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Pixelating Administrative Common Law in *Perez v. Mortgage Bankers Association*

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In Perez v. Mortgage Bankers, *the Supreme Court struck down a rule of administrative common law on the grounds that it was inconsistent with the Administrative Procedure Act (APA). But instead of simply respecting Congress's deliberate choices, the Court continues to weigh policy considerations. The Court shows no sign of relinquishing its self-appointed position as arbiter of what is good and bad, wise and unwise in administrative law.*

This Essay argues that the Court should take a step back and recognize the overarching problems with administrative common law: its lack of connection to public deliberation; its heightened separation of powers and public accountability concerns; and its lack of foresight about the practical implications of common law doctrine. In Mortgage Bankers, *the Court should have taken the opportunity to admonish the lower courts to focus their interpretation of the APA on the public deliberation inherent in the Act itself and to avoid creating rules of administrative common law that exceed the boundaries of the APA. Instead, the Court implicitly reaffirmed that it takes a functional approach to interpreting the APA; it addressed on the merits a deference doctrine that may not comport with the APA without even acknowledging that tension; and it invited the lower courts to continue to use administrative common law as a sort of constitutional avoidance doctrine unmoored from the public deliberation inherent in the APA itself.*

INTRODUCTION

In the National Portrait Gallery in Washington, D.C., hangs a painting by Chuck Close. When standing near the painting, all one sees are countless, abstract squares of color. But as one moves farther away, the individual squares merge into a portrait of President Clinton.[1]

1. *See Now on View: Bill Clinton by Chuck Close*, FACE TO FACE (Dec. 16, 2009, 2:51 PM),

In *Perez v. Mortgage Bankers Association*,[2] the Supreme Court struck down a judge-made rule from the D.C. Circuit as inconsistent with the plain text of the Administrative Procedure Act (APA).[3] The case arose after the Department of Labor reversed its interpretation of one of its own regulations. A previous opinion letter had concluded that, under the regulation, mortgage loan officers are not entitled to overtime pay. But the "Administrator's Interpretation" at issue in *Mortgage Bankers* reached the opposite conclusion.[4] The D.C. Circuit vacated the new interpretation because the agency issued it without going through notice-and-comment rulemaking procedure.[5] The APA, however, exempts an agency's interpretation from the notice-and-comment requirements that apply when an agency engages in rulemaking.[6] Nonetheless, the D.C. Circuit held—in accordance with its decision in *Paralyzed Veterans of America v. D.C. Arena L.P.*[7]—that changing the agency's "definitive interpretation" of a regulation is tantamount to changing the regulation itself, and thus requires notice and comment.[8] The Supreme Court reversed unanimously, holding that the D.C. Circuit's *Paralyzed Veterans* doctrine "is contrary to the clear text of the APA's rulemaking provisions."[9]

The Court reached the right result, but its opinion was flawed. Instead of simply noting the conflict between the D.C. Circuit's decision and the APA, it went on to analyze policy considerations. That analysis reveals that the Court is still amenable to administrative common law that exceeds the boundaries of the APA. The Court has yet to acknowledge the fundamental problem with such judge-made law: its lack of connection to public deliberation.[10] The Court's myopic focus on each individual case prevents it from seeing how its policy-oriented reasoning leaves the door open for common law doctrines that contradict the APA. The Court is standing too close to the canvas of administrative law to see the whole picture. Had it backed away from the

2. 135 S. Ct. 1199 (2015).

3. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–59 (2012)).

4. *See* Mortgage Bankers Ass'n v. Harris, 720 F.3d 966, 968 (D.C. Cir. 2013), *rev'd sub nom.* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

5. *Id.* at 968, 972.

6. 5 U.S.C. § 553(b)(A) (2012).

7. 117 F.3d 579 (D.C. Cir. 1997).

8. 720 F.3d at 967.

9. 135 S. Ct. at 1206. Justice Alito joined the Court's opinion in part and filed a concurring opinion, *id.* at 1210 (Alito, J., concurring in part and concurring in the judgment), and Justices Scalia and Thomas separately concurred in the judgment only, *id.* at 1211 (Scalia, J., concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment).

