SEEING THROUGH A PREAMBLE, DARKLY: ADMINISTRATIVE VERBOSITY IN AN AGE OF POPULISM AND "FAKE NEWS"

ALEC WEBLEY*

ABSTRACT

How does an ordinary citizen find out what the government is doing and why? One early method was pioneered by the Administrative Procedure Act (APA). The APA requires that when a government agency finalizes a rule, it publishes a preamble containing a "concise general statement of the rule's basis and purpose." But the public truth-telling function of these "preambles" has become undermined by their spectacular length, often to more than a thousand pages longer than their parent rules, making it virtually impossible for anyone (even lawyers!) to properly read them. Worse, the courts have made it clear that no rule will ever be thrown out for having a preamble that is too long—but a preamble might doom its parent rule by being too short.

This Article argues that the growth of the thousand-page preamble is not only a crying shame but quite possibly a shaming crime. The APA's command that preambles be "concise," read in its proper context, requires an agency to limit what it says so as to communicate a rule's basis and purpose effectively to the public, even (indeed especially) if the public does not comment on the proposed rule. Alas, without much thought or analysis, both agencies and courts re-purposed the preamble to facilitate technical, "hard-look" review of an

* Associate, Covington & Burling LLP; J.D., New York University School of Law; MSc., London School of Economics and Political Science (alec.webley@nyu.edu). The views expressed in this Article are my own and are not necessarily those of either Covington & Burling LLP or its clients. I am indebted to Adrienne Lee Benson, Peter Barton Hutt, Samuel Issacharoff, the Hon. Robert Katzmann, Kevin King, Joshua Matz, Lars Noah, James Risely, Adam Samaha, Melissa Schwartzberg, Bradley Silverman, and others for helpful comments, edits, and suggestions. Angel Cruz and his colleagues at the *Administrative Law Review* considerably improved this Article and were a genuine pleasure to work with. My continued gratitude extends to Jeffrey Green, Anne Norton, Rogers Smith, and Eileen Doherty-Sil. Mistakes—and verbosity—are my fault entirely.

agency's reasoning, rather than serving the separate statutory mandate of effective public information.

By reading "concise" out of the statute, agencies and courts unintentionally eliminated a popular counterweight built into an act that otherwise empowered elites. By so doing, courts have deprived the administrative process of a measure of popular legitimacy, as well as a promising means of fighting false information in political life—by requiring agencies to tell a plain, accessible, and true story about a rule, and be scrutinized in their public engagement by the judiciary. I argue that in this populist moment, where the legitimacy of the administrative state is under strain, it is time to seriously consider reviving "concise," and its vision for popular accountability, to bring a disenchanted public closer to the administrative process.

TABLE OF CONTENTS

INTRODUCTION

It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read.
— Federalist 62[1]

Demands for concision are a fixture of the world of law.[2] No court in the land—not even the U.S. Supreme Court—permits submissions of unlimited length.[3] Every first-year law student learns the injunction, in Rule 8 of the Federal Rules of Civil Procedure, that the pleadings in a case must be, among other things, "short and plain."[4] Even law reviews have tried to reduce the length of the articles they publish in response to the howls of anguish emitting from their readership and overburdened staff editors.[5]

The reason lawyers demand brevity seems plain enough: after all, *lex longa, vita brevis*.[6] But concision has many more uses in law than merely conserving our time. A concise document is more likely to be read and, when read, more likely to be understandable. Judges praise concision in briefs because it increases the chance that the reader will be exposed to those points of the case that are most important, rather than missing them while wading through

1. THE FEDERALIST NO. 62, at 336 (James Madison) (Hillsdale College ed. 2012).

2. Indeed, brevity might well be one of the earliest demands made of human expression. *See, e.g.*, *Ecclesiasticus* 32:8 (King James) ("Let thy speech be short, comprehending much in few words.").

3. SUP. CT. R. 33(g) (limiting the word count for each type of filing, from 15,000 words for merits briefs to 3,000 words for reply briefs in opposition); FED. R. APP. P. 32(a)(7)(B)(i) (amended 2016) (allowing a maximum of 14,000 words for principal brief). Indeed, the Federal Rules of Appellate Procedure were recently amended to cut down on the number of words permitted in briefs and other papers. *See* FED. R. APP. P. 32 advisory committee's note to 2016 amendment.

4. FED. R. CIV. P. 8(a). *But see* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (holding that the complaint must allege sufficient facts to "raise a right to relief above the speculative level").

5. *See* Joint Statement Regarding Articles Length, Harvard Law Review et al., http://harvardlawreview.org/wp-content/uploads/2014/03/articles_length_policy.pdf (last visited Jan. 26, 2018) (discussing the agreement and the survey that led to it). *But see* Stephen Bainbridge, *Law Review Word Limits Go Unenforced . . . at Least at Harvard and Yale*, PROFESSORBAINBRIDGE.COM (Oct. 15, 2013), http://www.professorbainbridge.com/professorbainbridgecom/2013/10/law-review-word-limits-go-unenforced-at-least-at-harvard-and-yale.html (noting that essentially all articles published in both Harvard and Yale's flagship journals in 2013 exceeded the official word limits).

6. *Cf.* HIPPOCRATES, APHORISMS § 1.1 (Francis Adams trans., 1849) (400 B.C.E.), http://classics.mit.edu//Hippocrates/aphorisms.1.i.html.

irrelevancies.[7] And truly concise, aphoristic expressions have power of their own—demonstrated as well as it perhaps has ever been in the fortunes of the winner of the 2016 election for President of the United States.[8]

However, there is one last outpost where concision appears to hold no sway, a tower of babble unabashed and unceasing: *the administrative state*. No matter the branch, no matter the agency, no matter the party, no matter the subject matter, the pattern is the same. Each and every year, the government[9] produces ever more pages of writing for internal and public consumption.[10] But it's not clear who, if anyone, is reading it. Indeed, while it might be thought that more information from the government facilitates more government accountability, at a certain point *too much* information obscures ra-

---

7. *Cf.*, ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 24 (2008) (discussing importance of concision in presenting legal arguments).

8. *See, e.g.*, Katy Waldman, *Trump's Tower of Babble*, SLATE (Nov. 2, 2016, 5:57 AM), http://www.slate.com/articles/news_and_politics/politics/2016/11/how_donald_trump_uses_language_and_why_we_can_t_stop_listening.html (noting the use of short, simple, explosive terms and phrases to effectively communicate a political message).

9. By "government" here I mean, rather loosely, the agencies and entities making up the Executive Branch of the United States federal government. But there is no reason to believe this is an exclusively U.S. phenomenon. *See, e.g.*, Winston Churchill, *Brevity*, NAT'L ARCHIVES (1951), http://discovery.nationalarchives.gov.uk/details/r/D7656438 ("In 1940 I called for brevity. Evidently I must do so again."); Laura Cowdrey, *Churchill's Call for Brevity*, NAT'L ARCHIVES (Oct. 17, 2013), http://blog.nationalarchives.gov.uk/blog/churchills-call-for-brevity/ (Churchill, demanding brevity again: "Forgive this cry of pain!"); David Runciman, *Rat-a-tat-a-tat-a-tat-a-tat*, 35 LOND. REV. BOOKS 13, 13 (June 6, 2013), https://www.lrb.co.uk/v35/n11/david-runciman/rat-a-tat-a-tat-a-tat-a-tat (quoting from a briefing memo issued by Margaret Thatcher to the Foreign Office five days after she became Prime Minister: "The prime minister, who is a quick reader, is fully prepared to tackle long briefs when necessary: but she would like their content to be pithy and concisely expressed.").

10. A crude measure of this phenomenon can be gleaned by simply comparing the number of documents published in the *Federal Register* (which chronicles government activity) with the number of pages in the *Federal Register*. While the number of documents has remained largely steady since about 1985 (averaging 31,000 per year, with no year producing more than 35,000), the number of pages published has increased from a five-year average of 48,693 (1985–1990) to an average of 82,227 (2011–2016), with pages-per-document increasing from an average of 1.5 to 2.5 over that time. *See* OFFICE OF THE FED. REGISTER, FEDERAL REGISTER STATISTICS (1936–2016), https://www.federalregister.gov/reader-aids/understanding-the-federal-register/federal-register-statistics (last visited Jan. 26, 2018). Precisely what is driving this growth we shall come to shortly; for now, the only point I wish to make is that the number of pages the government is printing is expanding, and not obviously as a result of simply expansion of the government's activities.

ther than illuminates government decisionmaking. One cannot feed a starving man by drowning him in soup.

For most people, holding the government accountable requires *seeing* and *understanding* what the government is doing. Civil society (whether businesses, non-profits, or the media) cannot fully replace the role the public can play when members of the public can directly perceive government action as it relates to them. Indeed, civil society brings its own problems: most notably, an incentive to spread a particular slant to the facts, or even "alternative facts,"[11] in order to mobilize popular support for certain policy outcomes,[12] or perhaps simply to increase the appeal of an otherwise "boring" policymaking process in order to boost readership or viewership.[13] *Popular* accountability, not just accountability to the people's tribunes, is important, if not essential, to the legitimation of government activity in a democracy. Thus, the government's seeming inability to keep its communications brief is no mere irritant or peccadillo; it has the capacity to strike at the heart of the democratic legitimacy of the administrative state and its capacity to keep up with our raucous and populist politics.

In this Article, I examine one example of government verbosity: preambles that accompany finalized government regulations.[14] I have selected pre-

---

11. *See* Jane Dvorak, *PRSA Statement on "Alternative Facts*," PUB. RELATIONS SOC'Y OF AM. (Jan. 24, 2017), https://www.prsa.org/prsa-statement-alternative-facts/ (noting that ethical professionals "never spin, mislead or alter facts").

12. *See* generally Richard Meagher, *The "Vast Right-Wing Conspiracy": Media and Conservative Networks*, 34 NEW POL. SCI. 469, 470 (2012) (reviewing a diversified array of civil society organizations dedicated to disseminating a particular view of government activity). This is hardly a uniquely American phenomenon. *See, e.g.*, Andrea Ceron & Vincenzo Memoli, *Trust in Government and Media Slant: A Cross-Sectional Analysis of Media Effects in Twenty-Seven European Countries*, 3 INT'L. J. PRESS/POL. 339, 340 (2015) (reviewing the effects on public trust in government of media perspectives on government).

13. *See, e.g.*, Robert M. Entman, *Reporting Environmental Policy Debate: The Real Media Biases*, 1 INT'L. J. PRESS/POL. 77, 77 (2016) (discussing the "biases that structure the news" that "led journalists to frame the debate over environmental policy reform in ways that prevented the average citizen from engaging in rational deliberation").

14. By "preamble," I mean the text published with a final rule in the *Federal Register* that purports to set out the "basis and purpose" of that rule. Most final rules are quite clear as to the content of their preamble; it is notable, moreover, that "executive summaries" or the one-paragraph "quick and dirty" summary of the rulemaking often describes what the *final rulemaking document is*, but not the basis and purpose of the *actual rule enacted*. In this regard, these summaries resemble the "last time on" recaps of serialized network TV shows (say, *Lost*), that are of virtually no help to anyone coming into the show cold.

ambles because they are not just unnecessarily verbose—they may be *unlawfully* so. An enforceable statute, the Administrative Procedure Act (APA),[15] requires preambles to be "concise" and "general" statements of the "basis and purpose" of a given regulation. They are not. Preambles represent, therefore, a promising institutional space in which we might pilot means of bending the long arc of the bureaucratic universe toward brevity.

Preambles are written in the course of "informal rulemaking,"[16] the process by which federal agencies adopt most of what we commonly understand as government regulations.[17] The informal rulemaking procedure under the APA has essentially three steps.[18] First, the agency proposes a rule by publishing a "notice of proposed rulemaking" in the *Federal Register*.[19] Second,

15. 5 U.S.C. § 551–559, 561–570a, 701–706 (2012). I note in passing that Congress is considering APA reform. *See* Christopher Walker, *The Regulatory Accountability Act is a Model of Bipartisan Reform*, REG. REV. (May 18, 2017), https://www.theregreview.org/2017/05/18/walker-model-bipartisan-reform/. However, no draft legislation introduced in Congress that I have seen, as of the start of 2018, changes the statutory language at issue in this Article.

16. Distinguished from formal rulemaking, which is now rare and disfavored. *See* 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE 173–75 (3d ed. 2010) (describing infrequency of application); *cf.* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 240 (1973) (holding that formal rulemaking requirements will not be presumed in the absence of specific words in the statute indicating Congress intended it). A formal rulemaking essentially involves a full trial in which the agency and its opponents argue about the details of a rule before a quasi-neutral decisionmaker.

17. "Regulation" is here and elsewhere synonymous with "rule" under the APA, namely an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). The definition of what is and is not a rule under law need not detain us; suffice it to say that a very large amount of federal policy is made by means of rules. *See* Ryan T. Holt, "Buy Stock in the GPO"? An Empirical Analysis of How *United States v. Mead Corp.* Increased the Use of Informal Rulemaking by Federal Agencies 101 (Feb. 10, 2011) (unpublished manuscript) (on file at https://works.bepress.com/ryan_holt/1/).

18. Since the 1980s, this process has become more involved as a practical matter owing to the application of Executive practices imposing additional procedures for the approval of especially economically significant regulations. *See, e.g.*, Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981) (applying more stringent review to certain economically significant regulations); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (modifying the review prescribed by Exec. Order 12,291); Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (establishing still further restrictions on regulatory activity). The essentials, however, remain as sketched here, and these essentials (as we shall see) form the basis of judicial scrutiny of the proposed rule.

19. 5 U.S.C. § 553(b).

the agency receives and considers comments on that rule from the public.[20] Third, the agency finalizes the rule, making changes in response to the comments received, and publishes the final product in the *Federal Register*.[21]

At the third step in this process, the APA requires that the agency "incorporate in the rules adopted a *concise general statement* of their basis and purpose."[22] What legislative history we have suggests that Congress used these words to ensure that the public could understand the often complex matters the administrative state would regulate.[23] Unfortunately, the courts have chosen to jettison the requirements of "concise" and "general" in favor of verbosity and specificity in order to facilitate their own review of agency regulations.

