Perez v. Mortgage Bankers Association: Portending a Return to Judicial Engagement

*By Stephen A. Vaden**

In a Term full of blockbuster cases considering the fate of Obamacare and establishing gay marriage as a constitutional right, it was easy to miss another case that may portend a larger and potentially more consequential turn in jurisprudence yet to come.[1] *Perez v. Mortgage Bankers Association* appears, at first glance, to be an esoteric administrative law case addressing a quirk in the D.C. Circuit's standard of review for agency regulations.[2] However, buried within the series of concurring opinions in this case lie signs that a majority of the Court might be willing to reclaim for the judiciary the preeminent role in interpreting the vast sea of federal regulations that govern Americans' everyday lives. The main question is how far the Court will go in defining deference down.

I. The Case

Executive and administrative employees have long been exempt from the forty-hour workweek rule under the Fair Labor Standards Act, but the Secretary of Labor determines who is an "administrative" employee. In 2004, through notice-and-comment rulemaking, the Labor Secretary promulgated regulations that exempted "[e]mployees in the financial services industry" who "generally meet the duties requirements for the administrative exception."[3] The regulations further specified that "an employee whose primary duty is selling financial products does not qualify" for the exemption.[4] Following the new regulations' promulgation, the Labor Secretary interpreted them to exempt mortgage-loan officers from the minimum-wage and maximum-hour requirements. Because the Labor Secretary's ruling constituted an "interpretation" of her prior-issued regulations, the Administrative Procedure Act (APA) did not require the Labor Department to engage in further notice-and-comment rulemaking.[5]

This interpretation governed until the Bush Administration gave way to the Obama Administration. In 2010, the Labor Department reexamined its interpretation of the administrative exemption and this time ruled that mortgage-loan officers were *not* exempt from the wage-and-hour limitations. Despite the about-face, the Department did not undergo the notice-and-comment process; it just issued a new administrative "interpretation" of its 2004 regulations. The Mortgage Bankers Association sued, and the D.C. Circuit invalidated the 2010 interpretation.[6]

Applying its nearly twenty-year-old *Paralyzed Veterans* doctrine, the D.C. Circuit found that the Labor Department could not change its interpretation of the 2004 regulations without first going through the notice-and-comment process. *Paralyzed Veterans* allowed agencies to issue a "definitive" interpretation of their existing regulations; but once the agency issued an initial definitive interpretation, it could not change that interpretation without going through the notice-and-comment process. The D.C. Circuit reasoned that allowing an agency to revise a prior interpretation without notice-and-comment would effectively allow it to amend the rule it purports to interpret.[7] Because the APA requires that amendments to regulations go through the notice-and-comment process, the D.C. Circuit held that changes to definitive interpretations of regulations must follow the same procedural path.[8] The Mortgage Bankers Association's case was a simple application of the *Paralyzed Veterans* rule. The Labor Department issued its "definitive" interpretation exempting mortgage-loan officers from the wage-and-hour requirements in 2006. In 2010, it reversed this interpretation without notice and comment. Thus, under *Paralyzed Veterans*, the Labor Department's 2010 interpretation was invalid.[9]

The case was equally simple for the Supreme Court—except in the government's favor. The APA establishes the maximum procedural requirements for agency rulemaking; courts lack the authority to add additional hurdles.[10] The challenged Labor Department rule was an interpretive rule, and the Mortgage Bankers Association had waived its opportunity to argue otherwise.[11] The APA states that notice-and-comment procedures do "not apply . . . to interpretive rules."[12] The *Paralyzed Veterans* doctrine thus violates the plain text of the APA by imposing a procedural requirement the statue expressly disclaims. A rule that can be promulgated without notice-and-comment may be amended the same way.[13]

