰ 519 U.S. 452 (1997).

²¹ Consolidated Brief of Respondent at 13-14, 37-48.

²² See Amicus Curiae Brief of Admin. Law Scholars in Support of Petitions at 9, *Perez v. Mortg. Bankers Ass'n*, Nos. 13-1041, 13-1052 (March 26, 2014) ("We are not aware of a single scholar who agrees with the doctrine."); Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917, 918 (2006) (listing academic critics of the doctrine).

²³ See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L. J. (forthcoming 2015) (manuscript at 7-8), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386025 (discussing administrative common law).

²⁴ *Id.* at 12, 56.

²⁵ Brief for the Federal Petitioners at 15-17, *Perez v. Mortg. Bankers Ass'n*, Nos. 13-1041, 13-1052 (U.S. Aug. 20, 2014) [hereinafter Brief for the Federal Petitioners].

²⁶ Transcript of Oral Argument at 13-14, *Perez v. Mortg. Bankers Ass'n*, Nos. 13-1041, 13-1052 (U.S. Dec. 1, 2014) [hereinafter Transcript].

²⁷ See Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1322-32 (2012) (arguing that Congress's difficulty in updating administrative law makes administrative common law inevitable).

But the APA is not an ordinary statute amenable to such judicial modernization. The APA is a quasi-constitutional superstatute that resulted from an extraordinary legislative process and has become deeply entrenched in our law.²⁸ It has taken on a normative gravity beyond that of an ordinary statute.²⁹ Certainly, the law must evolve to keep up with changing times and answer new questions as they arise. But in our form of government, the law must evolve in a way that reflects the public's will. Thus, courts must focus their statutory interpretation on public deliberation; they must respect such deliberation where it has occurred and seek to induce it where it has not.³⁰

For most statutes, agencies are at the center of that deliberative process. But the APA is not given to the care of a single agency; it is implemented and interpreted by all agencies.³¹ Hence, the locus of public deliberation about the APA is in Congress. When interpreting the APA, therefore, courts should stay within the boundaries of the text that Congress enacted, give effect to the compromises encoded in the Act, respect ongoing deliberation about the Act, and prod Congress to amend the Act if necessary.³²

The APA's legislative history confirms that Congress deliberated before deciding to exempt interpretive rules from section 553's notice-and-comment procedures.³³ The D.C. Circuit in *Mortgage Bankers* exceeded its authority when it shifted the political balance reflected in the APA. In *Vermont Yankee*,³⁴ *Greenwich Collieries*,³⁵ and *Darby*,³⁶ the Supreme Court adhered to the express terms of the APA. It should do the same in *Mortgage Bankers*. If we need a new rule for when agencies change definitive interpretations, the Court should prod Congress to amend the APA.³⁷

²⁸ Kovacs, *supra* note 23, at 4.

²⁹ *Id.* at 32.

³⁰ *Id.* at 45; see also WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 22-24 (2010).

³¹ Kovacs, *supra* note 23, at 39.

³² *Id.* at 46-50 (explaining how courts should interpret the APA).

³³ Brief for the Federal Petitioners at 21-23 (highlighting congressional hearings discussing the APA's exemption for interpretive rules).

³⁴ *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (holding that courts may not exceed the constraints on rulemaking set forth in section 553 of the APA).

³⁵ *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 280 (1994) (holding that the APA's requirement that "the proponent of a rule or order has the burden of proof" imposes not only the burden of production, but the burden of persuasion).

³⁶ *Darby v. Cisneros*, 509 U.S. 137, 154 (1993) (holding that section 704 of the APA requires exhaustion of administrative remedies "only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review").

³⁷ Kovacs, *supra* note 23, at 49-50.

This case demonstrates why administrative common law is problematic. Courts cannot foresee the implications of common law rules when they hear only from the parties to a particular case and are limited to the record and facts of a particular case.³⁸ Common law procedural requirements for notice-and-comment rulemaking that exceed the boundaries of section 553 arguably have hindered agency policymaking.³⁹ The difficulty of rulemaking may have pushed agencies to use non-binding means of communicating their policy positions, such as interpretive rules and policy statements.⁴⁰ The Court should not limit the availability of those tools until it alleviates the underlying problem; it should not force agencies to change policy through rulemaking until rulemaking is a viable means of communicating with the public. If the scales need to be rebalanced, the Court should leave that task to Congress.⁴¹