Courts have not merely failed to enforce the APA's command requiring a concise general statement; they have made this command impossible to practicably obey. A rule whose preamble is too *short* risks being struck down by the courts and sent back to the agency for a rewrite;[24] but no case has ever been reported where a court has thrown out a preamble for being too *long*. Because the most salient rules attract the most scrutiny, they are the places where agencies have every incentive to write more and not less—disabling ordinary citizens from receiving digestible, comprehensible information respecting the basis and purpose of exactly those regulations most salient to them or important to the economy. What's more, the courts' choice to read *concise* and *general* out of the statute was truly a choice: it was, and is, perfectly possible to have searching judicial review of regulations without warping the preamble in the ways the courts have done.[25]

To see the modern prolix preamble in action, consider the preamble for the recent regulation implementing the "Volcker Rule," a proposal made by former Federal Reserve Chair Paul Volcker that banks be restricted from engaging in certain kinds of potentially risky transactions.[26] The Volcker

---

20. *Id.* § 553(c).

21. *Id.*

22. *Id.* (emphasis added).

23. *See infra* Part II.B.1.

24. *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 249 (2d Cir. 1977).

25. Indeed, in some instances such review happens already. For example, when designating a group a terrorist organization, the Secretary of State is required to generate "an administrative record," and this record, rather than a preamble, is then employed by the courts to conduct an arbitrariness and capriciousness analysis. 8 U.S.C. § 1189(a)(3)(A) (2012).

26. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5808 (Jan. 31, 2014) (to be codified at 17 C.F.R. pt. 75). The Volcker Rule regulation is, obviously, a convenience sample, and chosen not necessarily to make generalizable claims but rather to illustrate a process that I will show later in this Part and is typical for most large rules.

Rule implementing regulation's preamble ran, in its final form, for nearly 900 pages containing a mind-numbing 298,728 words.[27] This abomination was produced without even a cursory nod to the APA's concision requirement.[28] And it is not alone.[29] Turn to any "significant" rule, as that term is understood by the government,[30] and one will almost always be confronted with a wall of teeny, tiny text that nowhere ever states, in a concise and general fashion, the basis and purpose of the finalized rule.

Some of the consequences of these prolix preambles have already attracted notice and, indeed, comment.[31] First, commentators have argued that preamble length requirements imposed by the courts contribute to the

---

27. *Id.* The word count is derived from the use of Microsoft Word 2016's Word Count feature on a document containing the text of the preamble. Pages were determined by reviewing a readable version of the rule produced by the law firm Davis Polk & Wardwell LLP. *Volcker Rule Preamble,* DAVIS POLK (Jan. 31, 2014) https://www.davispolk.com/files/Federal_Register_Final_Volcker_Rule_with_TOC_Jan._31_2014.pdf. The preamble was squeezed into 244 pages of the *Federal Register*, which keeps text to eight points in three columns. Although this page number is less dramatic, text of this size cannot be read, at least by this author, without oft-misplaced reading glasses. This is not a trivial problem. *See* Lincoln Caplan, *The Junior Justice*, AM. PROSPECT (May 4, 2015), http://prospect.org/article/junior-justice (noting that at least one Supreme Court Justice perennially forgets their reading glasses). So much for preambles "facilitating judicial review." *Cf.* Denis G. Pelli & Katharine A. Tillman, *The Uncrowded Window of Object Recognition*, 11 NATURE NEUROSCIENCE 1129 (2008) (discussing text readability, setting out a number of standards, all of which the printed *Federal Register* fails).

28. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. at 5808.

29. The longest statement ever published in the *Federal Register* was the notice of the U.S. Government's settlement with Microsoft over antitrust violations. United States v. Microsoft Corporation; Public Comments; Notice, 67 Fed. Reg. 23,653–30,305 (May 3, 2002). Published under a different law, the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) (2012) (which, to be fair to the bureaucracy, contains no mention of concision or brevity), this statement went for more than 10,000 pages of manuscript, compressed into 6653 pages of the *Federal Register*. Jim Hemphill, *Federal Register Facts*, FED. REG. (July 15, 2010), https://www.federalregister.gov/uploads/2011/01/fr_facts.pdf. It is unclear whether anyone has read it all the way through. *Cf.* H.P. LOVECRAFT, *History of the Necronomicon*, *in* COLLECTED FICTION 672–73 (2014) (postulating the existence of certain texts which, if read, drive their readers utterly mad).

30. Often, though not invariably, in terms of the impact that rule will have on the economy. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993) (setting out definition of "significant regulatory action" as a rule with an annual effect on the economy of $100 million, among other things).

31. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1347–48 (2010).

"ossification" of the rulemaking process, thereby delaying regulations that might be conducive to public health and safety.[32] The ossification thesis is well-ventilated[33] and controversial,[34] but it seems intuitively right to suppose, as does Wendy Wagner of the University of Texas, that agencies would make rules faster if they did not have to respond to commentators with a preamble of tremendous length.[35]

Second, Wagner and others have drawn attention to a phenomenon they describe as "information capture," a means by which well-resourced interests in civil society with superior access to information are able to "drown out" other interests in the rulemaking process,[36] undermining what we might call "regulatory pluralism," where multiple interests compete on equal or at least equitable footing to influence regulation.[37] Diminishing regulatory pluralism both diminishes agency accountability to civil society stakeholders[38] and

---

32. *See infra* Part II.A.

33. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 8–9 (1991).

34. *Compare* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1417 (2012) (ossification thesis is overstated), *with* Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493, 1495, 1497, 1499 (2012) (arguing that the ossification thesis is not overstated).

35. Wagner, *supra* note 31, at 1348–51.

36. *Id.* at 1386; *see also* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 194 (1994) (observing that the vast majority of rulemakings are dominated by industry groups); David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 623 (2012) (documenting industry domination of commenting processes—in many cases as much as 90% of the comments received come from industry).

37. Wagner, *supra* note 31, at 1374–78; *see also* Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683 (1974) ("Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy."). The pluralist conception of democracy is not new. *See* ROBERT DAHL, DEMOCRACY AND ITS CRITICS 225–32 (1989) (discussing polyarchy, which places a strong emphasis on pluralism, as a kind of achievable democracy).

38. Accountability is a contested concept, *see generally* Colin Scott, *Accountability in the Regulatory State*, 27 J.L. & SOC. 38, 40–48 (2000) (discussing competing formulations), but the sense used by these authors "decreased accountability" usually means that the agency is forced to justify themselves to fewer actors (or actors representing fewer discrete interests) than might be thought normatively desirable—with the premise that justification to a larger and more diverse group of outside actors would either advance a truth-seeking function or otherwise generate a more efficient or desirable outcome.

weakens the impact of the rule.[39] The consequences of this kind of information capture have been well-ventilated in other fields[40] and have already attracted the attention of public choice theorists.[41]

What has been neglected in past commentaries, however, is the impact prolix preambles have on the *public at large*, separate and apart from the impact that excessive information *from* the public has on the regulatory agency or on civil society organizations.[42] By forcing preambles into a model that requires them to be so lengthy as to be unreadable by almost anyone, the courts have in effect diminished the public's real, day-to-day, oversight of the administrative state. Civil society workarounds (for example, having organizations do the reading and communicating this reading in simplified terms to interested members of the public) do little to close the gap between agency activity and the public gaze, and may undermine the essential candor needed for the public to see and understand an agency's action on the public's own terms (and not those of the interpreting organization).

Access to candid, unfiltered information—facts—is almost universally understood to be an important precondition for liberal democracy, at least as liberal democracy is conventionally defined.[43] The genius of the concise gen-

---

39. *See, e.g.*, Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 131 (2011) (empirically documenting the impact of information capture on the EPA).

40. *See, e.g.*, Caroline Bradley, *Transparency Is the New Opacity: Constructing Financial Regulation After the Crisis*, 1 AM. U. BUS. L. REV. 7, 27 (2011–2012) (excessive information on firms released in accordance with mandatory disclosure laws have served to confuse, not inform, investors); Karen Bradshaw Schulz, *Information Flooding*, 48 IND. L. REV. 755, 800 (2015) (examining phenomenon in the consumer context); *Yes Minister: Big Brother* (BBC television broadcast Mar. 17, 1980) (civil servants deliberately seek to swamp ministers with paperwork, generating the "desired state of creative inertia").

41. *See, e.g.*, Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 39–40 (1998).

42. Although improving public participation in the commenting process by improving comprehensibility of notices of proposed rulemaking is the focus of an intriguing new study on "visual rulemaking." *See* Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183, 1248–58 (2016). This study and others continue to neglect the APA as a ready-made legislative framework for public accountability for finalized rules, hitherto buried by the courts.

43. *See, e.g.*, U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772–73 (1989) (endorsing the view, expressed elsewhere, that "a democracy cannot function unless the people are permitted to know what their government is up to"); Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 (Austl.) (holding, in the context of the Australian Constitution, that freedom of political communication was a necessary implication of a scheme of representative government); DAHL, *supra* note 37, at 111–12

eral statement requirement is its promise to at least partially satisfy the information requirements of a liberal democracy: it requires that an agency provide (1) a statement that is *candid* (because otherwise it is not a statement "of the rule's basis and purpose"); (2) a statement that is concise and general, in other words *accessible*, to the public at large; and (3) a statement that can be *evaluated* on these criteria by an independent judiciary through the APA's judicial review procedures. The preamble, understood in these terms, ceases to be a force of rulemaking ossification and instead becomes a tool for the introduction of judicially-scrutinized, publicly-digestible facts into the marketplace of ideas. This is the public good we have lost in the haste of courts and agencies to use the preamble to judicially review the rigor of agency decisionmaking.

With this background sketched, here is how I intend to proceed:

Part I considers the historical development of the preamble and the judicial doctrines surrounding the preamble. After some initial discussion on the history of the APA, I briefly survey the ways in which the courts read into the preamble requirement rules that incentivized preambles that were anything but concise and general.

I turn in Part II to the consequences of this choice. In Part II.A, I review the conventional attacks on the prolix preamble: that they decrease pluralistic accountability and are one of the causes of ossified agency rulemaking. These critiques have force but, as I argue in Part II.B, they are incomplete. Whatever their merits from the view of the agency, conventional critiques ignore the role of the people at large to both observe and act on the basis of governmental action—in other words, popular accountability. I argue that Congress most likely intended—and textually the word "concise" allows—for preambles to be mechanisms of public and not judicial accountability. I conclude Part II by examining the potential for what I will call "popular preambles" to facilitate truthful discourse on government activity in public debate, with a particular emphasis on the role of the judiciary and the possibility that accessible (and truthful) preambles might be able to compete even with claims by political actors that otherwise truthful sources are "fake news."

In Part III, I discuss what a popular preamble would look like and explain how these can be squared with other administrative law doctrines—in particular the doctrine barring post-hoc justification of agency action. Assuming that we wish to retain the "hard look" doctrine (and thus require extensive explanations from agencies for the rules they make),[44] I argue that reforms

(discussing the essential criterion of "enlightened understanding" in a democracy, which in turn rests on the free availability of information about the decisions proposed to be made).

44. To be clear, I make no claims in this Article about whether judicial or other review of agency regulations writ large should be tightened or loosened, or whether the administrative

hitherto proposed, which by and large aim to enhance concision as a consideration in preamble-writing, are doomed to failure.

Instead, I will argue that we should decouple review of the substance of an agency's decisionmaking from preambles altogether. There is no good reason to shoehorn a statement intended for the public into what amounts to a specialized court filing, and many good reasons to think that disentangling preambles and substantive review of finalized rules would better serve the U.S. Supreme Court's goals for the judicial review of administrative action.[45] If the courts were to read "concise general statement" as a claim about preamble *audience*, the jurisprudence of preambles would be free to begin again, this time with the public at large firmly in view. Thus the "concise general statement" would represent a new criterion against which rulemakings would have to be assessed, with hard look review subsisting on other statements in the rulemaking record. Public information was the purpose of the preamble from the beginning, and in an era in desperate need of well-supported public facts, it is a purpose to which preambles can, and should, return.

I. THE RISE AND FALL OF "CONCISE GENERAL STATEMENT" IN THE APA

A. Background: Concision in Administrative Law Before the APA

Long before the commencement of the American experiment in self-government, various authorities had laid down exhortations for concise and general statements from government officials.[46] The United States was no different. Appeals for brevity appeared in a variety of settings from the

---

state ought to be larger or smaller. I suppose I must take the minimal position, in contrast to Philip Hamburger, that administrative law is in fact lawful. *Cf.* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014). But I note that my proposals for a more candid, accessible, legislatively-mandated explanation of rules are not incompatible, at least at some level of abstraction, with Hamburger's broader desire to enhance the democratic responsiveness of the American system of government.

45. *See* SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) (holding that agency decisions must be assessed without regard to statements prepared for litigation—but that is what an agency preamble has become); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978) (deprecating judge-made additions to the APA).

46. Within the common-law tradition, the story is told of the hapless advocate who, upon writing a prolix brief, was forced to put his head through a hole in it (the written side outward) and be paraded around Westminster Hall as a warning to his peers. *See* 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 376–77 n.4 (Lea and Blanchard, 1846) (reporting 1596 case of *Mylward v. Weldon*).

Founding forward,[47] though none made it into the Constitution.[48] For example, the Interstate Commerce Act of 1887,[49] the statute widely regarded as kicking off the modern administrative state,[50] mandated that railways produce schedules of their fares "plainly printed in large type, of at least the size of ordinary pica" that "plainly state" the prices the carrier charges.[51]

Nonetheless, demands that *government agencies* be concise when communicating to the public were essentially non-existent prior to the APA's enactment in 1946.[52] The principal statutes of the pre-New Deal administrative state usually omitted any brevity injunctions targeted at the government, referring to concision only elliptically.[53] As a typical example, the (federal) Bureau of Corporations, established in 1903, was obliged by its founding statute

---

47. *See, e.g.*, Letter from Thomas Jefferson to Mr. David Harding, President of the Jefferson Debating Society of Hingham (April 20, 1824), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 346, 347 (H. A. Washington ed., 1854) ("Amplification is the vice of modern oratory. It is an insult to an assembly of reasonable men . . . . Speeches measured by the hour, die with the hour.").

48. *But see generally* Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601 (2006) (arguing that parts of the Constitution might be read as incorporating an "undue process" norm that would include something akin to a concision concept). I note in passing that one or two clauses might also be relevant to effective public communication—such as the Opinion Clause, which gives the President the power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments." U.S. CONST. art. II § 2 cl. 1; *see* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 670–72 (1996) (reading the phrase *in writing* to mean that the Framers intended for a form of public transparency and limitation of ex parte contacts between officers and the President). No commentator I could find, however, had much to say about the Opinion Clause and *concision*, per se.

49. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887).