II. The Concurrences

If that is all *Perez* said, it would not warrant more than a passing mention. It is what three Justices went on to say in their concurrences that gives *Perez* its true import. While the D.C. Circuit may have chosen the wrong remedy, it did identify a very real problem: the ability of the administrative state to insulate its ever-expanding regulatory reach from meaningful judicial review. Current Supreme Court precedent requires federal courts to defer to agencies' interpretations of their own regulations. Known as *Seminole Rock* or *Auer* deference—after the cases that established and reaffirmed the rule, respectively—it requires judicial deference to almost any interpretation an agency elects to give its regulations.[14] Those who are subject to these interpretive rules see it as rulemaking without checks or balances. Justices Alito, Scalia, and Thomas view this problem as one of the Supreme Court's own creation and therefore a problem that only the Supreme Court can remedy. Their three separate concurrences, taken together, suggest that the era of administrative deference may have passed its peak and that a majority may be forming to reassert the judiciary's role to say what the law is.

Justice Alito's short concurrence simply stated a willingness to reconsider the Supreme Court's longstanding *Seminole Rock* doctrine granting deference to an agency's interpretation

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of its own regulations.[15] Justices Scalia and Thomas, however, delved more deeply into what they see as the problem at hand. Justice Scalia's opinion identified three key legal and practical results of the Court's decision in *Seminole Rock*. First, by giving deference to an agency's interpretation of its own regulations, the Court has upset the balance between the executive and judicial branches established by the text of the APA. While the APA provides agencies with the power to issue rules interpreting their own regulations and exempts those rules from notice-and-comment procedures, it also provides that the federal courts "shall . . . interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action."[16] Thus, as Justice Scalia sees it, Congress gave agencies the power to "advise the public" about their preferred interpretation of their own regulations through interpretive rules, but it gave the judiciary the final say over what agency regulations mean.[17] By mandating that federal courts defer to the interpretations agencies give their own regulations, the Supreme Court has compelled "reviewing court[s] to 'decide' that the text means what the agency says."[18] The courts have thus neutered their own statutory power to "interpret . . . and determine the meaning or applicability of . . . agency actions."[19]

Second, this judicial deference destroys the practical difference between what the APA calls substantive rules—which are meant to have the binding effect of law and must go through the notice-and-comment process—and interpretive rules—which do not. If a court must defer to an agency's interpretive rule, the distinction between substantive and interpretive rules is meaningless to the regulated party. It must follow both because the courts will defer to the agency and enforce both.[20] Interpretive rules therefore "*do* have the force of law."[21] As a necessary corollary, *Seminole Rock* and its progeny allow agencies to control the scope of their discretion. By writing broad and vague substantive rules, an agency can leave gaps to fill later through interpretive rules that are unhindered by notice-and-comment procedures and the additional judicial scrutiny those procedures afford.[22] Courts cannot force agencies to respond to cogent criticism submitted through public comments when no comments are required.[23]

Third, Justice Scalia's concurrence attacks the foundation of modern administrative jurisprudence while also casting an unstated accusatory finger back at the Justice himself. Taken in its strongest form, his concern about the judiciary's abdication of its responsibility "to decide whether the law means what the agency says it means" calls into question not just *Seminole Rock*[24] but also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[25] which requires courts to show deference to agency interpretations that resolve ambiguities in congressional statutes, *i.e.*, to defer to an agency's substantive rules.[26] The APA's provision granting courts the authority to "determine the meaning of . . . agency action" applies to all agency actions, not just the review of interpretive rules.[27] *Chevron*, therefore, seems to be vulnerable. But courts might tolerate abridgment of their right to have the final say on the meaning of substantive, but not interpretive, rules for a non-textual reason: the traditional role of executive authority.[28] The executive branch traditionally has received leeway when resolving ambiguities in congressionally-authored statutes but not when resolving ambiguities the executive branch creates itself. Whether such a "tradition" should override a statutory command is a question Justice Scalia here leaves unaddressed.