10. *See* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1212-13 (2015) (defining "administrative common law"), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386025 [http://perma.cc/HT39-B32A]; Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012) (same).

canvas, the Court would have reversed the D.C. Circuit simply because *Paralyzed Veterans* doctrine contradicts the APA. Perhaps the Court would have gone on to admonish the lower courts to respect the public deliberation reflected in the APA itself and to avoid creating administrative common law doctrines that conflict with the statute. But in saying less, the Court would have accomplished more.

In this Essay, I begin by explaining what sets the APA apart from ordinary statutes and how its special status should affect its interpretation. I then analyze how the Court departed from that prescription in *Mortgage Bankers* and how it should have decided the case.

I. INTERPRETING THE APA

Although the APA needs revising as it nears its seventieth birthday, it is not like other statutes that the courts may legitimately keep up to date.[11] The APA is a superstatute. William Eskridge and John Ferejohn conceived of superstatutes as statutes that emerge from a lengthy public debate and take on great normative weight.[12] The APA meets Eskridge and Ferejohn's criteria for superstatute status: it was born of deep public deliberation, has stood the test of time, taken on normative gravity, and become firmly entrenched in our law.[13]

Congress spent significant time in the 1930s and 1940s debating how to control the administrative state before settling on the formula of the APA in 1946. The debate involved federal agencies, the American Bar Association, and many other groups.[14] Conservatives in Congress wanted to impose strict new controls on federal agencies. New Deal liberals wanted to maintain agency discretion.[15] The APA of 1946 represents a monumental compromise between those two camps. Since 1946, Congress has made major amendments to the APA, and has given serious consideration to other changes right up to the present.[16] The APA is therefore the product of deep public deliberation.[17]

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11. *See* Kathryn E. Kovacs, *Abandoning Administrative Common Law in* Mortgage Bankers, 95 B.U. L. REV. ANNEX 1, 4 (2015).

12. WILLIAM N. ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 26-27 (2010).

13. *See* Kovacs, *supra* note 10, at 1223-37.

14. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557 (1996).

15. *See id.*

16. *E.g.*, Freedom of Information Act, ch. 324, § 3(a), 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. §552 (2012)); Government in the Sunshine Act, Pub. L. No. 94-409, §§ 3(a), 4, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552(b) (2012)); Act of Oct. 21, 1976, ch. 7, § 702–03, 90 Stat. 2721, 2721, (codified at 5 U.S.C. § 702 (2012)); Regulatory

Over the years, the APA has amassed normative gravity, in terms of both its own weight and its pull on other laws. For example, the idea of providing public notice and comment before issuing binding rules is firmly entrenched in administrative law,[18] and the arbitrary or capricious standard is replicated throughout the U.S. Code.[19]

One of William Eskridge and John Ferejohn's central insights in their work on superstatutes is that statutory interpretation should focus on deliberation — not judges deliberating behind closed doors while reading briefs submitted by the parties to a case, but public deliberation.[20] If the law is to evolve, as it must to answer new questions that arise, it should evolve in a way that reflects the public's will. For most statutes, agencies are at the center of that deliberative process. For example, the Environmental Protection Agency interprets the Clean Water Act in a regulatory process that involves agency staff, the public, the White House, Congress, and ultimately the courts.[21] But the APA is different. No single agency is tasked with interpreting the APA; all agencies interpret the APA, and no one agency's interpretation is binding on the others.[22] Because no agency has control over the APA, the public deliberation that has shaped the law has taken place in Congress.

These characteristics affect how courts should interpret the APA. First, Eskridge and Ferejohn argue that superstatutes should be allowed to evolve over time, even to the point of exceeding the enacting Congress's expectations.[23] That assertion, however, is premised on a single agency forming the center of an interpretive web intertwined with the other branches of government and the public.[24] But the APA is not a typical superstatute because no single agency centers the interpretive process. When interpreting the APA, therefore, courts should stay within the boundaries of the text that Congress

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Accountability Act of 2015, H.R. 185, 114th Cong. (2015); Regulations from the Executive in Need of Scrutiny Act of 2013, H.R. 427, 114th Cong. (2015).

17. *See* Kovacs, *supra* note 10, at 1224-27, 1234-35.