50. *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1365 (2010); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 439 (2d ed. 1985) ("In hindsight, the development of administrative law seems mostly a contribution of the 20th century. . . . The creation of the Interstate Commerce Commission, in 1887, has been taken to be a kind of genesis.").

51. § 66 Pub. L. No. 49-41, § 6, 24 Stat. 379, 380–82.

52. It is important to distinguish information the government can *require someone send to it*, which is ostensibly limited by a variety of laws, *see, e.g.*, Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521 (2012), and information the government *transmits* to the public. To be sure, a request for information in is at the same time the transmission of information out; in this sense, at least one part of government communications is being somewhat contained. *But see* Adam M. Samaha, *Death and Paperwork Reduction*, 65 DUKE L.J. 279 (2015) (suggesting that "somewhat" may be putting it too strongly).

53. For a general discussion of administrative history before the Administrative Procedure Act, see Mashaw, *supra* note 50, at 1458–70.

to "gather, compile, publish, and supply *useful* information concerning corporations doing business within the limits of the United States."[54] While the word "useful" might be read to require some selectivity in the information the Bureau released, there is no suggestion that the Bureau was the target of even an attempted suit for providing *useless* information.

The major statutes passed immediately before and during the New Deal were likewise bereft of agency-targeted brevity injunctions. Indeed, the reverse was often true—the Federal Reserve Board was instructed to provide "full information" on its activities to the public,[55] while the Federal Register Act was (perhaps understandably) far more concerned with comprehensiveness than with concision, or for that matter with comprehensibility.[56] Indeed, very shortly after the publication of the first editions of the *Federal Register*, the editors of the Harvard Law Review complained that "elaborate orders of the Securities Exchange Commission [(SEC)] relevant to particular cases have been printed in full, although it would seem that the public interest in having notice of these orders would be satisfied by a summary statement."[57] As a matter of fact, the Securities and Exchange Commission Act empowered the SEC to make regulations with respect to twenty-one different categories of activities but applied no concision rules on its communications or rulemakings;[58] the National Recovery Act, the cornerstone of the First New Deal, was also silent on matters of brevity.[59] So things stood until the APA.

B. The APA: The Concision Revolution, Judicially Deferred

The APA marked a significant break in this historical practice, requiring that preambles to regulations include a "*concise general statement* of [a rule's] basis and purpose."[60]

---

54. Act of Feb. 14, 1903, ch. 552, § 6, 32 Stat. 825 (emphasis added).

55. Act of Dec. 13, 1913, ch. 6, § 11(b), 38 Stat. 251.

56. *See generally* Federal Register Act, Pub. L. No. 74-220, 49 Stat. 500 (1935) (codified as amended at 44 U.S.C. §§ 1501–1511; H.R. REP. NO. 74-280, at 1–3 (1935) (committee report on the Federal Register Act, discussing the large number of executive orders and the requirement that they be comprehensively compiled and restated in what would become the *Federal Register*).

57. *Legislation*, 49 HARV. L. REV. 1209, 1210 (1936). To put it mildly, this complaint was not acted upon.

58. Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. § 78a (2012)).

59. Pub. L. No. 73-67, 48 Stat. 195 (1933) (formerly codified at 15 U.S.C. § 703–710), *invalidated by* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

60. Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237, 243 (1946) (codified at 5 U.S.C. § 553 (2012)) (emphasis added).

The words "concise general statement," are not, however, defined in the APA. (Neither, for that matter, is the word "preamble.") Almost immediately after the APA was approved, the courts assumed and retain a leading role in interpretation of the APA.[61] In this role, reviewing courts quickly established a mode of practice that would render the word "concise" in the APA almost entirely nugatory. To wit: no court has ever invalidated a rule whose preamble is prolix or otherwise not "concise [and] general." But rules *have* been invalidated by the courts—many times—for preambles that are deemed insufficiently complete under a doctrine I shall here call "Show Your Working."[62] It is no surprise that this one-way ratchet where long preambles are approved and short ones (possibly) condemned has led, inexorably, to a world dominated by the prolix preamble.

This is not to say that the Show Your Working doctrine is totally unmoored from the phrase "concise general statement of . . . basis and purpose." The doctrine simply calls for courts to focus their attention on whether the preamble is a statement of *the entire* "basis and purpose" of the rule, rather than being a "concise general" but perhaps incomplete statement.[63] Courts have held that an agency has failed to show its working, as it were, when it identifies some significant concern a commentator raised during the notice-and-comment period that went unaddressed in the preamble.[64] It is on the basis of this failure to satisfactorily address some important element of the rule that a preamble is held inadequate by a court.[65]

---

61. This is, it should be noted, in some contrast to the approach of courts to agencies' powers under their authorizing statutes. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984); *see also* Peter Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1030 (showing a 40% decline in remands for *ultra vires* rules in the wake of *Chevron*).

62. Courts have also thrown out rules that, according to their preambles, relied on studies that were not disclosed in advance when notice of the rule was first given. *See, e.g.*, Chamber of Commerce v. SEC, 443 F.3d 890, 901, 906 (D.C. Cir. 2006) (rejecting an SEC rule because of a reliance on publicly available studies which were not flagged in advance to potential commentators). Remand under these circumstances usually requires re-opening comments on the rule with notice of the facts or studies the court felt were insufficiently ventilated and then finalizing the rule again. KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 235–37 (2008). We might conceive of this doctrine as requiring a certain kind of candor, albeit at the notice of proposed rulemaking stage rather than the final rule stage (the only stage requiring the "concise general statement" of 5 U.S.C. § 553(c)).

63. *See, e.g.*, Encino Motorcars, L.L.C. v. Navarro, 136 S. Ct. 2117, 2125–27 (2016) (collecting cases that discuss requirements for explanations regarding agencies' changing positions).

64. *See infra* Part I.B.2.

65. *Id.*

To see the doctrine in action, consider the case often cited as representative of the Show Your Working doctrine: *United States v. Nova Scotia Food Products Corp.*,[66] also known as the "Smoked Whitefish" case. The case concerned the enforcement of an FDA regulation requiring that smoked whitefish be cooked to a particularly high temperature to ward against the risk of botulism.[67] Smoked whitefish producers protested: the temperature required was so high that selling smoked whitefish would become commercially infeasible; in any case, there were no recorded instances—ever—of anyone contracting botulism from *smoked* whitefish cooked at any temperature.[68]

The Second Circuit sided with the producers, primarily because their commercial feasibility argument—that the FDA was banning smoked whitefish without any supportable public health rationale—had not been fully addressed by the agency. The court explained:

> It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered. The agencies certainly have a good deal of discretion in expressing the basis of a rule, but the agencies do not have quite the prerogative of obscurantism reserved to legislatures.[69]

The Second Circuit then went on to quote from an opinion of the D.C. Circuit in which a relatively terse preamble had been approved:

> [We] caution against an overly literal reading of the statutory terms "concise" and "general." These adjectives must be *accommodated to the realities of judicial scrutiny*, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking. We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement of . . . basis and purpose" mandated by Section 4 [of the APA] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.[70]

The D.C. Circuit's phrasing was artful. Notice that it is "these adjectives" that must be "accommodated to the realities of judicial scrutiny" rather than the realities of judicial scrutiny accommodating themselves to the text of the law.[71] Likewise, claiming that the APA intended for judicial review to be "meaningful" begs the question: as I shall discuss in Part III, it is perfectly

---

66. 568 F.2d 240, 242 (2d Cir. 1977).

67. *Id.* at 244–45.

68. *Id.* at 245.

69. *Id.* at 252.

70. Auto Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (emphasis added).

71. *Id.*

possible to insist that agencies show their working while not burdening the preamble with fulfilling this requirement.

Nonetheless, the Second Circuit held, the preamble accompanying the whitefish temperature rule rendered the rule invalid because the preamble was not, in its shortened form, "an adequate safeguard against arbitrary decisionmaking."[72] Thus the FDA's rather silly agency action was remanded not because it was irrational *per se* but (at least as the Second Circuit told the story) because the preamble accompanying it did not sufficiently justify, in the name of public health, the condemnation to penury of the nation's smoked whitefish producers. The important point to draw from the Smoked Whitefish case is the role in which it casts the preamble: not necessarily conveying a "concise general statement" to the general public but rather providing justifications for the agency's particular decisionmaking processes so as to accommodate judicial scrutiny.

Although some commentators have criticized the Show Your Working doctrine as being precisely the kind of judicial procedural innovation condemned in the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,[73] the doctrine remains alive and well.[74] Indeed, shortly after *Vermont Yankee* was handed down, the D.C. Circuit decided *Weyerhaeuser Co. v. Costle*,[75] which after reviewing a joint appendix of some 2,000 pages, determined that the preamble[76] issued by the EPA was *too* concise, since it failed to mention a set of calculations the agency had already mentioned elsewhere[77] but were absent from the preamble itself.[78] The D.C. Circuit's doubling-down on lengthy preambles was underscored by its decision in *Independent U.S. Tanker Owners Commission v. Dole*, [79] where it rejected

---

72. *Nova Scotia Food Products Corp.*, 568 F.2d at 253. Note, however, that the court never addressed why the *preamble* must be used to "safeguard against arbitrary agency decision-making." *Id.*

73. 435 U.S. 519 (1978); *see, e.g.*, Richard J. Pierce, Jr., *Waiting for* Vermont Yankee *III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 917 (2007).

74. *See, e.g.*, Chamber of Commerce v. SEC, 443 F.3d 890, 901–06 (D.C. Cir. 2006); Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1132–33 (D.C. Cir. 1995); Am. Radio Relay League v. FCC, 524 F.3d 227, 240 (D.C. Cir. 2008).

75. 590 F.2d 1011 (D.C. Cir. 1978).

76. Pulp, Paper, and Paperboard Point Source Category, 42 Fed. Reg. 1398, 1398–99 (Jan. 6, 1977) While being pretty much incomprehensible this preamble is indeed pithy at a slender ~1,467 words. *Id.*

77. Weyerhaeuser, 590 F.2d at 1030 (explaining that the preamble "deletes mention of a phantom set of not-quite-offsetting adjustments that Agency attorneys now deem crucial to the viability of the EPA's cost determination.").

78. *Id.*

79. 809 F.2d 847 (D.C. Cir. 1987).

another preamble (itself approximately 9,800 words)[80] on the grounds that it did not include a sufficient discussion of regulatory alternatives—even though those alternatives *were* discussed and rejected in the lengthy rulemaking record.[81]

These cases are representative of the view, now almost universally held among the U.S. Courts of Appeals, that preambles exist to serve the needs of judicial review in general and the requirement of reasoned explanation for agency action in particular.[82] Indeed, the D.C. Circuit has gone further and held that a lengthy, responsive preamble is needed to vindicate public *comment*.[83] (Public understanding *after* the rule is finalized does not, oddly enough, receive much discussion in this opinion.) The combined effect of these judicial contentions is to read the words "concise" and "general" out of the APA.[84] As the cases above illustrate, something had to go if an agency was to cram into a preamble all the materials the courts demand be so

---

80. Construction-Differential Subsidy Repayment; Total Payment Policy, 50 Fed. Reg. 19,170 (May 7, 1985) (to be codified at 46 C.F.R. pt. 276) (word count determined using Microsoft Word 2016's word count feature and the official *Federal Register* version of the preamble).

81. *Dole*, 809 F.2d at 854.

82. *See, e.g.*, Chamber of Commerce v. SEC, 443 F.3d 890, 901–06 (D.C. Cir. 2006) (stating that agencies must articulate the content and basis of proposed legislative rules with enough detail to facilitate judicial review as well as commentator engagement with the rulemaking process); Int'l Union, United Mine Workers v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005) (same); Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1132–33 (D.C. Cir. 1995) (same); *see also* St. James Hosp. v. Heckler, 760 F.2d 1460, 1470 (7th Cir. 1985) (by providing only brief responses to critiques of statistical studies, the basis and purpose statement "failed to give a reasoned response"); Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1567 (11th Cir. 1985) (same); Abington Mem'l Hosp. v. Heckler, 576 F. Supp. 1081, 1085–86 (E.D. Pa. 1983), *aff'd*, 750 F.2d 242 (3d Cir. 1984) ("It would have been a miracle of bureaucratic succinctness had the Secretary managed to reply adequately in two scant columns of Federal Register prose to the 600-plus comments that occupy five thick volumes of the administrative record. Unfortunately, no such miracle has been witnessed by this court, which instead finds the Secretary's response woefully inadequate."); Nat'l Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 701 (2d Cir. 1975) (holding that the FDA has failed to provide an adequate statement supporting a rule because it lacked a "thorough and comprehensible statement of the reasons for its decision" that establish the basis for the agency's rule); Associated Indus. of N.Y. State, Inc. v. U.S. Dep't of Labor, 487 F.2d 342 (2d Cir. 1973) (failure to fully address national consensus on lavatory installation arguing against rule).

83. *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9, 35–36 (D.C. Cir. 1977) ("Moreover, a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.").

84. *See* KOCH, *supra* note 16, at 427 ("Modern courts do not feel limited by the words 'concise' and 'general' in § 553.").

crammed. The jettisoned virtue was concision, and, more broadly, readability.

Certainly, on occasion, a reviewing court will excuse a preamble for not addressing a particular issue raised by plaintiffs—often by contrasting the concise general statement requirement of informal rulemaking to the much more exhaustive record required by the APA from "formal rulemaking."[85] In these pro-agency decisions, the statutory word "concise" is used to excuse the preamble's failure to respond to immaterial comments (with a "material" comment being one which, if accepted, would change the agency's mind).[86] Indeed, in a few cases the preamble has been allowed to be omitted altogether, when the "basis and purpose [of the rules was] considered obvious"[87] and no comments were sufficiently material to require response.[88]

Regrettably, these cases lack a discernible pattern that would help agencies reliably predict when a short preamble will suffice. The question of what comments or considerations must be responded to in the preamble is essentially ad-hoc, depending on the court's interpretation of the principal issues at stake in the rulemaking.[89] This creates a strong incentive for an agency to laboriously address every comment and every argument concerning its regulation to ward against the possibility of a remand.[90] And because "concise"

---

85. *See, e.g.*, MCI WorldCom, Inc. v. FCC, 209 F.3d 760, 766 (D.C. Cir. 2000) (approving an FCC rulemaking that did not respond to certain comments because those comments did not touch on the "essence" of the rulemaking); Cal-Almond, Inc. v. U.S. Dep't of Agric., 14 F.3d 429, 443 (9th Cir. 1993); Citizens to Save Spencer Cty. v. EPA, 600 F.2d 844, 884 (D.C. Cir. 1979); Mobil Oil Corp. v. Fed. Power Comm'n, 469 F.2d 130, 139 (D.C. Cir. 1972) (upholding the Federal Power Commission's moratorium on rates for certain kinds of natural gas service despite a lack of relevant findings of fact, noting that "an agency is not required to abide by the same stringent requirements of fact findings and supporting reasons which apply to adjudication").