Also left unstated is the role Justice Scalia played in creating the conundrum in which the concurring Justices find themselves. He wrote the Court's opinion in *Auer*, which also involved interpretive rules under the Fair Labor Standards Act, and which not only reaffirmed *Seminole Rock* but also declared that the contrary position he now supports "would make little sense."[29] And only two Terms ago in *City of Arlington v. FCC*, Justice Scalia discounted the concerns expressed by Justices Roberts, Kennedy, and Alito about judicial deference to an agency's interpretation of its own jurisdiction[30] by declaring that "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[31] Any other result would call into question "*Chevron* itself."[32] Two Terms later, it is Justice Scalia raising the very questions he once dismissed.

Justice Thomas joined in this questioning at a more theoretical level and without a concern for the continuing validity of *Chevron* or other Supreme Court precedents. His only stated concerns are that (1) the Court defend judicial independence, which would mean that (2) the only interpretation of a law or rule that can govern is the one that a court independently determines is the best based on the text of the provision.[33] Starting, as is his practice, with the history of the Court's jurisprudence, Justice Thomas notes that the language from *Seminole Rock* that is causing such constitutional consternation is dicta.[34] The *Seminole Rock* Court found that the text of the regulation "clearly" determined the question at issue.[35] There was no need to defer because there was no ambiguity to interpret. Nonetheless, *Seminole Rock*'s dicta spread throughout federal jurisprudence and now governs an astounding number of administrative actions covering topics as varied as forestry policy to criminal law.[36]

Seminole Rock's "holding," in Justice Thomas's view, has caused the judiciary to relinquish its power to definitively interpret the law to the agencies of the executive branch. Only through deference could a regulation whose text has not changed be given two diametrically opposite meanings in four years. Thus, Thomas fears, the Court's abdication of its role is leading the federal government to become a government of men and not of laws. The meaning of a text will vary not with its words but with the composition of the administration enforcing it.[37] Justice Thomas finds the origins of this transfer of power in the "belief that bureaucrats might more effectively govern the country than the American people"—a belief that originated in the writings of President Woodrow Wilson and his fellow "progressives."[38] Given the gravity of these constitutional concerns, Justice Thomas calls for reconsideration of "the entire line of precedent beginning with *Seminole Rock*."[39]

III. Conclusion

Perez therefore announces that at least three Justices are willing to reconsider *Seminole Rock*, *Auer*, and their progeny. Looking past *Perez*, however, a majority of the Court in recent Terms has expressed unease with the amount of deference agencies receive from the judiciary. In *City of Arlington*, Justices

Kennedy and Alito signed onto Chief Justice Roberts's dissent, which called on the Court to stop assuming that Congress has delegated to agencies the power to interpret every ambiguity in a statute. Instead, the Chief Justice argued that courts should determine independently whether Congress has delegated the power to interpret the specific ambiguity at issue.[40] Chief Justice Roberts and Justice Kennedy put this principle into practice in the second Obamacare case, *King v. Burwell*.[41] There, Chief Justice Roberts declined to defer to the IRS's interpretation of the phrase "an Exchange established by the State."[42] The Court rather held that Congress had not delegated to the IRS the authority to interpret a statutory provision involving the price of health insurance—an area wholly outside the IRS's expertise. The Court instead interpreted the language on its own without showing deference to the agency.[43] A redefinition of the Court's role in interpreting administrative statutes and regulations, therefore, already may be underway.

The Justices may differ on how far such a reexamination of the Court's administrative law jurisprudence should go. A reconsideration of *Chevron* may or may not be on the table.[44] It does appear that the days of federal courts deferring to agencies' interpretations of their own regulations are numbered.[45] Whether or not the Court chooses to go beyond *Seminole Rock* and its progeny and reexamine deference more broadly will determine how far the Court goes in reclaiming from the executive branch the judiciary's power to say what the law is.

Endnotes

1 *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (finding that substantive due process mandates a right to gay marriage); King v. Burwell, 135 S. Ct. 2480 (2015) (rejecting a statutory challenge to tax credits under Obamacare meant to allow for recipients to purchase health insurance on state marketplaces).

2 135 S. Ct. 1199 (2015).

3 29 C.F.R. § 541.203(b).