18. *See*, *e.g.*, 8 U.S.C. § 1356(h)(1) (2012); 12 U.S.C. § 2279bb-1(d)(1) (2012); 15 U.S.C. § 7214(a)(2)(C) (2012); 16 U.S.C. § 1383b(a)(1) (2012); 18 U.S.C. § 1520(a)(2) (2012); 25 U.S.C. § 458c(b) (2012); 42 U.S.C. § 7607(d)(3) (2012).

19. *See*, *e.g.*, 5 U.S.C. § 7703(c)(1) (2012); 8 U.S.C. § 1189(c)(3)(A); 30 U.S.C. § 1276(a)(1) (2012); 31 U.S.C. § 755(a)(1) (2012); 38 U.S.C. § 7261(a)(3) (2012); 42 U.S.C. § 7607(d)(9)(a) (2012); 42 U.S.C. § 9613(j)(2) (2012).

20. ESKRIDGE & FEREJOHN, *supra* note 12, at 22-24.

21. *See* 33 U.S.C. § 1361 (2012) (granting EPA rulemaking authority); Kovacs, *supra* note 10, at 1238-39 (describing the agency-centered deliberative process).

22. *See* 5 U.S.C. § 551(1) (defining "agency" to include "each authority of the Government of the United States"); *see also* Kovacs, *supra* note 10, at 1242-48.

23. ESKRIDGE & FEREJOHN, *supra* note 12, at 267.

24. *Id.* at 19, 105.

enacted.[25] Some words leave wiggle room for interpretation, like "arbitrary, capricious, or contrary to law."[26] Other terms are more definite, like section 704, which requires exhaustion of administrative remedies "only" in certain circumstances.[27] No clear line divides statutory interpretation from administrative common law.[28] But administrative common law "exceeds the boundaries of any permissible interpretation" of the text.[29] When that common law also contradicts or ignores the APA, it must be avoided.[30]

Second, courts must give effect to the compromises encoded in the Act. Some provisions were wins for the conservative minority, others wins for the liberal majority. One cannot tell which is which, and thus cannot really understand the text if one does not also look at the full context and history of the Act leading up to 1946.

Third, courts must respect ongoing public deliberation about the Act. This deliberation includes not just amendments that have been enacted, but also amendments that get defeated after significant debate.[31] When the Court invalidated a Department of Labor burden-shifting rule in *Director, Office of*

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25. Judicial deliberation does not satisfy superstatute theory's call for deliberation that involves the public and representative branches of government. *See* ESKRIDGE & FEREJOHN, *supra* note 12, at 21, 24.

26. 5 U.S.C. § 706(2)(A).

27. 5 U.S.C. § 704.

28. Metzger, *supra* note 10, at 1310. John Duffy remarked that "the split between statutory and common-law approaches in administrative law" is not a "disagreement[] about how to interpret the APA, but *whether* to interpret the APA." John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 181 (1998).

29. Kovacs, *supra* note 10, at 1212. Thus, requiring agencies to evaluate "relevant data" and disregard factors that Congress did not intend for the agency to consider, *see* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), may be within the boundaries of the capacious terms "arbitrary" and "capricious." Kovacs, *supra* note 10, at 1213.

30. Not all administrative common law contradicts the APA. Section 702 of the Act, for example, anticipates the continued employment of common law by preserving the courts' authority to "deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702.

31. *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1461 (2014) ("When the Court has interpreted a statute and Congress has engaged in an open, deliberative, and pluralistic appraisal of the Court's decision without overriding it, that ought to be an additional reason for the Court to be reluctant to overrule its statutory precedent."). The list of defeated amendments to the APA would be far too long to include here. For a taste, see William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235 (1986); Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 344 (1986); Craig N. Oren, *Be Careful What You Wish For: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1141, 1149-50 (2004); Ronald M. Levin, *Statutory Reform of the Administrative Process: The American Experience and the Role of the Bar*, 83 WASH. U. L.Q. 1875, 1880 (2005); and Ronald M. Levin, Comment, *Review of "Jurisdictional" Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355.