86. *See, e.g.*, Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972) (declining to criticize a preamble that did not discuss several issues because the "regulation . . . contains sufficient exposition of the purpose and basis of the regulation as a whole to satisfy this legislative minimum").

87. *Cal-Almond, Inc.*, 14 F.3d at 443; *accord Citizens to Save Spencer Cty.*, 600 F.2d at 884.

88. *Cal-Almond, Inc.*, 14 F.3d at 443. I note that I could not find cases decided since *Cal-Almond* in which the total absence of a preamble or other published statement purporting to fulfill the requirements of 5 U.S.C. § 553 was excused, or for that matter even discussed. It may be the case that this particularly relaxed judicial attitude has faded into desuetude.

89. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 166 (1999) (discussing the uncertainties involved in procedural review).

90. 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 596 (5th ed. 2010) (discussing the difficulties created by "frequent judicial demand for a synoptic analysis of all decisional factors, factual controversies, policy-based objections, and suggested alternatives [that] exceeds any conceivable interpretation of congressional intent").

is, at best, a safety net for the agency rather than an enforceable requirement of preambles, there is no reason *not* to make the preamble as long as possible. The result, as Richard Pierce put it, is that "[t]he courts have replaced the statutory adjectives, 'concise' and 'general' with the judicial adjectives 'detailed' and 'encyclopedic.'"[91]

As went the courts, so went the rest of the government: despite many exhortations for plain, short, simple, concise, general, and pithy government communication in (non-binding) legislation and style guides,[92] the simple reality that lengthy preambles were, and are, far safer (in terms of risk of judicial remand) than short ones led agencies to create over-long preambles exhaustively addressing every comment.[93] After all, it takes only a little time to add more detail to a preamble, but a remanded regulation could take months to reissue if it is ever reissued at all.[94]

II. THE CONSEQUENCES OF PROLIX PREAMBLES

The prolix preamble generates three sets of burdens: on the people who write them (i.e. the agencies), the people who read them, and the people who might read them but will not because of the preambles' prolixity. However, the agencies have received the lion's share of the attention in the scholarship on lengthy preambles.[95] The richest accounts of the "reader burden" imposed by long preambles tend to focus on the various elite interests[96] that use

91. *Id.*; *accord* Wagner, *supra* note 31, at 1357.

92. *See, e.g.*, Plain Writing Act 2010, Pub. L. No. 111-274, § 3(3), 124 Stat. 2861 (2010) (defining plain language as language that is "clear, concise, [and] well-organized"); Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (calling for "plain language"); Memorandum from Cass R. Sunstein to the Heads of Executive Departments and Agencies, Final Guidance on Implementing Plain Writing Act of 2010 (Apr. 13, 2011) (on file at https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf) (discussing the benefits of clear and concise language); *Federal Plain Language Guidelines*, PLAINLANGUAGE.GOV, http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/ (last visited Jan. 26, 2018) (frequently calling for brevity in government communications throughout its 118 pages); Press Release, Chairman Arthur Levitt Issues Challenge to SEC Staff to Heighten Awareness of Need for Plain English (July 16, 1997) (on file at http://sec.gov/news/press/pressarchive/1997/97-59.txt). *See generally* Rachel Stabler, *"What We've Got Here Is Failure to Communicate": The Plain Writing Act of 2010*, 40 J. LEGIS. 280 (2013).

93. Wagner, *supra* note 31, at 1359.

94. *Id.*

95. *See infra* text accompanying notes 97–111.

96. I am using the term "elite," at least for present purposes, to describe those persons who have the resources to engage in a sustained way with the federal policymaking process and actually do so engage. The paradigm of an elite in this sense would be, say, a paid staffer

the rulemaking process as a means of influencing—and at the extremes perhaps capturing—agency decisionmaking (often claiming that some elites are getting too much or too little power as compared to other elites as a result of this doctrine). The member of the general public as a *reader* of a preamble has been considered, as far as I can tell, not at all.

In this Part, after a review of this existing literature on the burdens of prolix preambles, I proceed to point out the gaps in that account: in particular, the role of the public at large, whose engagement was envisaged in the original design of the APA. Two burdens on the public seem to me to be especially problematic today: first, a prolix preamble diminishes the capacity of popular power to hold the administrative state to account; second, a prolix preamble deprives the public of not just information, but *unusually trustworthy* information, useful for public deliberation.

A. The Existing Account: Pluralist Problems with Prolix Preambles

The most prominent critiques of lengthy preambles have been agency-centric. Thomas McGarity's classic article on ossification, for example, explains that agencies "take much longer to write the lengthy preambles" required by the doctrine and the rulemaking process thereby is impeded, delaying beneficial regulation.[97] Richard Pierce agrees that judicially lengthened preambles contributed to a slowing down of agency action.[98] Indeed, the prolix preamble (and the Show Your Working doctrine that contributes to it) invariably finds itself in the rogues gallery assembled by believers in the ossification thesis.[99]

---

for the U.S. Chamber of Commerce (who, while not perhaps being terribly wealthy, nonetheless enjoys access and influence over the federal government exponentially greater than that of the average voter).

97. McGarity, *supra* note 33, at 1387–88; *accord* Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 301–02 ("[A]n agency realistically must conclude that making an important policy decision through the rulemaking process will require it to commit a significant proportion of its scarce resources to that process for as much as a decade.").

98. Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 40 ADMIN. L. REV. 59, 65 (1995).

99. *See, e.g.*, STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE—TOWARD EFFECTIVE RISK REGULATION 48 (1993); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 272–73 (1987); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEXAS L. REV. 525, 533–36 (1997). I make no claim as to the veracity of the ossification thesis; my point is simply that it is agency-centric and exceedingly well-ventilated (on all sides). *Compare* Yackee & Yackee, *supra* note 34, at 1417 (ossification thesis is overstated), *with* Pierce, *supra* note 34 (it is not).

A related agency-centric critique of prolix preambles, explored by Wendy Wagner in a recent article,[100] is "information capture," where an agency is manipulated by being "flooded" with information from well-resourced outside parties.[101] Because there are no "filters" on information *coming in* to the agency, the best-resourced groups can fill the administrative record with comments pointing only in the groups' preferred direction.[102] What I have described as the Show Your Working doctrine forces agencies to engage with these comments, and in so doing warps an agency's understanding of the problems to be addressed to reflect the priorities selected by the well-resourced group.[103]

For Wagner, the principal problem with prolix preambles is the process by which they are created.[104] That process, in her view, undermines the *pluralist* legitimacy of the administrative process,[105] because it leads to fewer parties—reflective of different opinions and identities in the body politic—participating in its creation.[106] Diminishing the variety of interest-group participation, the argument runs, has two consequences: shaping regulation

100. Wagner, *supra* note 31.

101. *Id.* at 1325.

102. *Id.*

103. *Id.*; *cf.* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 114 (2003) (discussing the basis of the APA and its faith that commentators would provide significant useful information to agencies).

104. Wagner also discusses the related issue of legal complexity—information flooding leads to an increase in complexity that could, by a process of emergence, eventually become impossible for humans to comprehend. Wagner, *supra* note 31, at 1403. Wagner does not reckon, however, with the forces of Weberian rationalization that seem likely to intervene before this reaches a breaking point. *See generally* Stephen Kalberg, *Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History*, 85 AM. J. SOC. 1145 (1980) (discussing the processes of rationalization first articulated by Weber). The far more pressing and important point in Wagner's analysis seems to me to be the pluralist point developed below.

105. Wagner, *supra* note 31, at 1403.

106. *See, e.g.*, DEP'T OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 103 (Jan. 22, 1941) (stressing pluralist engagement by interest groups as essential to legitimacy in administrative procedures); STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 294 (2008) (providing an optimistic view: "If one group supplies an agency with incomplete or biased information, another group with adverse interests will have opportunities to challenge or rebut it."); David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1477–91 (2013) (reviewing existing democratic theory as applied to the administrative process); Rubin, *supra* note 103, at 101 (arguing that the APA itself is a "one-trick pony" that relies on engagement of civil society for all oversight and control).

to favor certain interests over others[107] (as compared, one presumes, to an idealized process in which all affected parties could participate on an even playing-field) and hurting the legitimacy of the administrative state at least outside of elite circles.[108]

Pluralist concerns likewise animate Lars Noah's proposal for preambles to serve as the "legislative history" of a given rule when such history is important to the judicial interpretation of the rule's meaning.[109] Noah persuasively argues that any possible employment of preambles for this purpose is impeded, if not altogether frustrated, by preambles' prolixity.[110] But underlying Noah's preambles-as-legislative-history is a vision of the administrative process that, like Wagner's, is limited to agencies, courts, and the (usually) vanishingly small number of elite interlocutors engaging in the commentating process: in other words, pluralism all the way down.[111]

The pluralist model of democracy is an old warhorse of the democratic theory literature at this point.[112] However, even defenders of pluralism have come to admit that as a theory of "democracy well understood," pluralism is

---

107. *See, e.g.*, Wagner, *supra* note 31, at 1337.

108. *Id.* at 1399–1402.

109. Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255 (2000); *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 690 (1996) (arguing, like Noah, that agencies' efforts to tune preambles so as to ward off judicial invalidation of the underlying rule "may well distract agencies from using the statement of basis and purpose as a device for coherent explanation of regulatory meaning").

110. Noah, *supra* note 109, at 310–11.

111. Noah's view that courts should hold agencies to the content of their preambles rests on the unstated assumption that someone (commentators on the proposed rule, most likely) will read and rely on those preambles, such that when a preamble "included reassurances in response to comments that expressed concerns about particular applications of a proposed rule . . . the agency should not subsequently interpret the rule otherwise." *Id.* at 311. Fair enough. But what Noah describes here is estoppel, and the basic principles of estoppel require, among other things, that the counterparty *relies* on the representation. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1980); RESTATEMENT (SECOND) OF AGENCY § 8B (AM. LAW INST. 1958); RESTATEMENT (SECOND) OF TORTS §§ 872, 894 (AM. LAW INST. 1979). What of a population who do not read the agency's reassurance at all; indeed, probably does not know the agency exists? What entitlement ought they get from this agency representation, made without their knowledge?

112. Most notably because it fails to account for structural inequalities that will forever prevent certain groups from fully taking part in the contest for power and influence. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 49–50 (1985) (reviewing pluralist critiques); *cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (discussing the need for judicial protection of "discrete and insular minorities" who will be structurally excluded from the political process).

decidedly incomplete, if only because the layer of mediating representation at its core creates a variety of principal-agent problems.[113] These problems are only enhanced in the rulemaking context, since most organizations engaging with the rulemaking processes are not controlled by their members but by donors and officers drawn in large part, at least for those non-profits actively participating in the administrative rulemaking process, from a particular elite class referred to as "lawyers."[114]

The elitist problem with pluralism—its inability to account for the participation and control of public at large—is common to most other theories attempting to lend democratic legitimacy to the administrative state. For example, those who see the democratically elected President as redressing the lack of popular participation in administrative law[115] have no good answer to the criticisms about the nature of the position itself. The occasional interventions of a single individual living in a palace elected by a minority of the population[116] seems a poor substitute for the kind of direct popular participation that would signify "people's rule" in a strong sense (at least without principal-agent problems similar to those arising under the pluralist account).

The public is similarly excluded from accounts that rely on Congress to supply the democratic deficit, such as those articulated in defenses of the non-

---

113. *See* DAHL, *supra* note 37, at 280–98 (1989) (a seminal account of pluralist politics, recognizing that pluralism cannot and does not achieve various important democratic desiderata); Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, *in* DEMOCRACY'S VALUES (Ian Shapiro et al. eds., 1999) (discussing an important underpinning of pluralist theory: that the players expect repeat play).

114. For a general review of these problems see Stijn van Puyvelde et al., *The Governance of Nonprofit Organizations: Integrating Agency Theory with Stakeholder and Stewardship Theories*, 41 NONPROFIT & VOLUNTARY SECTOR Q. 431 (2012); *see also* Wagner, *supra* note 31, at 1384 (discussing the impact of dependence on the donor class for the administrative process).

115. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 728–29 (1988) (Scalia, J., dissenting) (discussing prosecutorial decisionmaking); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party. . . . A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001) (discussing democratic accountability as a feature of greater centralization of administration in the President).

116. *See* Nora Kelly, *Hillary Clinton's Lead is Greater Than Multiple Former Presidents'*, ATLANTIC (Nov. 24, 2016), https://www.theatlantic.com/politics/archive/2016/11/clinton-vote-lead/508667/ (highlighting that the loser of the 2016 U.S. Presidential election won more than 2 million more votes than winner of election).

delegation doctrine.[117] Even deliberative democracy requires a degree of elitism in any practical implementation, since the participants in deliberation must have the leisure and capacity to understand the issues at stake and engage in the time-consuming process of discussion amongst themselves to come to a consensus about them.[118]

I do not mean to deny the force of many of these theories of administrative accountability on their own terms; my point is simply that they are incomplete. On these accounts, the public on whose behalf regulations are ostensibly made are more or less absent—able to reach the administrative process, if at all, through various intermediaries. As I will discuss in the next section, the APA foresaw a much more direct, and dynamic, kind of popular accountability for agencies that rested in part on the accessibility and comprehensibility of the preambles published with final rules. If we understand how the prolix preamble wounds the APA's vision of popular accountability, we can have a better idea of its true costs. We may also find a new and unexpected tool to help engage and educate the public on agency actions in this brave new world of alternative facts and fake news.

B. Prolix Preambles' Populist Promise: A Different Kind of Accountability and Administrative Legitimacy

1. The APA's Vision of Democratic Accountability

On its surface, the federal administrative process is remarkably open to forms of *direct* popular participation in federal government decisionmaking. Although the public lacks plebiscitary powers over the administrative process, the APA nonetheless grants any person a right to receive, via the *Federal Register*, notice of essentially all rulemakings[119] and the right to comment on

117. *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (arguing for a revival of the "non-delegation" nondoctrine to "ensure[] . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will").

