AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

**Perez v. Mortgage Bankers Association, \_ U.S. \_** (2015)

*The Administrative Procedure Act of 1946 (APA) established procedures by which administrative agencies engage in rulemaking. “Legislative rules” are issued through a notice-and-comment process that requires the agency to seek input from affected parties about proposed rules. “Interpretive rules” simply notify the public of how the agency will apply rules in the future and do not require notice-and-comment. The U.S. Supreme Court has long held that the federal courts should be deferential to the interpretive rules issued by agencies (“*Seminole Rock *deference”). In 1997, the U.S. Court of Appeals for the District of Columbia, which serves as the primary court for resolving disputes over federal regulations, adopted the “*Paralyzed Veterans *doctrine.” That doctrine required federal agencies to make use of notice-and-comment procedures when substantially altering interpretive rules.*

*The U.S. Department of Labor is charged with determining what classes of employees are exempt from the minimum wage and overtime compensation requirements of the Fair Labor Standards Act (FLSA). In 2004, the Department adopted a legislative rule regarding whether employees in the financial services industry fell within the FLSA exemptions. At the behest of the Mortgage Bankers Association (MBA), the Department issued an opinion letter in 2006 interpreting the new rule explaining that mortgage-loan officers fell within the exemption. In 2010, however, the Department changed its mind, issuing a new interpretation that said that mortgage-loan officers would no longer be regarded as exempt. The MBA filed suit in federal district court, arguing that 2010 interpretation fell within the* Paralyzed Veterans *doctrine and yet failed to follow the required notice-and-comment. The district court held that the doctrine did not apply in this case, but on appeal the D.C. circuit court reversed. The secretary of labor appealed to the U.S. Supreme Court, which unanimously reversed the circuit court. In so doing, the Court overturned the Paralyzed Veterans doctrine as inconsistent with the APA. Notably, Justices Thomas, Scalia and Alito issued concurring opinions calling into question the constitutionality of the judiciary’s longstanding deference to agency interpretations of its own rules.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

When a federal administrative agency first issues a rule interpreting one of its regulations, it is generally not required to follow the notice-and-comment rulemaking procedures of the Administrative Procedures Act (APA). The United States Court of Appeals for the District of Columbia Circuit has nevertheless held, in a line of cases beginning with *Paralyzed Veterans of America v. D.C. Arena L.P*., 117 F.3d 579 (D.C. Cir., 1997) that an agency must use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted. The question in these cases is whether the rule announced in Paralyzed Veterans is consistent with the APA. We hold that it is not.

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The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA rulemaking provisions, and it improperly imposes on agencies an obligation beyond the “maximum procedural requirements” specified in the APA.

. . . Section 4 of the APA provides that “notice of proposed rulemaking shall be published in the Federal Register.” When such notice is required by the APA, “the agency shall give interested persons an opportunity to participate in the rulemaking.” But Section 4 further states that unless “notice or hearing is required by statute,” the Act’s notice-and-comment requirement “does not apply . . . to interpretive rules.” This exemption of interpretive rules from the notice-and-comment process is categorical, and it is fatal to the rule announced in *Paralyzed Veterans*.

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*Reversed*.

JUSTICE ALITO, concurring.

. . . . The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect. I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.

JUSTICE SCALIA, concurring.

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. . . . . I would . . . restore the balance originally struck by the APA with respect to an agency’s interpretations of its own regulations. . . . The agency is free to interpret its own regulations with or without notice and comment; but the courts will decide – with no deference to the agency – whether that interpretation is correct.

JUSTICE THOMAS, concurring.

I concur in the Court’s holding that the doctrine first announced in Paralyzed Veterans of America is inconsistent with the APA, and must be rejected. An agency’s substantial revision of its interpretation of a regulation does not amount to an “amendment” of the regulation as that word is used in the statute.