Workers' Compensation Programs v. Greenwich Collieries,[32] for example, it did not consider post-1946 statutes and regulations.[33]

Finally, if the APA needs to be amended to respond to new circumstances, the courts should not take on that task themselves, but should prod Congress to do its job.[34] Judicial deliberation is not a "second best" alternative to public deliberation.[35]

Judge-made rules that exceed the boundaries of the APA's text defy those core interpretive tenets.[36] The primary problem of administrative common law is its lack of connection to public deliberation.[37] Another problem relates to separation of powers and political accountability. Thomas Merrill argued that lawmaking by federal judges represents "a major shift in policymaking power away from Congress and toward the federal judiciary" and "a potential erosion of the principle of electoral accountability."[38] Those objections may overreach insofar as they would invalidate all federal common law.[39] The years of intensive public deliberation over the APA, however, raises the stakes on those concerns.[40]

Moreover, courts cannot foresee the implications of the administrative common law rules they create, as they typically hear from only one agency in a given case.[41] For example, the D.C. Circuit has imposed common-law requirements on agency rulemaking, including requiring that a final rule be a "logical outgrowth" of the proposed rule and that agencies provide public

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32. 512 U.S. 267 (1994).

33. *See* Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1418-19 (1996).

34. Kovacs, *supra* note 10, at 1250-54.

35. Lawrence Solum, *Legal Theory Lexicon: Second Best & Nonideal Theory*, LEGAL THEORY BLOG (Sept. 14, 2014), http://lsolum.typepad.com/legaltheory/2014/09/legal-theory-lexicon-second-best-nonideal-theory.html [http://perma.cc/Z969-VFAG] ("[W]hen the first-best policy option is unavailable, then normative legal theorists should consider second-best solutions.").

36. I do not take issue with administrative common law doctrines where the APA itself carves out space for common law or where the terms of the APA are "so indefinite as to invite judicial elaboration." Kovacs, *supra* note 10, at 1213.

37. *Id.* at 1254-55, 1257.

38. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 23, 27 (1985).

39. *See* Metzger, *supra* note 10, at 1347-48.

40. Kovacs, *supra* note 10 at 1254-56.

41. 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.").

notice of the information considered in drafting the rule.[42] Those common law requirements, among others, may have pushed agencies to use non-binding means, such as interpretive rules and policy statements, to communicate their policy positions, as the Department of Labor did in *Mortgage Bankers*.[43] The Court should not eliminate the availability of such subregulatory forms until it lifts the common law cloud on rulemaking.[44]

II. THE COURT'S PIXELATED VIEW

The Supreme Court does not hear many cases that present such a stark conflict between a doctrine of administrative common law and the APA. Thus, *Mortgage Bankers* presented a rare opportunity to caution the lower courts against creating administrative common law doctrines that conflict with the statute. Although the Court in *Mortgage Bankers* reached the right result, it missed that opportunity.

The Court recognized that "[t]he text of the APA answers the question presented" in that it expressly exempts "interpretative rules" from the Act's rulemaking requirements.[45] The Court purported to leave to Congress the task of "weigh[ing] the costs and benefits of placing more rigorous procedural restrictions on the issuance of interpretive rules."[46] And the Court explained that it is not in the position to decide whether *Paralyzed Veterans* doctrine is "wise policy" or not.[47]

If the Court had recognized the problems with administrative common law, it would have ended its opinion there. The Court could have disposed of

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42. Am. Radio Relay League v. FCC, 524 F.3d 227, 245–46 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) (opining that the doctrine requiring agencies to disclose studies "cannot be squared with the text of § 553 of the APA"); Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 8 (2011) (stating that the "logical outgrowth" requirement is "largely detached from the language and intent behind the APA's rulemaking provisions").

43. 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."); Cass R. Sunstein, *When All Nine Justices Agree*, BLOOMBERG VIEW (Mar. 10, 2015), http://www.bloombergview.com/articles/2015-03-10/when-all-nine-justices-agree [http://perma.cc/A4Z3-ELQ4] ("A Democratic administration will often disagree with the interpretations of its Republican predecessor, and if it has to go through the time-consuming public comment process to make a change, it will be delayed and possibly even stymied.").

44. Kovacs, *supra* note 11, at 5.

45. 5 U.S.C. § 553(b)(A) (2012); Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015).

46. *Perez*, 135 S. Ct. at 1206-07.