118. *See, e.g.*, David Fontana, Essay, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 97 (2005) (proposing that judicial review be less stringent when the rulemaking process achieves certain deliberative democratic desiderata); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation in Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 211 (1997) (arguing that paradoxically mass participation detracts from achieving true deliberation).

119. 44 U.S.C. §§ 1504–1505 (2012) (requiring broad publication of government actions in the *Federal Register* and public delivery of the *Register*).

the vast bulk of them.[120] The APA obliges agencies to give "consideration" of the "relevant matter" in the comments,[121] and are often called on by the courts to do so on behalf of "the public," rather than the particular interest of the party suing the agency.[122]

What is especially remarkable about the APA's public participation rights is that they were not, at the time the APA was adopted, accompanied by expanded rights for particular elites. To be sure, financial and political elites have retained superior access to the administrative process since the founding of the Republic,[123] but as a *legal* matter the APA conceptualizes these elites as being in the same line as destitute veterans on their way home from the front. This contrasts tellingly with other countries' comparable administrative accountability regimes,[124] as well as with the 1990s-era fad for "negotiated rulemaking," a distinctly elitist procedure designed to square powerful interests with a given regulatory proposal.[125]

Even judicial review in the APA envisaged a form of accountability more populist than elitist. Initial proposals for administrative law reform in the lead-up to the APA envisaged "administrative courts" and internal reviews which would have a considerable degree of centralization, serving as a kind of deregulatory engine within the administrative state.[126] What the APA created, however, was a decentralized scheme of judicial review, where any person affected by a regulation could sue in any United States court in the country to block the regulation.[127] Its romantic vision seems to have been that

120. *See* 5 U.S.C. § 553(c) (2012) (granting the right to comment on all informal rulemaking proposals).

121. *Id.*

122. *See, e.g.*, Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin., 956 F.2d 321, 327 (D.C. Cir. 1992) ("When the government regulates in a way that prices many of its citizens out of access to large-car safety, it owes them reasonable candor.").

123. *See* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 11–23 (2014) (discussing various influencers in the early days of the American Republic).

124. *See generally* Anthony Ogus, *Comparing Regulatory Systems: Institutions, Processes and Legal Forms in Industrialised Countries* (Ctr. on Regulation & Competition, Working Paper No. 35, 2002) (arguing that the United States' APA goes furthest, when compared to other industrialized countries, in providing for public participatory rights).

125. *See generally* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256–70 (1997).

126. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1569–78 (1996) (discussing in detail approximately two decades of political wrangling preceding the enactment of the APA).

127. 5 U.S.C. § 703 (2012) (barring specific provision in a statute, challenges under the APA can be brought in any court of "competent jurisdiction"); *see also* Eric M. Fraser et al.,

any citizen would be able to have her day in court against even the mightiest of federal government departments.

This kind of individualist, populist thinking was at play in the APA's drafting process.[128] A bevy of discontented law professors and commercial lawyers had been on the warpath against the administrative state since Franklin Delano Roosevelt was elected,[129] but it was only after a truly *populist* case against the administrative state could be made, focusing on popular dissatisfaction with decisions being made by particular agencies, especially public-facing agencies, that these criticisms gained political traction.[130] By Roosevelt's second term, agencies had begun to appear socialistic and high-handed to many of the populations they ostensibly served.[131] It was the *popular* anger at agencies that led to the APA; had this anger not existed, efforts at administrative reform would almost certainly have been killed wholesale by President Roosevelt's veto pen.[132]

The APA's populist policy choices are of a piece with the romantic notion that direct popular accountability (especially, but not exclusively, via elections) will deliver better (in the sense of more efficient or more just) outcomes than a more pluralist or elitist kind of accountability.[133] As Rick Pildes puts it, the American vision of democracy is a distinctly *individualist* one, based on a kind of egalitarianism that stresses a formally equal role for each member of the polity.[134]

Popular accountability of this sort presents a quite different approach to the administrative process than the pluralist or elitist accounts reviewed in Part II.A, above. Instead, popular accountability looks to two separate sets of forces to restrain government action, which we might call "vision" and

---

The Jurisdiction of the D.C. Circuit, 23 CORNELL J.L. & PUB. POL'Y 130, 148–52 (2013) (discussing those cases where jurisdiction is vested specifically in the D.C. Circuit—a set that is far from complete).

128. Shepherd, *supra* note 126, at 1560.

129. *See* Walter Gelhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 221 (1986) (discussing strident opposition to the administrative state from the bench and bar).

130. Shepherd, *supra* note 126, at 1591–93.

131. *Id.* at 1641–43 (discussing the impact of agency incompetence on public opinion during the war).

132. And indeed, the progenitor bill to the APA was vetoed. *Id.* at 1625–32 (discussing the veto and the very narrow failure of the House of Representatives to override it); *see also* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 448 (1986) (concurring that the politics of the New Deal served as a principal driver in the adoption of the APA).

133. Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 810–18 (2014).

134. *Id.*

"voice," that it vests with individual members of the public.[135]

By "voice," I mean those activities that allow individual members of the public (sometimes referred to in political theory as "the people") to communicate with government officials. The First Amendment, for example, provides protection literally for "speech," but also for dissemination of speech (the press) and speech directed at the government itself (petition).[136] The vote, which expresses preferences for those who will rule and the policies by which they rule, is conventionally viewed as a kind of speech,[137] including by certain U.S. Supreme Court Justices.[138] Most relevant for our purposes, administrative law itself could be said to conceive of public as in their vocal capacity, as commentators (and possibly litigants) participating in a kind of deliberation with agency officials, ultimately shaping the outcome of the regulatory decisionmaking process.[139]

Vision, by contrast, is at minimum an essential prerequisite to voice: the public surely must *observe* what the government is doing and *understand* it at least at some level before it can or would make use, or threaten to make use, of its vocal powers. Popular vision might also serve as a means of keeping government accountable all by itself—consider in this context Foucault's famous discussion of the disciplining "gaze" where simply observing prisoners has a powerful impact on their behavior.[140] And this view too has long-standing endorsement from at least one U.S. Supreme Court Justice.[141] It appears

---

135. The distinction between "vision" and "voice" is comprehensively discussed in JEFFREY EDWARD GREEN, THE EYES OF THE PEOPLE: DEMOCRACY IN AN AGE OF SPECTATORSHIP (2010). Green's theories have already been applied in an interesting way to the criminal jury trial. *See* Andrew E. Taslitz, *The People's Peremptory Challenge and* Batson*: Aiding the People's Voice and Vision Through the "Representative" Jury*, 97 IOWA L. REV. 1675, 1684 (2012).

136. U.S. CONST. amend. I. For a comprehensive democracy-as-voice account of the First Amendment, see BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT (2015).

137. For a discussion of the right to vote in the context of the First Amendment see, for example, ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 59–61 (1978); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 39–40 (1960).

138. Vieth v. Jubelirer, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (discussing the First Amendment implications of partisan gerrymandering in particular and voting in general).

139. It is in this capacity that commentators like Nina Mendelson see the potential for the Internet to democratize rulemaking. *See* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011).

140. MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 195–228 (1977).

141. Louis Brandeis School of Law Library, *What Publicity Can Do*, HARPER'S WEEKLY 10–13 (Dec. 20, 1913), https://louisville.edu/law/library/special-collections/the-louis-d.-

in a variety of federal statutes: the Federal Register Act,[142] the Freedom of Information Act,[143] the Plain Writing Act,[144] and, as we will see, the APA itself.

Indeed, for some commentators the power of voice in modern liberal democracy has become so attenuated that new devices ought to be considered to bolster popular vision as a tool of popular power.[145] Even if we do not accept this vision-centered position, we can say that at a minimum voice needs vision to be effective, and that vision must be unimpaired—able to be exercised without the intervention of elites.

The popular, individualist ideal of administrative accountability was at the forefront of the notice (i.e. the vision) sections of the APA. Although the Administration and conservatives in Congress disagreed over the scope and stringency of the procedures with which agencies would have to comply,[146] both sides found common ground over provisions designed to effectively inform the public about regulatory action had to do so in a way that the public could *and would* understand.[147] What was needed was a statement suitable for every individual in the polity—one that was general and, indeed, concise. As the influential[148] Attorney General's Report on the APA,[149] argued,

> The required statement will be important in that the courts and the public may be expected to use such statements in the interpretation of the agency's rules. The statement is to be "concise" and "general." Except as required by statutes providing for "formal" rule making procedure, findings of fact and conclusions of law are not

---

brandeis-collection/other-peoples-money-chapter-v.

142. 44 U.S.C. §§ 1501–1511 (2012).

143. 5 U.S.C. § 552 (2012).

144. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (2010).

145. GREEN, *supra* note 135, at 64–120.

146. Shepherd, *supra* note 126, at 1560.

147. *Id.* *Compare* DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 32 (1947) ("the statement is intended to advise the public of the general basis and purpose of the rules"), *with* STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON THE ADMINISTRATIVE PROCEDURE ACT 20 (Comm. Print 1945) (describing this provision in terms of "public procedure").

148. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (calling it "the Government's own most authoritative interpretation of the APA . . . which we have repeatedly given great weight."); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 546 (1978) (noting that it represents "a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation"). *But cf.* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 131–34 (1998) (pointing out that the Department of Justice was hardly neutral in the contested process of writing the APA).

149. DEP'T OF JUSTICE, *supra* note 147.

> necessary. Nor is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued. Rather, *the statement is intended to advise the public* of the general basis and purpose of the rules.[150]

Notice that the Report makes a gesture to the courts in the first sentence, but only to employ the required statement "in the interpretation" of the agency's rules—not to judge their rigor or evaluate whether the agency has "shown its working."[151] By the final sentence of the paragraph the courts drop out in favor of a bald claim that the statement "is intended" to advise "the public" of the basis and purpose of the rules. In conceiving basis and purpose statements, the courts appear to have been largely an afterthought—it would only be later that the basis and purpose statement would be turned to judicial purposes. The basis and purposes of the basis and purpose statement, if you will, was to "advise the public"—not through intermediaries, but directly—of what the government was doing and why. It was, in other words, a means of enhancing popular accountability.

Right now, the prolix preamble essentially requires the intervention of third parties (most notably the media) to mobilize various forms of popular voice. An excellent illustration of this process is the 2014 rulemaking regarding net neutrality, which concerned the conditions under which Internet service providers could prioritize certain kinds of web traffic.[152] In the lead-up to the close of public comments on the proposed rulemaking, comedian John Oliver featured the rulemaking on his weekly current events show.[153] Oliver characterized the appointment of Tom Wheeler, a former cable lobbyist, as Chairman of the Federal Communications Commission (FCC), as being like "appointing a dingo to take care of your baby," and analogized the FCC's two-speed service proposal floated in the Notice of Proposed Rulemaking as "Usain Bolt and Usain Bolt-ed to an anchor,"[154] encouraging his viewers to

---

150. *Id.* at 32 (emphasis added); *see also* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY , 79TH CONGRESS, 1944–46 225 (1997) (describing preambles as "designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules").

151. *Cf.* Manning, *supra* note 109, at 690.

152. *See* Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,447 (July 1, 2014) (to be codified at 47 C.F.R. pt. 8); Edward Wyatt, *The Nuts and Bolts of Network Neutrality*, N.Y. TIMES (Jan. 14, 2014, 7:57 PM), http://bits.blogs.nytimes.com/2014/01/14/the-nuts-and-bolts-of-network-neutrality/.

153. John Oliver, *Last Week Tonight with John Oliver: Net Neutrality (HBO)*, YOUTUBE (June 1, 2014), https://www.youtube.com/watch?v=fpbOEoRrHyU.

154. *Id.* For more on the worrying possibility that the now-former FCC Chairman is indeed a dingo, see John Oliver, *Last Week Tonight with John Oliver: Tom Wheeler is Not a Dingo (HBO)*, YOUTUBE (June 15, 2014), https://www.youtube.com/watch?v=hkjkQ-wCZ5A.

comment in opposition to the FCC rulemaking.[155] The Oliver presentation appears to have had a significant effect—it was seen on YouTube tens of millions of times,[156] led to commentary and discussion within the FCC,[157] and was credited with significantly increasing the number of public comments issued as part of the rulemaking.[158]

While this may appear to be a species of popular accountability,[159] a full 95% of the comments from non-organizations were form letters, written by advocacy groups.[160] This preponderance of form letters strongly suggests that the public were not responding to the facts of the proposal but merely to the *interpretation* of the net neutrality proposal offered by the groups and by Oliver. Because the agency knew that none of the individual (non-elite) commentators read the preamble of the FCC's proposed rule (which ran for 34,637 words),[161] or the preamble of the FCC's finalized rule (at 121,718

155. *See* Oliver, *supra* note 153.

156. *See* Oliver, *supra* notes 153, 154 (showing, by YouTube's count, that the main presentation was viewed 11,282,580 times and the presentation focusing on Chairman Wheeler's dingohood was viewed 1,926,066 times).

157. Colin Lecher, *Read the FCC's Internal Emails About John Oliver's Net Neutrality Segment*, VERGE (Nov. 13, 2014, 10:54 AM), http://www.theverge.com/2014/11/13/7205817/fcc-john-oliver-net-neutrality-emails.

158. Ben Brody, *How John Oliver Transformed the Net Neutrality Debate Once and for All*, BLOOMBERG POLITICS (Feb. 26, 2015, 10:00AM), http://www.bloomberg.com/politics/articles/2015-02-26/how-john-oliver-transformed-the-net-neutrality-debate-once-and-for-all (discussing Oliver's impact); David Carr, *John Oliver's Complicated Fun Connects for HBO*, N.Y. TIMES (Nov. 16, 2014), http://www.nytimes.com/2014/11/17/business/media/john-olivers-complicated-fun-connects-for-hbo.html ("Nu Wexler, a policy spokesman for Twitter, said that at a meeting of lobbyists and policy types on the net neutrality issue last summer, they thought Mr. Oliver's piece beat many other efforts. 'We all agreed that John Oliver's brilliant net neutrality segment explained a very complex policy issue in a simple, compelling way that had a wider reach than many expensive advocacy campaigns,' he said.").

159. For example, it attracted 3.9 million comments. Gigi B. Sohn, *FCC Releases Open Internet Reply Comments to the Public*, FED. COMM. COMM'N (Oct. 22, 2014, 4:07 PM), https://www.fcc.gov/news-events/blog/2014/10/22/fcc-releases-open-internet-reply-comments-public. Note that the FCC made no serious attempt to determine that each individual comment (i.e., one not signed by an organization) was in fact submitted by a unique natural person.