B. *Auer Deference Doctrine*

At the *Mortgage Bankers* oral argument, the justices seemed to agree with the government that the *Paralyzed Veterans* doctrine conflicts with the APA and *Vermont Yankee*.⁴² Even if the Court is unanimous on that point, however, that may not resolve the case. The Mortgage Bankers Association defended the *Paralyzed Veterans* doctrine, essentially conceding that the Administrator's Interpretation is an interpretive rule.⁴³ But it argued in the alternative that the interpretation is actually a legislative rule because the agency asserted that it is entitled to *Auer* deference, giving the interpretation the force of law.⁴⁴ As the government pointed out in its reply brief, the Mortgage Bankers Association waived that argument in the district court, on appeal, and in the Supreme Court.⁴⁵ Parties may not present new legal arguments for the first time at the

³⁸ *Id.* at 36-38, 54-55; see also Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1322 (2014) ("Courts . . . learn about agencies in case-by-case snapshots and have only a dim sense of how judicial oversight will affect how agencies go about their business."); Transcript, *supra* note 26, at 45-46.

³⁹ Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 483-84 (1997) ("[D]evelopments in administrative law over the past two decades that were meant to expand public participation and influence in administrative decisionmaking have unintentionally put these hurdles in place.")

⁴⁰ Cf. Stuart Shapiro, *Agency Oversight As "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523, 527-28 (2014) (arguing that restrictions on informal rulemaking lead agencies to set policy through more informal means).

⁴¹ See Bagley, *supra* note 38, at 1322.

⁴² See Transcript, *supra* note 26, at 37-42.

⁴³ Consolidated Brief of Respondent at 16-23.

⁴⁴ *Id.* at 14.

⁴⁵ Reply Brief for Federal Petitioners at 8-11, *Perez v. Mortg. Bankers Ass'n*, Nos. 13-1041, 13-1052 (U.S. Nov. 10, 2014) [hereinafter "Reply Brief"].

merits stage in the Supreme Court.⁴⁶ But at oral argument, several justices seemed interested in this line of reasoning.⁴⁷

If the Court does address this argument, it should reject it. Asserting that an agency's interpretation of its own regulations is entitled to deference does not give the interpretation the force of law.⁴⁸ The Mortgage Bankers Association is attempting to import *Chevron* deference principles into the *Auer* deference framework. Following *Mead*, the Court will accord *Chevron* deference to agency interpretations of the statutes they administer where "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."⁴⁹ The Court has never imposed that condition on *Auer* deference, but rather has accorded *Auer* deference to interpretations that do not have the force of law.⁵⁰ And when the Court deferred to those non-binding agency interpretations, it did not thereby endow them with the force of law. Thus, assuming the Administrator's Interpretation is entitled to deference under *Auer*, that does not mean it required notice and comment.⁵¹

Three members of the Court have expressed an interest in eliminating *Auer* doctrine entirely.⁵² At oral argument, Justice Scalia repeated that refrain, saying: "Maybe . . . we shouldn't give deference to agency interpretations of [their] own regulations. That would solve . . . the problem of this case. For me it would be easy."⁵³

The Court should decline Justice Scalia's invitation at this juncture. When Justice Scalia urged the Court to abandon the *Auer* doctrine in *Decker*, Justices Roberts and Alito declined to join him because the issue was not fully briefed.⁵⁴ In *Mortgage Bankers*, the issue received even less attention than in

⁴⁶ STEPHEN M. SHAPIRO, et al., *SUPREME COURT PRACTICE* 498 (10th ed. 2013).

⁴⁷ See Transcript, *supra* note 26, at 6, 10-11, 19, 37, 46.

⁴⁸ Reply Brief, *supra* note 45, at 14 ("[A] court's decision to construe a legislative regulation by deferring to the agency's proffered reading does not mean that the interpretive rule articulating the agency's reading of its regulation has the 'force of law.'").

⁴⁹ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

⁵⁰ E.g., *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

⁵¹ Just as the Mortgage Bankers Association inappropriately links *Auer* doctrine to *Chevron* doctrine, so too does it inappropriately link *Auer* doctrine to the line of D.C. Circuit precedent that distinguishes legislative rules from interpretive rules based in part on "whether the rule effectively amends a prior legislative rule." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); Transcript, *supra* note 26, at 39-40.

⁵² *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, J., concurring); *id.* at 1339-42 (Scalia, J., concurring in part and dissenting in part).

⁵³ Transcript, *supra* note 26, at 10.