47. *Id.* at 1207.

the case simply by noting that the arguments the Mortgage Bankers Association (MBA) raised in support of *Paralyzed Veterans* doctrine could not overcome the doctrine's conflict with the APA. Standing so close to the canvas, however, the Court did not see the entire picture. The Court was so focused on the case before it that when it went on to address MBA's arguments, it left the door ajar for administrative common law that contradicts or ignores the APA. In saying less, the Court would have accomplished more.

Several aspects of the Court's opinion reveal that it is still amenable to administrative common law that exceeds the terms of the APA. The Court implicitly reaffirmed that it takes a functional approach to interpreting the APA; it addressed on the merits a deference doctrine that may not comport with the APA without even acknowledging that tension; and it invited the lower courts to continue to use administrative common law as a sort of constitutional avoidance doctrine unmoored from the public deliberation inherent in the APA itself.

First, the Court did not disagree with MBA's contention that the Court takes a "'functional' approach to interpreting the APA."[48] Instead of accepting an agency's characterization of its action at face value, MBA argued, the Court analyzes the function of the agency's pronouncement.[49] It was just such a functional approach that led the D.C. Circuit to craft the *Paralyzed Veterans* doctrine. Instead of accepting the APA at face value, the D.C. Circuit interpreted the exception for interpretive rules to serve what the court saw as its proper function.[50] In *Mortgage Bankers*, rather than eschewing that approach, the Supreme Court simply distinguished the cases upon which MBA relied to defend the *Paralyzed Veterans* doctrine.[51] The Court reached the right result. Its mistake was in focusing on the function of administrative law doctrines instead of the public deliberation that shaped the APA.[52]

Similarly, instead of simply rejecting MBA's "practical and policy" arguments as irrelevant in light of Congress's clear expression of intent in the

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48. *Id.* at 1208.

49. Consolidated Brief of Respondent at 23-24, *Perez*, 135 S. Ct. 1199.

50. *See* Ryan DeMotte, *Interpretive Rulemaking and the* Alaska Hunters *Doctrine: A Necessary Limitation on Agency Discretion*, 66 U. PITT. L. REV. 357, 378 (2004) (defending the D.C. Circuit's functional approach); *see also* Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999), *abrogated by* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.").

51. 135 S. Ct. at 1208.

52. Even if a doctrine's function might legitimately factor into the Court's choice between two reasonable interpretations of an ambiguous provision of the APA, in *Mortgage Bankers*, section 553(b)(A) left no such ambiguity.

APA, the Court answered those policy questions on their merits.[53] Of course, it is not unusual for the Court to address a party's arguments in an opinion. But it was this sort of "practical and policy" consideration that led the D.C. Circuit to create *Paralyzed Veterans* doctrine. By addressing those arguments on their merits, the Supreme Court indicated that they provide a valid means of interpreting the APA. The Court should have simply reiterated its statement that just because the Court might "have struck the balance differently does not permit [it] to overturn Congress's contrary judgment."[54]

Second, the Court's treatment of the *Auer* doctrine further demonstrates its continued comfort with administrative common law. Under *Auer v. Robbins*, agency interpretations of their own rules receive deference.[55] MBA argued that because interpretive rules get *Auer* deference, they have the force of law.[56] The Court need not have addressed *Auer* at all, since MBA waived the argument by not raising it in its brief in opposition.[57] Nonetheless, the Court rejected MBA's contention because, even where *Auer* applies, "it is the Court that ultimately decides whether a given regulation means what the agency says."[58]

What is notable, though, is not the Court's response, but rather that, having addressed *Auer*, the majority opinion ignored the elephant in the room. Several justices have raised the question in recent years of whether the *Auer* doctrine should be eliminated, practically inviting petitions for certiorari on the issue.[59] Yet the majority in *Mortgage Bankers* did not even acknowledge that question.

Although the *Auer* doctrine may not conflict with the express terms of the APA like the *Paralyzed Veterans* doctrine, giving deference to an agency's interpretation of its own regulations is at least in some tension with Act's requirement that courts "decide all relevant questions of law" and "interpret

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53. *Id.* at 1209. MBA argued, *inter alia*, that the *Paralyzed Veterans* doctrine furthers the APA's goal of establishing procedural fairness. Consolidated Brief of Respondent at 16-23, *Perez*, 135 S. Ct. 1199.