160. Bob Lannon & Andrew Pendleton, *What Can We Learn From 800,000 Public Comments on the FCC's Net Neutrality Plan?*, SUNLIGHT FOUND. (Sept. 2, 2014, 9:49 AM), http://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan.

161. Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,447 (July 1, 2014) (to be codified at 47 C.F.R. pt. 8) (measured by copying the preamble into Microsoft Word and using its Word Count feature).

words),[162] or could afford attorneys that could,[163] it could ignore those commentators on the assumption that those commentators would not sue.[164]

For sure, the proposed rulemaking and comments issued in response to it were not part of a final rule to which the concise general statement requirement of the APA applies. But the above is a nice, practical illustration of the reality that current popular accountability in the form of popular voice emerges only when the public is advised of that action by an elite—with a potentially misleading presentation of the rule's basis and purpose.[165] Meanwhile, the preamble, unreadably long, is rendered entirely pointless in the

---

162. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8 & 20). Notably, the rule itself was only 3,700 words long. *Id.*

163. The median billing rate for administrative law matters is about $350 per hour. *See* Frank Strong, *What are the Going Law Firm Billing Rates by Practice Area?*, LEXISNEXIS: BUS. OF L. BLOG (June 3, 2015), http://businessoflawblog.com/2015/06/law-firm-billing-rates-volatility/. The average adult reads at a rate of about 300 words per minute. Laura Bell & Charles Perfetti, *Reading Skill: Some Adult Comparisons*, 86 J. EDUC. PSYCHOL. 244, 246 (1994) (reviewing literature on reading speeds). Assuming a billing rate, then, of around $5.80 per minute, and assuming a lawyer is an average (careful) reader, simply having a conventional lawyer *read* the relevant preambles would cost the hapless commentator some $3,022. The median inflation-adjusted household income as of 2017 was $59,039, *see* Sho Chandra & Jordan Yadoo, *U.S. Household Incomes Rose to Record in 2016 as Poverty Fell*, BLOOMBERG (Sept. 12, 2017, 10:20 AM), https://www.bloomberg.com/news/articles/2017-09-12/u-s-household-incomes-rose-to-record-in-2016-as-poverty-fell, and so this fee would represent two weeks' wages (before taxes, I hasten to add). To put it simply: this is not within the means, or the wants, of most, if any, Americans.

164. Interestingly, Oliver *also* failed to use his audience in an effort to attack the rule using the Show Your Working doctrine, which would have required him to urge his audience to submit *different* comments so as to proliferate issues beyond the FCC's ability to respond. Instead, when asking members of the audience to comment on the FCC's website, he asked viewers to "focus your indiscriminate rage in a useful direction . . . turn on the caps lock and fly, my pretties! Fly, fly, fly!" *See* Oliver, *supra* notes 153.

165. As the net neutrality debate has worn on, the role of civil society "explainers," whether in the conventional media or not, has if anything expanded as the FCC continues to fail to articulate in a way intelligible to the average American the basis and purpose of its rulemakings back and forth on the subject. *Cf.* Cecelia Kang, *Net Neutrality Hits a Nerve, Eliciting Intense Reactions*, N.Y. TIMES (Nov. 28, 2017), https://www.nytimes.com/2017/11/28/technology/net-neutrality-reaction.html. For the closest thing to a publicly-accessible communication by FCC leadership of the basis and purpose of the FCC's latest net neutrality proposal, see Hamza Shaban, *Watch FCC's Ajit Pai dress up as Santa and Wield a Lightsaber to Mock Net Neutrality Rules*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/12/14/the-fccs-ajit-pai-dressed-up-as-santa-and-wielded-a-light-saber-to-mock-net-neutrality-rules/.

public debate it was meant to foster. As with comments, so with the final rule—where the APA envisions a popular dialogue about a given final rule we are instead left to the mercy of elites in control of interest groups to marshal popular resources through essentially unchallengeable representations of what the rule really means.[166]

As a normative matter, I suppose there is something to be said for abandoning the romanticism of the APA and instead judging the procedures the APA creates entirely from a pluralist perspective.[167] But the less the administrative process speaks directly to those who must live under the rules it creates (even if indirectly), the greater grows the "shadow of unfairness," or the perception of the ordinary citizen that they are being disempowered and robbed of their agency in a system the purports to invest them with real and abiding power over the government.[168] As the present presidential election cycle has eloquently demonstrated, the candidates that emerge from under the shadow of unfairness are not, to put it mildly, the kind of candidates pluralists would like to see superintend the administrative process.[169]

If we accept that we ought to care about the specter of unfairness, and therefore should seek to increase the popular accountability and hence legitimacy of the administrative state, what better place to begin than mandating that agencies communicate intelligibly to the public?[170] The modern prolix preamble is a gigantic, confounding mass of verbiage that is simply too long for most people to intelligently read. Indeed, in certain ways our administrative state has reverted to its very earliest form—the medieval practice of rendering the decisions of the powerful in a unique language, whether Latin

166. Because challenge would require reading the preamble or the rule, both of which are too long and too technical—given the prolix preamble—to be of much assistance.

167. *See* Part II.A. (detailing the pluralist account.); *see also, e.g.*, BREYER, *supra* note 99 at 33 (arguing that public opinion, communicated via media and direct representations to agencies and legislators, leads to unjustified regulations); Rossi, *supra* note 118, at 174 (arguing that public opinion communicated via the Internet tends to disrupt beneficial deliberative processes).

168. *See generally* JEFFREY GREEN, THE SHADOW OF UNFAIRNESS: A PLEBEIAN THEORY OF DEMOCRACY 36–40 (2016) (discussing how removal from decisionmaking generates a shadow of unfairness).

169. *See* Phillip Wallach, *The Administrative State's Legitimacy Crisis*, BROOKINGS INST. (Apr. 2016), https://www.brookings.edu/wp-content/uploads/2016/07/Administrative-state-legitimacy-crisis_FINAL.pdf (exploring the connections between anger at the administrative state and the rise of toxic populism in American politics).

170. It's perfectly possible to design institutional reforms with the aim of increasing popular accountability that have the perverse effect of making the institution less so, or appear to be less so. But, as I will discuss in Part III.B, concise preambles seem to avoid many of these pitfalls.

or Norman French, that put them beyond the reach or control of those subject to them.

It is from the perspective of the administrative processes' reliance on *popular accountability* that we can see fully the damage wrought by the prolix preamble. Without popular vision, which can be achieved only by a form of agency communication that is, at a minimum, comprehensible and therefore concise and general, the principle popular accountability embedded in the APA is at best frustrated and, at worst, thwarted.

2. An Opportunity Forgone: Concise Preambles as Trustworthy Contributors to Public Debate

In the light of the past year or two of American politics, it might reasonably be argued that my analysis above is somewhat too pessimistic about the populist accountability inherent in the current means by which agencies keep the public abreast of their activities. The 2016 Presidential election has been broadly understood as a kind of populist revolt,[171] one prompted, in part at least, on disgust shared by many Americans about the regulations promulgated by the Federal administration.[172] It could be said, then, that the public's vision was not at all impaired—the public (or "We the People," if you like) saw, and, using the voice of the ballot box, elected as president a candidate who will attempt to make good on the promise of eliminating a very large amount of regulation indeed.[173]

---

171. *See generally* J. Eric Oliver & Wendy M. Rahn, *Rise of the Trumpenvolk*: *Populism in the 2016 Election*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 189 (2016) (collecting citations).

172. *See, e.g.*, Brian Seasholes, *Rural Americans' Anger, Trump's Election and Environmental Regulation*, DAILY CALLER (Jan. 5, 2017, 2:35 PM), http://dailycaller.com/2017/01/05/rural-americans-anger-trumps-election-and-environmental-regulation ("A growing source of rural Americans' anger is the ever-tightening grip of environmental regulations that have less to do with the environment than they do liberal elites' desire for social engineering and control over ordinary peoples' lives"); Emily Mills et al., *Frustrated with Democrats, White Working-Class Voters Turn to Trump*, CTR. FOR PUB. INTEGRITY (Aug. 25, 2016, 5:00 AM), https://www.publicintegrity.org/2016/08/25/20083/frustrated-democrats-white-working-class-voters-turn-trump ("Many Trump supporters criticize increasing government regulations, President Obama's health care law and immigration.").

173. Either 75% of all federal regulations, as he has claimed in some settings, *see* Jenna Johnson & Ylan Q. Mui, *Trump to CEOs: Stay here, and I'll Wipe Out 75 Percent of Regulations, Fast-Track Factories*, WASH. POST. (Jan. 23, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/01/23/trump-to-ceos-ill-wipe-out-75-percent-of-regulations-fast-track-u-s-factories/, or perhaps a lesser number compelled by his curious "one in, two out" Executive Order on Regulatory Reform. *See* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017)*; see also* Lydia Wheeler, *Trump Administration Reveals First Regulatory Agenda*, HILL (July 20, 2017,

If we assume that popular power of at least a certain sort, and as expressed by those lucky enough to actually reach the ballot box, is indeed alive and well, there is still serious reason to doubt that popular power was or is exercised on a truly clear popular vision of what agencies, or for that matter Congress, had actually done or were planning to do. After all, without concise or general statements of what agencies were doing or why, many voters—perhaps almost all voters—had to rely on mediating entities, such as those entities widely if under-inclusively referred to as *the media*, to understand exactly what the government was doing so as to decide how to vote. Alas, in the run-up to the 2016 election the quality of the information transmitted to the public by the media was, to put it mildly, variable.[174]

I do not here intend to review the manifold distortions of government policy put forward by media sources, including those distortions generated by the activities of partisan media sources,[175] poorly-designed algorithms,[176] Russians,[177] and deliberate purveyors of falsehoods possessing a strange obsession with pizza.[178] My point is simply that the Internet's proliferation of news sources has led to something of an epistemic crisis, one in which many

---

11:44 AM), http://thehill.com/regulation/administration/342922-trump-administration-reveals-first-regulatory-agenda (reviewing recently published Trump regulatory agenda).

174. *See generally* Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211 (2017) (collecting studies discussing the dissemination of inaccurate news stories).

175. *Id.*

176. *See* Nick Wingfield et al., *Google and Facebook Take Aim at Fake News Sites*, N.Y. TIMES (Nov. 14, 2016), https://www.nytimes.com/2016/11/15/technology/google-will-ban-websites-that-host-fake-news-from-using-its-ad-service.html (examining actions taken to change Google search and Facebook News Feed algorithms in the wake of the 2016 election based on accusations that these algorithms gave improper weight to sensational but fictional "news" items).

177. *See* Craig Timberg, *Russian Propaganda Effort Helped Spread 'Fake News' During Election, Experts Say*, WASH. POST (Nov. 24, 2016), https://www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts-say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe_story.html?utm_term=.01a262b4f6f7.

178. *See* Joshua Gillin, *How Pizzagate Went from Fake News to a Real Problem for a D.C. Business*, POLITIFACT (Dec. 5, 2016, 5:23 PM), http://www.politifact.com/truth-o-meter/article/2016/dec/05/how-pizzagate-went-fake-news-real-problem-dc-busin/ (reviewing the history of this particular fake news conspiracy). Of course, some concern with pizza is entirely normal, especially if that concern involves lobbying for the confection served in Chicago to be referred to as a casserole and not pizza. This view is supported by impeccable legal authority. *Scalia Deep-Dish Pizza Ruling: Supreme Court Justice Calls Chicago-Style 'A Tomato Pie,'* HUFFINGTON POST (Oct. 20, 2011, 10:59 AM), https://www.huffingtonpost.com/2011/10/20/scalia-deep-dish-pizza-tomato-pie_n_1021778.html.

people do not know, to return to our metaphor of popular vision, which spectacle to look at in order to understand precisely what the government is doing and why.

A truly concise general statement of a government rule's basis and purpose, which I will call a "popular preamble," might step, however tentatively and marginally, into this epistemic breach. It could do so because it would create a source of accessible, readable, *likely to be read* information that would draw on one of the last wellsprings of legitimacy in the federal government: the judiciary.[179]

The APA requires that the judiciary validate or invalidate regulations in part on those regulations' compliance with the various dictates of the APA,[180] including, as we have seen, the concise general statement requirement. It is already the case that a statement that is false or dissembling can lead to a judge sending the accompanying rule back to the agency.[181] Here, a judge would perform the same analysis but in the context of a statement that must additionally be concise and general, i.e., accessible to the public. Assuming, as I will discuss in Part III, below, that the court-imposed requirements on preambles can be severed from the public-facing preamble to which the concise general statement requirement applies, the result of this process will be a stream of accessible, understandable, and (we must assume) essentially truthful statements about what the government is doing, and why.

Accessible and judicially-validated expressions of government activity have the potential to assume a special place in discourse over administrative action. Returning to the example of network neutrality discussed above, the FCC's popular preamble might appear *directly* on John Oliver's show, because it would now be in a format suitable for direct mass consumption (or something close to it).[182] Posting these popular preambles on the Internet would enable citizens to read, in an efficient fashion, accessible and trustworthy statements of the government's actions, straight from the government itself—without intervention from Oliver and extraneous discussions about

179. *See* Lydia Saad, *Americans' Confidence in Government Takes Positive Turn*, GALLUP (Sept. 19, 2016), http://www.gallup.com/poll/195635/americans-confidence-government-takes-positive-turn.aspx (reviewing persistently high ratings for the federal judiciary, including a graph indicating the federal judiciary have polled better than the other two branches since the commencement of polling).

180. 5 U.S.C. § 706(2)(D) (2012).

181. *See, e.g.*, Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin., 956 F.2d 321, 327 (D.C. Cir. 1992) (explaining that "[t]he requirement of reasoned decision-making ensures this result and prevents officials from cowering behind bureaucratic mumbo-jumbo.").

182. Making these statements suitable for television consumption is especially important since television remains the primary source of news for many Americans. Allcott & Gentzkow, *supra* note 174, at 233.

dingoes.[183] This statement would serve as a powerful counterpoint to a criticism of the FCC because it would both be easy to understand (thus able to compete with the otherwise decisively more entertaining fare from Oliver and company) *and* because it would be understood that the rule's existence depends on the truthfulness of the statement as measured by the courts.