4 *Id.*

5 *See* 5 U.S.C. § 553(b)(A) (providing that the notice-and-comment requirement "does not apply . . . to interpretative rules").

6 Mortgage Bankers Ass'n v. Harris, 720 F.3d 966, 967 (D.C. Cir. 2013).

7 Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579, 586 (D.C. Cir. 1997); *see also* 5 U.S.C. § 551(5) (defining "rule making" to include "amending or repealing a rule").

8 Paralyzed Veterans, 117 F.3d at 586; *see* 5 U.S.C. § 553 (requiring notice-and-comment procedures for rule making).

9 Mortgage Bankers Ass'n, 720 F.3d at 968.

10 Perez, 135 S. Ct. at 1207.

11 *Id.* at 1210 (finding waiver).

12 5 U.S.C. § 553(b)(A).

13 Perez, 135 S. Ct. 1206.

14 *See* Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

15 Perez, 135 S. Ct. at 1210-11 (Alito, J., concurring in the judgment); *see also* Seminole Rock, 325 U.S. at 414.

16 5 U.S.C. § 706.

17 Perez, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (emphasis removed).

18 *Id.* at 1212.

19 5 U.S.C. § 706.

20 Perez, 135 S. Ct. at 1211-12.

21 *Id.* at 1212.

22 *Id.*

23 *Cf.* Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin., 741 F.3d 1309, 1313-14 (2014) (remanding rule to agency because it failed to respond to comment noting its proposed rule would treat similar products differently).

24 Perez, 135 S. Ct. at 1211.

25 467 U.S. 837, 842-43 (1984).

26 Perez, 135 S. Ct. at 1211.

27 *See* 5 U.S.C. §§ 701(a), 706.

28 Perez, 135 S. Ct. at 1212.

29 *See* Auer, 519 U.S. at 463.

30 *Compare* City of Arlington v. FCC, 133 S. Ct. 1863, 1877-78 (2013) (Roberts, C.J., dissenting) (raising concerns that Justice Scalia's opinion risks putting legislative, executive, and judicial power all in the agencies' hands, "the very definition of tyranny"), *with* Perez, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (arguing that the APA requires that "courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations").

31 City of Arlington, 133 S. Ct. 1863, 1868 (Scalia, J.)

32 *Id.* at 1873.

33 Perez, 135 S. Ct. at 1217-21 (Thomas, J., concurring in the judgment).

34 *Id.* at 1214.

35 Seminole Rock, 325 U.S. at 415.

36 *See* Perez, 135 S. Ct. at 1214 (string citation listing the "broad spectrum of subjects" to which *Seminole Rock* has been applied).

37 *Id.* at 1222 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

38 *Id.* at 1223 n.6.

39 *Id.* at 1225.

40 City of Arlington, 133 S. Ct. 1883 (Roberts, C.J., dissenting).

41 135 S. Ct. 2480 (2015).

42 *Id.* at 2488 (quoting 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i)).

43 *Id.* at 2488-89.

44 *Compare* City of Arlington, 133 S. Ct. at 1885-86 (Roberts, C.J., dissenting) (disclaiming Justice Scalia's charge that the dissent takes aim at *Chevron*),

with Perez, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (acknowledging that the concerns raised may affect *Chevron*), *and* Perez, 135 S. Ct. at 1225 (Thomas, J., concurring in the judgment) (calling on the Court to examine "the entire line of precedent requiring deference, beginning with *Seminole Rock*," in light of the Constitution's delineation of the separation of powers).

45 *See* Decker v. Nw. Envt'l Def. Ctr., 133 S. Ct. 1326, 1339, 1342 (2013) (Scalia J., concurring in part and dissenting in part) (repudiating *Auer* as a doctrine with "no principled basis" and urging that "it is time" to "reconsider *Auer*"); *see also id.* at 1338 (Roberts, C.J., and Alito, J., concurring) ("It may be appropriate to reconsider [*Auer*] in an appropriate case.").