54. 135 S. Ct. at 1207.

55. Auer v. Robbins, 519 U.S. 452 (1997).

56. 135 S. Ct. at 1208 n.4.

57. The Court held that MBA waived its argument that the agency interpretation at issue was actually a legislative rule. *Id.* at 1210. The basis for that argument was that the interpretation would get *Auer* deference and thus have the force of law. Consolidated Brief of Respondent at 13-14, 37-48, *Perez*, 135 S. Ct. 1199. *Auer* was not involved in the case for any other reason. So, the Court did not need to address *Auer* at all.

58. 135 S. Ct. at 1208 n.4.

59. Decker v. Nw. Envtl. Def. Cntr., 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring); *id.* at 1339-42 (Scalia, J., concurring in part and dissenting in part); Talk Am. v. Mich. Bell Tel., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

constitutional and statutory provisions."[60] Again, the Court could have held simply that the *Paralyzed Veterans* doctrine conflicts with the APA. Instead, the Court addressed a doctrine that was not at issue in the case and that might itself contradict the APA. To be sure, the majority did not endorse *Auer* doctrine, but it missed an opportunity to say that one common law doctrine cannot justify another common law doctrine that conflicts with the APA. The majority essentially gave the lower courts the go-ahead to continue to develop administrative law without considering how their doctrines comport with the APA.

Finally, MBA argued that the *Paralyzed Veterans* doctrine prevents agencies from undermining reliance interests by "unilaterally and unexpectedly altering their interpretation of important regulations."[61] The Court did not need to address retroactivity in *Mortgage Bankers* because the FLSA contains a safe-harbor provision that insulates employers from liability where they acted in conformity with the then-current Department of Labor interpretation of the Act.[62] Nonetheless, the Court noted that principles of retroactivity might limit an agency's ability to enforce a new interpretation against a regulated party that relied on an earlier interpretation.[63] While this retroactivity principle probably reflects Due Process Clause concerns,[64] unless the Court grounds its decision more directly in the Constitution this concern devolves into administrative common law.[65] The Court avoids confronting constitutional tensions using administrative common law "as a constitutional avoidance doctrine."[66] By not positioning its discussion of retroactivity in the context of the Due Process Clause, however, the Court left its discussion of retroactivity unmoored, thus implying that courts may continue to develop common law out of whole cloth instead of focusing their analysis on the public deliberation inherent in the APA.

Justice Scalia addressed some of these issues in his concurrence. He came closer to the mark of recognizing the problems with administrative common law by pointing out that, to restore the balance Congress struck when it

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60. 5 U.S.C. § 706 (2012); Kovacs, *supra* note 11, at 7 (discussing how *Auer* might be reconciled with the APA's text).

61. 135 S. Ct. at 1209.

62. *Id.* (discussing 29 U.S.C. § 251 (2012)).

63. *Id.* at 1209 n.5.

64. *See* FCC v. Fox Tel. Stations, Inc., 132 S. Ct. 2307, 2317 (2012); Metzger, *supra* note 10, at 1296 (discussing the Court's stated reliance on due process concerns in FCC v. Fox Tel. Studios, Inc., 556 U.S. 502 (2009)).

65. *Cf.* Metzger, supra note 10, at 1339 ("Instead of invalidating modern administration on constitutional grounds, the Court has often addressed the constitutional concerns that modern administrative governance raises through administrative common law doctrines.").

66. *Id.* at 1341.

enacted the APA in 1946, the Court must not examine *Paralyzed Veterans* doctrine in isolation, but must also consider "judge-made doctrines of deference."[67] Yet even Justice Scalia failed to recognize that it might be the common law of rulemaking that has driven agencies to rely on subregulatory forms of policy communication.[68] Justice Scalia went on to say that, if the D.C. Circuit were to purport to overrule a Supreme Court decision, that act would be a "greater fault" than ignoring a congressional enactment.[69] Whether correct or not, that statement fails to recognize the danger inherent in *any* rule of administrative common law that contradicts the APA, and fails to recognize the need for courts to respect public deliberation.[70]