This last point bears some elaboration. At the heart of the current fashion for crying "fake news" is a claim about *conflicts of interest*. Thus, "fake news" criers argue, the New York Times is meant to report facts but instead reports fake news because its liberal masters wish to bring down the present Administration;[184] the Washington Post is driven to report news benefiting its owner, Jeff Bezos;[185] and so on. Truth is the default and lies emerge owing to the self-interest of the controlling party. This is also, at a high level, how we level accusations of political spin against one another: an agency or its public-facing representative would normally give us the *real* reason they are taking a given action, but instead dissemble because their underlying interests compel them to do so.

The nettlesome thing about rebutting claims of fake news is, as has previously been observed, that those who cry "fake news" generally cannot be persuaded to believe otherwise even if presented with facts supporting the news they claim to be fake.[186] Other considerations, especially connected

---

183. *See supra* text accompanying notes 153–164.

184. *See, e.g.*, Michael Goodwin, *Why the Media Has Broken Down in the Age of Trump*, N.Y. POST (July 1, 2017, 11:58 AM), http://nypost.com/2017/07/01/why-the-media-has-broken-down-in-the-age-of-trump (op-ed summarizing conservative views as to the bias of the New York Times).

185. *See, e.g.*, Sean Smyth, *Trump says Washington Post is Doing Amazon's Bidding*, BOS. GLOBE (July 25, 2017), https://www.bostonglobe.com/business/2017/07/24/trump-says-washington-post-doing-amazon-bidding/vnw5zKcFMPsXLs3Y28ArjJ/story.html.

186. The literature on this point is voluminous, but for a representative selection, see Ryan L. Claassen & Michael J. Ensley, *Motivated Reasoning and Yard-Sign-Stealing Partisans: Mine is a Likable Rogue, Yours is a Degenerate Criminal*, 38 POL. BEHAV. 317, 320 (2015); Oliver James & Gregg G. Van Ryzin, *Motivated Reasoning about Public Performance: An Experimental Study of How Citizens Judge the Affordable Care Act*, 27 J. PUB. ADMIN. RES. & THEORY 197, 198 (2017); Dan M. Kahan et al., *Motivated Numeracy and Enlightened Self-Government*, 1 BEHAV. PUB. POL'Y 54, 61 (2017) [hereinafter Kahan, *Motivated Numeracy*]; Mei-Chen Lin et al., *The Role of Political Identity and Media Selection on Perceptions of Hostile Media Bias During the 2012 Presidential Campaign*, 60 J. BROAD. & ELEC. MEDIA 425, 427 (2016); Julie Beck, *This Article Won't Change Your Mind*, ATLANTIC (Mar. 13, 2017), https://www.theatlantic.com/science/archive/2017/03/this-article-wont-change-your-mind/519093/; Dan M. Kahan, *Misconceptions, Misinformation, and the Logic of Identity-Protective Cognition*, (Yale L. & Econ. Res., Working Paper No. 164, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2973067 [hereinafter Kahan, *Misconceptions*].

with group identity, motivate a person to willfully ignore the evidence contradicting their settled positions.[187] This is a neat inversion of the accusations made of journalistic outlets like the New York Times—namely that they would prefer the "liberal" narrative to be true, and so report it as if it is despite the facts to the contrary.

The way out of this Gordian epistemic knot is third-party validation: I am quite likely to change my mind about a fact if the contrary facts are presented by someone I trust, which decreases the chances I will reject the facts out of loyalty to my group identity.[188] As discussed above, the judiciary still commands a modicum of respect across party lines (it remains the most-trusted branch of government), and thus has a chance of being seen as sufficiently unbiased to validate the facts in the popular preambles produced by the agency (i.e., performing that validating work in such a way that the public can see the results). Even if this is not the case, *trust* can mean more than believing that the judiciary will root out the truth: here, *trust* also means trusting agencies to act according to their *base self-interest*. I can think that an agency is hopelessly captured by special interests and still believe that it will want to speak truthfully in its popular preamble because doing otherwise would create a risk that their goals (creating a regulation) would be undermined by the courts. In other words, a popular preamble would be validated by the popular belief that judiciaries will be good and agencies will be bad.

In this context, consider our very first example of administrative concision rules—the Interstate Commerce Act of 1887, with its mandate that railways produce schedules of their fares "plainly printed in large type, of at least the size of ordinary picta" that "plainly state" the prices the carrier charges.[189] This provision addressed the problem that railroads were obscuring the fares passengers would be required to pay on board (so that the railroad might induce more people to buy tickets on board rather than at the station, paying a higher rate).[190] One way to understand the Interstate Commerce Commission Act's solution is as a means of enhancing passengers' confidence in the

187. *See* Kahan, *Misconceptions*, *supra* note 186; *see also* Kahan, *Motivated Numeracy*, *supra* note 186.

188. *See* Kahan, *Misconceptions*, *supra* note 186; *see also* Kahan, *Motivated Numeracy*, *supra* note 186.

189. Interstate Commerce Act of 1887, § 6, 24 Stat. 379, 380–82 (1866).

190. *See* SAMUEL DECANIO, DEMOCRACY AND THE ORIGINS OF THE AMERICAN REGULATORY STATE 180–199 (2015) (discussing in depth the political movements leading to the adoption of the Interstate Commerce Commission (ICC) Act, and placing emphasis on the influence, albeit manipulated, of public opinion). *But see* Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139 (2015) (arguing that the ICC was

accuracy of the posted fares without undermining passengers' prejudices about railroads duplicity—there was no need to believe railroads were not duplicitous when one knew that railroads now had an *incentive* to be truthful (post the right fares or face federal fines). The most important element of this regulatory intervention, however, was that it took place over information *that the passengers would see*—that is, the fares "plainly printed in large type."[191]

When government-generated information is appropriately concise, general, and truthful, and when that truthfulness has been assessed by a trusted third-party in a forum where the public can understand the validating activity going on, the effect on political discourse can be both positive and profound. Consider, for example, the recent interventions by the Congressional Budget Office (CBO) in the debate over repealing the Affordable Care Act. Each intervention was phrased in concise and general terms—so many people would gain or lose insurance[192]—and possessed a degree of legitimacy because of the CBO's high reputation,[193] notwithstanding sustained efforts by the President's subordinates to undermine it.[194] The impact of those statements might have been enhanced still further if a third party (a "Court of Statistical Review" perhaps) stood in the position of reviewing and validating the CBO's statements, but the basic principle seems clear enough: concise general statements can, and have, had an important and salutary effect on public debate.

Of course, even if preambles were concise, in the ways I suggest they could be (as I shall cover in the next Part), we would need mechanisms to spread

---

created to provide incentives to funnel campaign contributions to politicians owing to the decline of the patronage assessment system).

191. Interstate Commerce Act of 1887, § 6.

192. *See, e.g.*, CONG. BUDGET OFFICE, CONGRESSIONAL BUDGET OFFICE COST ESTIMATE (2017) (estimating that one of the latest drafts of the Republican Obamacare repeal effort would decrease federal deficits by $119 billion over the following decade and increase the number of people who are uninsured by 23 million in 2026 relative to current law).

193. *See* Philip Joyce, *The Congressional Budget Office at Middle Age* (Hutchins Ctr. on Fiscal & Monetary Policy, Working Paper No. 9, 2015), https://www.brookings.edu/wp-content/uploads/2016/06/PJ_WorkingPaper9_Feb11_Final.pdf (reviewing legitimacy-building activities of the Congressional Budget Office (CBO) prior to the current Administration).

194. *See* Bob Bryan, *The White House Made a Video Attacking the Budget Office That Gave Devastating Reviews to the GOP Healthcare Bills*, BUS. INSIDER (July 12, 2017, 4:57 PM), http://www.businessinsider.com/cbo-score-health-care-bill-white-hosue-video-2017-7 (recapitulating White House attempts to attack CBO legitimacy); Emily Guskin & Scott Clement, *Republicans' Obamacare Repeal Was Never Really That Popular*, WASH. POST (July 28, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/07/28/republicans-obamacare-repeal-was-never-really-that-popular/ (reviewing polling that suggested White House attacks on CBO had no effect).

the new, concise, validated information about agency activity to the public. No dentist will ever put the day's edition of the *Federal Register* in her waiting room. But it seems to stretch a commonplace too far to claim that the public does not care about policy wholesale. Indeed, this claim sounds much like the old saw about children hating mathematics. As any teacher knows, every subject can be made interesting if we just make the effort to teach it well.[195] And as every teacher also knows, the most important steps we take when teaching is to teach what is true and teach what is comprehensible. The statements explaining rulemaking should be both. Little can be accomplished until they are.

III. MODELS OF A NEW CONCISION NORM FOR PREAMBLES

In the preceding section I discussed the consequences of prolix preambles with reference to popular accountability, which is embedded into the structure and history of the APA. But this discussion of burdens risks ignoring the benefits that the Show Your Working doctrine created: the real possibility that it has, at least in some cases, prevented agencies from adopting silly rules. Consider the Smoked Whitefish case, which was set off by a study in bureaucratic obstinacy in which the FDA was prepared to essentially destroy the smoked whitefish industry over groundless concerns about botulism.[196] It was probably a good thing—especially if you like smoked whitefish—that the court remanded the rule back to the agency for a second look.[197]

However, we can retain the benefits of the Show Your Working doctrine

195. *See, e.g.*, Elizabeth Green, *Why Do Americans Stink at Math?*, N.Y. TIMES (July 23, 2014), https://www.nytimes.com/2014/07/27/magazine/why-do-americans-stink-at-math.html; David Bornstein, *A Better Way to Teach Math*, N.Y. TIMES (Apr. 18, 2011, 8:30 PM), https://opinionator.blogs.nytimes.com/2011/04/18/a-better-way-to-teach-math/.

196. United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 249 (2d Cir. 1977).

197. It is worth noting in passing that judiciaries may be better equipped to detect and stop bad rules (for whatever definition of *bad* we care to specify) than a central administrative hub like the White House Office of Information and Regulatory Affairs because judiciaries are forced to respond to (essentially) any suit from any (reasonably connected and harmed) interest challenging any rule, rather than being able to allocate their resources selectively to focus on "major" rulemakings. *Compare* 33 CHARLES A. WRIGHT & CHARLES H. KOCH, FEDERAL PRACTICE & PROCEDURE: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 440–47 (1st ed. 2006) (discussing broad basis for standing in administrative law cases), *with* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993) (reserving centralized review only for significant regulations with an impact on the economy of $100 million or more). All of this is to say that the goods we get from judicial review of regulations may not be easily moved into another institution—which weighs in favor of retaining it to reap these quite significant benefits.

and restore the preamble to its rightful place by separating the preamble from the Show Your Working doctrine, making the popular preamble itself a touchstone of procedural review while directing an agency to use other means to substantiate the decisions it made in the administrative record.

This separation is compelled, as a practical matter, by an absence of alternatives that would properly incentivize agencies to produce popular preambles and still function. Agencies would be lodged between a judicial rock and hard place if they were to be simultaneously required to Show Your Working in a preamble *and* keep the preamble concise and general. Such a requirement feels less like a balanced procedure and more like a naked effort to shut down agency rulemaking.[198] Likewise, as we have seen, making the word *concise* a limitation on judicial review, or a countervailing consideration, appears to simply lead to unpredictability rather than shorter preambles.[199] These considerations also seem to weigh against Wagner's proposed softer standard by which a court would "remand rules that are too obtuse and disjointed and that assume too high a level of technical information for the average elite reader"[200] (to say nothing of not serving the popular accountability goal we have seen preambles possess), and similar standards from civil procedure[201] or products liability law. [202]

Given these difficulties, the simplest solution might well be the best: create two separate statements, or parts of the judicial record, one that sets out a "concise general statement of the rule's basis and purpose: and another that satisfies the Show Your Working doctrine, which can be pitched at the level of commentators or experts. The next section explores this possibility.

---

198. Although in practice it would likely lead to even more pronounced agency abandonment of rulemaking altogether, which seems thoroughly unsatisfactory. *See* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 68 (2015) (original empirical analysis demonstrates that agencies will invoke exceptions allowing them to avoid notice-and-comment when they can).

199. *See supra* Part I.B. For an example of a court remanding a rule for an insufficiently complete preamble, see AFL-CIO v. OSHA, 965 F.2d 962, 968, 986–87 (11th Cir. 1992) (holding that 54 Fed. Reg. 2332 (Jan. 19, 1989) was an inadequate preamble although it ran nearly 500 pages of the *Federal Register*).

200. Wagner, *supra* note 31, at 1421.

201. *See generally* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1281 (3d ed. 2016) (discussing various violations of Rule 8). *See also, e.g.*, Gollomp v. Spitzer, 568 F.3d 355, 371 (2d Cir. 2009) (collecting cases).

202. *See* CHARLES J. NAGY, JR., AMERICAN LAW OF PRODUCTS LIABILITY 19 (3d ed. 2015 & Supp. 2016) (collecting cases on warning adequacy); Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1194 n.2 (1994) (discussing products liability warning jurisprudence that requires that the warning be "comprehended by the average consumer and would prevent the injury if followed").

A. Reclaiming Preambles for the Public: Shorter, Simpler Preambles

What if we returned to the days of short, simple preambles, targeted at the public—but, to satisfy judicial review, the agency is required to file a comprehensive explanatory document by affidavit explaining what they did and why with a focus particularly on the gravamen of the complaint?

Something akin to this was attempted a few years ago. Cass Sunstein, the then-Administrator of the Office of Information and Regulatory Affairs (OIRA), issued an encyclical to all agencies requiring short "Executive Summaries" be appended to complicated rules.[203] But in more than 90% of rules issued after the letter agencies simply did not include Executive Summaries at all.[204] Agencies correctly gambled that OIRA was not going to stand in their way for failure to write an Executive Summary (especially since the statute under which Sunstein acted, the Plain Writing Act, is unenforceable on its own terms).[205] With no change in agency incentives, there was no change in agency behavior: preambles remained long, and executive summaries remained essentially a novelty. Worse, those Executive Summaries that *were* included were often more prolix and/or incomprehensible than the preambles they supplemented.[206]

Fortunately, sterner tools are available: agencies could be required by the courts to write a concise general statement of the regulation's basis and purpose that was primarily tested against whether the statement was concise and general, rather than whether the statement was sufficiently responsive or comprehensive. We could extract the preamble from the Show Your Working doctrine and apply the doctrine to some other agency submission to the courts—not the preamble.