I write separately because these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations. That line of precedents, beginning with *Bowles v. Seminole Rock & Sand Co*. (1945), requires judges to defer to agency interpretations of regulations, thus . . . giving legal effect to the interpretations rather than the regulations themselves. Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. The line of precedents undermines our obligations to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses the Framers sought to prevent.

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We have not always been vigilant about protecting the structure of our Constitution. Although this Court has repeatedly invoked the “separation of powers” and “the constitutional system of checks and balances” as core principles of our constitutional design, essential to the protection of individual liberty, it has also endorsed a “more pragmatic, flexible approach” to that design when it has seemed more convenient to permit the powers to be mixed. As the history shows, that approach runs the risk of compromising our constitutional structure.

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When the Framers met for the Constitutional Convention, they understood the need for greater checks and balances [than traditional theory allowed] to reinforce the separation of powers. As Madison remarked, “experience has taught us to a distrust” of the separation of powers alone as “a sufficient security to each [branch] [against] encroachments of the others.” . . . During the ratification debates, Madison argued that this structure represented “the great security” for liberty in the Constitution.

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*Seminole Rock* raises two related constitutional concerns. It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a “check” on the political branches.

Those who ratified the Constitution knew that legal texts would often contain ambiguities. . . .

The judicial power was understood to include the power to resolve these ambiguities over time. . . . It is undoubtedly true that the other branches of Government have the authority and obligation to interpret the law, but only the judicial interpretation would be considered authoritative in a judicial proceeding.

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One of the key elements of the Federalists’ arguments in support of the allocation of power to make binding interpretations of the law was that Article III judges would exercise independent judgment. . . . Independent judgment required judges to decide cases in accordance with the law of the land, not in accordance with pressure placed upon them through either internal or external sources. Internal sources might include personal biases, while external sources might include pressure from the political branches, the public, or other interested parties.

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Interpreting agency regulations calls for that exercise of independent judgment. Substantive regulations have the force and effect of law. Agencies and private parties alike can use these regulations in proceedings against regulated parties. . . . Just as it is critical for judges to exercise independent judgment in applying statutes, it is critical for judges to exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties. Defining the legal meaning of the regulation is one aspects of that determination.

*Seminole Rock* deference, however, precludes judges from independently determining that meaning. Rather than judges’ applying recognized tools of interpretation to determine the best meaning of a regulation, this doctrine demands that courts accord “controlling weight” to the agency interpretations of a regulation, subject only to the narrow exception for interpretations that are plainly erroneous or inconsistent with the regulation. That deference amounts to a transfer of the judge’s exercise of interpretive judgment to the agency. . . But the agency, as part of the Executive Branch, lacks the structural protections for independent judgment adopted by the Framers, including the life tenure and salary protections of Article III. Because the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns.

*Seminole Rock* is constitutionally questionable for an additional reason: it undermines the judicial “check” on the political branches. Unlike the Legislative and Executive Branches, each of which possesses several political checks on the other, the Judiciary has one primary check on the excesses of political branches. That check is the enforcement of the rule of law through the exercise of judicial power.

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But we have not consistently exercised the judicial check with respect to administrative agencies. Even though regulated parties have repeatedly challenged agency interpretations as inconsistent with existing regulations, we have just as repeatedly declined to exercise independent judgment as to those claims. Instead, we have deferred to the executive agency that both promulgated the regulations and enforced them. . . . When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against.

This accumulation of governmental powers allows agencies to change the meaning of regulations at their discretion and without any advance notice to the parties. . . . When courts give “controlling weight” to an administrative interpretation of a regulation – instead of to the best interpretation of it – they effectively given the interpretation – and not the regulation – the force and effect of law. To regulated parties, the new interpretation might as well be a new regulation.

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This practice turns on its head the principle that the United States is “a government of laws, and not of men.” Regulations provide notice to regulated parties in only a limited sense because their meaning will ultimately be determined by agencies rather than by the “strict rules and precedents” to which Alexander Hamilton once referred.

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Although on the surface these cases require only a straightforward application of the APA, closer scrutiny reveals serious constitutional questions lurking beneath. . . . By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case.