⁵⁴ *Decker*, 133 S. Ct. at 1338-39 (Roberts, J., concurring) ("I would await a case in which the issue is properly raised and argued.").

Decker because the Mortgage Bankers Association raised the issue so late in the litigation. The Court does not have sufficient information to decide the *Auer* doctrine's fate.

One question the Court must address before deciding whether to abandon *Auer* doctrine is whether the doctrine can be reconciled with the text of the APA. Like the *Paralyzed Veterans* doctrine, the *Auer* doctrine is common law; it is not an interpretation of ambiguous terms in the APA.⁵⁵ Unlike the *Paralyzed Veterans* doctrine, however, it does not conflict with the express terms of the APA. Nonetheless, *Auer* is at least in some tension with the APA's command that courts "decide all relevant questions of law" and "interpret constitutional and statutory provisions."⁵⁶ It might be possible to harmonize the doctrine with that text by recognizing that, when a court applies *Auer*, the court decides what the regulation means, "and the court does so by deciding whether to adopt the agency's reading as its own."⁵⁷ Alternatively, *Auer* might be reconciled with section 706 in the same manner some have reconciled *Chevron* with section 706. As Peter Strauss explained, "among the 'relevant questions of law' are whether statutory meaning is uncertain and, if so, whether congressional action has committed the judicially-found areas of uncertainty to agency administration."⁵⁸ In the *Auer* context, then, the questions of law would be whether the regulation is ambiguous and whether the agency's interpretation falls within the scope of the agency's discretion.⁵⁹

Even if *Auer* can be reconciled with the APA's text, another question that must be addressed before the Court decides whether to abandon *Auer* is whether the doctrine has been subject to adequate deliberation. What we know as the *Auer* doctrine was enunciated in *Seminole Rock*⁶⁰ before Congress

⁵⁵ See Kovacs, *supra* note 23, at 7-8; Metzger, *supra* note 27, at 1309.

⁵⁶ 5 U.S.C. § 706 (2012).

⁵⁷ Reply Brief, *supra* note 45, at 14.

⁵⁸ Peter L. Strauss, Essay, "Deference" Is Too Confusing – Let's Call Them "Chevron Space" and "Skidmore Weight," 112 COLUM. L. REV. 1143, 1160 (2012); see also *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, J., dissenting) ("[B]efore a court may grant [*Chevron*] deference, it must on its own decide whether Congress . . . has in fact delegated to the agency lawmaking power over the ambiguity at issue."); *United States v. Mead Corp.*, 533 U.S. 218, 241-42 n.2 (Scalia, J., dissenting) ("It could be argued . . . that the legal presumption identified by *Chevron* left as the only 'questio[n] of law' whether the agency's interpretation had gone beyond the scope of discretion that the statutory ambiguity conferred."); Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 97 (2000); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 868-72 (2001); Metzger, *supra* note 27, at 1301; Peter L. Strauss, *Overseers or "The Deciders" – the Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 818 (2008).

⁵⁹ Yet another possibility is that the *Auer* doctrine is a "grandfathered common law variation" preserved by 5 U.S.C. § 559. See *Dickinson v. Zurko*, 527 U.S. 150, 155, 161 (1999); Metzger, *supra* note 27, at 1342 n.249, 1350.

⁶⁰ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

enacted the APA. Did Congress deliberately decide to let the doctrine stand either before or after it enacted the APA?⁶¹ If so, that deliberate choice should prevail, perhaps even if it is reflected in congressional silence.⁶² If Congress has not paid sufficient attention to the doctrine, the Court should prod Congress to do so. Perhaps the *Auer* doctrine is flawed and should be eliminated, but the Court should only make that decision after these questions are answered.

CONCLUSION

Interpretation of the APA should focus on congressional deliberation. Instead of weighing policy considerations and deciding for itself, constrained by the limits of a particular case, what the law ought to be, the Court should respect Congress's deliberate choices and prod Congress to consider issues that need to be addressed. In *Mortgage Bankers*, the result of this interpretive exercise is clear: the Court should do away with *Paralyzed Veterans* doctrine because it conflicts with the APA, but decline to address *Auer* doctrine until the issue is adequately briefed.

⁶¹ See, e.g., Am. Bar Ass'n Section of Admin. Law and Regulatory Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 624, 668 (2012) (asserting that the Regulatory Accountability Act "would abolish all judicial deference to agencies' interpretations of their own rules").

⁶² Kovacs, *supra* note 23, at 49.