The Court's pixelated analysis of administrative common law is nothing new. The Court is often so focused on the minutia of an individual case that it does not recognize the overarching problem with administrative common law that contradicts the APA. In *Vermont Yankee Nuclear Power Corp. v. NRDC*, for example, the Court held that the D.C. Circuit erred in imposing procedural requirements that exceeded the terms of section 553 of the APA for informal rulemaking. The Court invalidated a rule of administrative common law.[71] But the Court seemed to speak out of both sides of its mouth. It urged the lower courts not to exceed the boundaries of section 553, essentially cautioning them against creating administrative common law.[72] Yet, instead of centering its own analysis on section 553, the Court focused on its prior decisions, only one of which mentioned the APA, and then only in footnotes.[73] Indeed, the Court seemed to go well beyond the APA itself by invoking "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."[74] When put so broadly, that statement contradicts the very

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67. 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).

68. *See infra* text accompanying note 43.

69. 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

70. Even Justice Thomas, who addressed separation-of-powers concerns directly, did not acknowledge the need for the Court to respect public deliberation. His concern was with transferring judicial power to agencies and undermining the judiciary's ability to check the legislature. 135 S. Ct. at 1215-17 (Thomas, J., concurring in the judgment). He expressed no concern about the judiciary respecting the legislature's judgment.

71. 435 U.S. 519, 524 (1978).

72. *Id.*

73. *Id.* at 544 (citing FCC v. Schreiber, 381 U.S. 279, 287 n.15, 293 n.20 (1965)). Only after discussing prior case law did the Court examine the APA's legislative history, and then only to reject one of the respondent's arguments. *Id.* at 545. And only after enunciating concerns about the predictability of judicial review and "Monday morning quarterbacking" did the Court go on to explain how the court of appeals' conception of the "record" misread the APA. *Id.* at 546-48.

74. *Id.* at 544.

purpose of the APA: "to settle and regulate the field of Federal administrative law and procedure."[75]

By the same token, the Court stuck close to the APA's text when it invalidated common law exhaustion doctrine in *Darby v. Cisneros*.[76] But even there, it expressly permitted courts "to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review."[77] In *Vermont Yankee*, *Darby*, and again in *Mortgage Bankers*, the Supreme Court missed an opportunity to caution the lower courts against creating administrative common law doctrines that conflict with the APA.

CONCLUSION

The Court pixelates intentionally: it decides cases narrowly based on the facts presented.[78] But in so doing, the Court sometimes misses the bigger picture. It is so focused on individual dots that it does not notice how they cohere into a unified image. This is one of the primary problems with administrative common law. As Nicholas Bagley has explained, courts see only "case-by-case snapshots" of agencies and "have only a dim sense of how judicial oversight will affect how agencies go about their business."[79] Although courts are deeply deliberative, they lack the necessary foresight, and they lack the connection to the public that renders lawmaking valid in our system of government.[80]

The Court should take a step back from the canvas of administrative law to see the whole picture. If it had taken a step back in *Mortgage Bankers*, it would have explained why *Paralyzed Veterans* doctrine conflicts with the APA and ended its opinion there. Perhaps it would have gone on to admonish the lower courts to focus their interpretation of the APA on the public deliberation inherent in the Act itself and cautioned them against creating administrative

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75. S. REP. NO. 79-752, at 3 (1945); *see also id.* ("[T]here should be some simple and standard plan of administrative procedure.").

76. 509 U.S. 137 (1993).

77. *Id.* at 146. In *Lexmark Intern., Inc. v. Static Control Components, Inc.*, the Court held that the zone-of-interests analysis is not a matter of prudential standing at the jurisdictional phase, but a matter of whether the plaintiff "has a cause of action under the statute." 134 S. Ct. 1377, 1387 (2014). Nonetheless, the Court's opinion is infused with common law. Likewise, the Court was somewhat uneasy with common law ripeness doctrine in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014). But the Court there cited *Lexmark*, indicating that its concern may be with housing the ripeness inquiry in jurisdiction, rather than the merits. *Id.* Thus, these decisions do not evince any general distaste for administrative common law.

78. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

79. Bagley, *supra* note 41, at 1322.

80. Kovacs, *supra* note 10, at 1240-42, 1257-58.

common law doctrines that conflict with the APA. If the Court takes a step back, the pixels of each individual case will merge into a picture in which administrative common law is something to be approached with skepticism instead of open arms.

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