One major objection to such a proposal is that it would seem to contravene the Supreme Court's command in *SEC v. Chenery Corp.*,[207] which bars courts from justifying agency action in litigation on grounds different to those employed by the agency to justify its actions *prior* to litigation.[208] This objection is less serious than it appears for two reasons: (1) the courts more or less accidentally settled on the preamble as the preferred vehicle for justification

---

203. Cass R. Sunstein, *To the Point*, WHITE HOUSE (Jan. 6, 2012, 12:53 PM), https://obamawhitehouse.archives.gov/blog/2012/01/06/point.

204. Cynthia R. Farina et al., *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1386 (2015).

205. Plain Writing Act of 2010, Pub. L. No. 111-274, § 6(b), 124 Stat. 2861, 2683 (2010) ("No provision of this Act shall be construed to create any right or benefit, substantive or procedural, enforceable by any administrative or judicial action.").

206. *See* Stabler, *supra* note 92 (documenting this trend).

207. 318 U.S. 80, 95 (1943).

208. KOCH, JR., *supra* note 16, at § 8:22[5].

of agency action; it is not *necessary* for an agency to use the preamble to do this; (2) it is not at all clear that a preamble satisfies *Chenery* in the first place.

Begin with (1), the courts' settling on the preamble as a vehicle for judicial review. *Chenery* "merely held" that "[i]f an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment."[209] *Chenery* did not reference the APA's preambles for the excellent reason that, at the time it was decided, the APA did not yet exist. In *Burlington Truck Lines, Inc. v. United States*,[210] one of the first major cases considering the APA in the context of *Chenery*, the Supreme Court had little if anything to say about how the agency could express its rationales and engagement with commentators. *Burlington* took pains only to rule out "post-hoc justifications" by *counsel* during litigation.[211]

The next major case, *Citizens to Preserve Overton Park, Inc. v. Volpe*,[212] also failed to say anything about rulemaking preambles when it remanded the agency's decision to the lower courts for a more thorough analysis of the record.[213] Indeed, *Overton Park* took pains to call for the "full administrative record that was before the Secretary at the time he made his decision."[214] The case that kicked off more searching judicial scrutiny of an agency's justification for regulations, *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[215] likewise said nothing about agency preambles as the vehicle for this review.[216] Just two years ago, the Court remained coy about exactly where an agency must disclose its reasoning, provided that reasoning is disclosed prior to litigation.[217] It has been the lower courts and only the lower courts that have read the phrase "basis and purpose" to require prolix explanations in preambles, in the cases establishing the Show Your Working doctrine.[218]

Turning to (2), it is hard to understand why the same courts that rail so

---

209. *Chenery*, 318 U.S. at 88.

210. 371 U.S. 156 (1962).

211. *Id.* at 169.

212. 401 U.S. 402 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

213. *Id.* at 419–20.

214. *Id.* at 420.

215. 463 U.S. 29 (1983).

216. *Id.* at 43.

217. *See* Encino Motorcars, L.L.C. v. Navarro, 136 S. Ct. 2117, 2125–27 (2016) (collecting cases discussing the requirements that explanations for changes in an agency's position must meet).

218. *See supra* Part I.B.

consistently against post-hoc justifications of agency action prepared for litigation give the preamble a free pass. The modern preamble, as we have seen, *is* a post-hoc justification of agency action prepared for litigation.[219] That the litigation has not started yet seems a formalist defense at best. In *Overton Park*, the relevant record was the material "before the Secretary *at the time he made his decision*."[220] The preamble was not part of those materials—rather, it is what the Secretary wrote (or at least signed) after making his decision. Courts are attempting to use the preamble to see into the administrative process underlying that preamble even though the preamble has essentially been transformed into a legal brief written without a word limit.

To put it another way: when agency lawyers are writing preambles and agency lawyers (or at least government lawyers who at least traditionally defend their fellow government agencies)[221] are defending the rule the distinction between the two kinds of justification is hard to discern. Thus, courts serious about putting a stop to post-hoc justifications while retaining hard look seem to be doing themselves a disservice by leaning on the litigation document that is the modern prolix preamble.

All that is required to create popularly accessible preambles to rules is to reject the lower courts' unnecessary and internally inconsistent reliance on preambles as post-hoc litigation documents that are somehow not post-hoc litigation documents. Instead, agencies could provide a *separate* explanatory document responding at length to comments—either when litigation commences or, as is currently the case, with each rule as it is issued. This requirement could be read into § 706 of the APA[222] with no more violence to the text than is currently being done by the Show Your Working doctrine. The agency can communicate with commentators on their own dedicated line, if you will, without repurposing the line the APA dedicated to agency communications with the public.

---

219. *See, e.g.*, John F. Duffy, *supra* note 148, at 131–34 (1998) (arguing that preambles cannot serve as honest accountings of agency processes and procedures because they were prepared by the agency with a direct stake in future litigation on the sufficiency of the preamble).

220. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (emphasis added).

221. *But see* Mark Joseph Stern, *Department of Wackadoodle*, SLATE (Sept. 26, 2017, 7:43PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/09/the_doj_s_new_anti_gay_legal_posture_just_got_shut_down_in_federal_court.html (describing a case in which DOJ lawyers intervened and directly opposed the position taken by Equal Employment Opportunity Commission lawyers).

222. 5 U.S.C. § 706 (2012) (requiring that when determining the arbitrariness and capriciousness of a given rule, courts "shall review the whole record" without defining what that record must be).

The critical difference between this proposal and the Executive Summaries implemented by OIRA (discussed above) is that instead of creating a new and unenforceable requirement for an ill-defined Executive Summary, my proposal would see the long-standing and very much enforceable preamble requirement of the APA restored to its original purpose—with the novel Show Your Working doctrine shunted into an appropriately novel, and separate, part of the administrative record.

I do not doubt that this proposal would have deleterious effects on agency administrative alacrity in at least some cases,[223] since this proposal would essentially retain the prolix preamble (and thus require the agency to spend all the time it presently does cobbling together these thousand-page monstrosities) but then spend *more* time complying with a new, or perhaps a rediscovered, requirement that they then provide truly concise general statements describing the rules.

And yet, if we take the costs of the prolix preamble to popular accountability seriously, and if we hope to vindicate the purposes and the text of the APA, there is at least a well-founded claim that the trade-off might be worth making. After all, agencies could surely get much more done if they were relieved of the obligation to consult with the public altogether. We ultimately place these constraints on agencies in the hopes of enhancing other values—here, democratic accountability of agencies in a world where that accountability will only be achieved by the vast bulk of citizens through their eyes, rather than through conventional participation.

B. What a Popular Preamble Might Look Like

I close this Part with a brief sketch of how a popular preamble—one that vindicates the purposes of the concise general statement commanded by the APA—might be composed and regulated by the courts (as it must be, since compliance with § 553 is an essential part of informal rulemaking).

The discussion above has already laid out at least a few guidelines for the popular preamble. It would not need to include a specific discourse on comments, since these would be preserved for a separate document engaging the commentators (who are after all not the audience for the preamble—the public is); it would need to be comprehensible; it would need to be concise such that it could be readily digested by the average member of the public in a reasonable time; and it would need to be accurate. These latter concerns require a little additional explanation.

Begin with comprehensibility. Concision is, I think, fairly characterized as necessary if insufficient for comprehensibility (at least if our aim is actual

223. Assuming, of course, that the ossification thesis is borne out in reality. *See supra* Part II.A.

comprehension rather than the capacity of the preamble to be comprehended). The administrative state has hitherto done a fairly poor job in making even its press releases comprehensible.[224] The ill-starred executive summaries mandated by Cass Sunstein turned out to be if anything less comprehensible than the preambles they supplemented;[225] and almost none of them can be understood, based on latest comprehensibility statistics, by anyone without a college education.[226] Indeed, the so-called Volcker Rule preamble (concerning the extent to which banks could invest certain types of money entrusted to them) blandly declared, having dispensed with the Executive Summary requirement without comment, that "the final rule is written plainly and clearly."[227] Readers are invited to judge the matter for themselves.[228]

That said, it is perfectly possible for an agency to render an appropriately comprehensible communication with the general population when the spirit moves it. Consider the Internal Revenue Service (IRS), which despite its reputation for obscurantism has taken great strides in the effort to communicate the bewildering complexity of the tax code to the public. Joshua Blank and Leigh Osofsky document the various internal guidelines and structures established by the IRS to ensure that communications made to the general public are comprehensible.[229] They offer the following example of the IRS rendering a regulation in a comprehensible fashion (here, a definition of "improvements," which cannot be deducted from business income taxes, rather than "repairs," which can). I have set out the regulation in full here, followed by the IRS's explanation as quoted by Blank and Osofsky.
The regulation:

---

224. For a history of attempts to impose plain language requirements on rulemaking explanations, see Farina et al., *supra* note 204, at 1367–79.

225. *Id.* at 1405.

226. *Id.*

227. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536, 5774 (Jan. 31, 2014). Plain language is an (unenforced) statutory requirement for banking regulations. *See* 12 U.S.C. § 4809 (2012).

228. A flavor of the work follows:

> The prohibition contained in § 255.3(a) does not apply to the risk-mitigating hedging activities of a banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings of the banking entity and designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings.

17 C.F.R. § 255.5 (2014).

229. Joshua D. Blank & Leigh Osofsky, *Simplexity: Plain Language and the Tax Law*, 66 EMORY L.J. 189, 197–200 (2017).

> *Requirement to capitalize amounts paid for improvements*. Except as provided in paragraph (h) or paragraph (n) of this section or under § 1.263(a)–1(f), a taxpayer generally must capitalize the related amounts (as defined in paragraph (g)(3) of this section) paid to improve a unit of property owned by the taxpayer.

The IRS's explanation:

> *Improvements*. Improvements are generally major expenditures. Some examples are new electric wiring, a new roof, a new floor, new plumbing, bricking up windows to strengthen a wall, and lighting improvements.
>
> Generally, you must capitalize the costs of making improvements to a business asset if the improvements result in a betterment to the unit of property, restore the unit of property, or adapt the unit of property to a new or different use.
>
> However, you can currently deduct repairs that keep your property in a normal efficient operating condition as a business expense. Treat as repairs amounts paid to replace parts of a machine that only keep it in a normal operating condition.[230]

This is much more comprehensible. But the IRS example raises the second concern I articulated at the start of this sub-part, namely the need to ensure that explanations are candid. When attempting to accurately but eventfully discuss a complex regulation, agencies run the risk of creating "simplexity." Simplexity is the phenomenon by which an underlying, complex set of facts is explained in a way which misleads the reader as to those complexities. In the statements above, the shorter and simpler explanation arguably misrepresents the actual tax law, which might allow major renovations that double as repairs to be deducted.[231]

A more accessible, if extreme, example of simplexity is the recent book *Thing Explainer: Complicated Stuff in Simple Words*,[232] which seeks to explain complex concepts using only the 1,000 most common words in the English language. One of these concepts is the U.S. Constitution, which is elegantly compressed on to a single page.[233] But simplicity and concision led the author astray: he explains the Eleventh Amendment as saying: "People can't have law fights with other states—only their own," which is almost, though not quite, the opposite of what the Eleventh Amendment means in practice.[234]

---

230. *Id.* at 191, 214–17. The full Internal Revenue Service explanation was taken from I.R.S. Pub. 535 (2016), https://taxmap.ntis.gov/taxmap/pubs/p535-001.htm.

231. Blank & Osofsky, *supra* note 229, at 214–17.

232. RANDALL MUNROE, THING EXPLAINER: COMPLICATED STUFF IN SIMPLE WORDS (2015).

233. *Id.* at 14.

234. *See* Hans v. Louisiana, 134 U.S. 1, 13 (1890) (sovereign immunity extends to suits against a state by its own citizens). Though in fairness Mr. Munroe, a non-lawyer, can hardly be blamed for thinking the text of the Eleventh Amendment actually means what it says. *See*

Simplexity can be viewed as another branch of the candor concern discussed in the previous section. As Blank and Osofsky note, the IRS's publicly-accessible concise explanations invariably explain the law in such a way as to discourage those who rely on those explanations from deducting expenses—in other words, the IRS is simplifying the law with a view to depriving ordinary taxpayers of the loopholes Congress (probably) meant for them to exploit.[235] This has a differential impact: once again, those who can bear the information costs of determining the *real* regulation are placed in a financially superior position when compared to those who cannot.

But we can be candid about simplexity too. Techniques abound that help signal the existence of more information for the readers for which the information is relevant.[236] The Eleventh Amendment can, if we soothe our textualist consciences for a moment,[237] be explained accurately without sacrificing simplicity or concision as, for example, "People can't have law fights with a state unless the state says so, most of the time." In this explanation, "most of the time" signals that more information is available if the reader cares to access it.

Likewise, the IRS example above would have been made accurate, with respect to the tax code underpinning it, if it had included the sentence: "If something you already used stopped working or broke and you repaired it, it may count as a repair and not an improvement." Candor does not, as discussed above, require a comprehensive disclosure of information—instead, it requires that the substance of the decision be revealed under conditions of publicity the creators of the decision do not control (a general statement, if you will). Just as a politician's candid statement (for example, a confession of being corrupt) serves as a signal of a much more complex set of background facts (the details of the confessed corruption) but still meets the requirements of the politics of candor, so too here an agency's signal of more complexity behind the scenes does not much undermine the candor of its statement, if at all. Indeed, it enhances it.

MUNROE, *supra* note 232, at 14. *See* Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 820–21 (1999) (noting with disapproval the completely atextualist basis of Supreme Court Eleventh Amendment precedent).

235. Blank & Osofsky, *supra* note 229, at 204.

236. This footnote, for example, contains extraneous data that the reader will only observe and process if she is sufficiently engaged by the question of just what these techniques are. Candor requires me to report that additional techniques are not forthcoming in this footnote, but the footnote itself stands as such a technique, thus providing its own support for its own proposition. *See generally* Randall Munroe, *Self-Description*, XKCD, (Oct. 11, 2017), https://xkcd.com/688/.

237. *But see* Rappaport, *supra* note 234.

Our desiderata for the popular preamble then stand at the following: (1) that it be candid, (2) that it be comprehensible, most likely through the employment of simple language, and (3) that it avoid simplexity by fairly representing complexity or signaling the existence of complexity.

In addition, there is nothing about the word "statement" that requires the statement be in writing—agencies might fulfill their preamble requirements by producing a short animated video describing in a general way the basis and purpose of the rules, with indications of places where more detail is available. Indeed, as Elizabeth Porter and Kathryn Watts have documented, several agencies have begun to employ graphical representations of their regulations in an effort to improve public understanding of agency work.[238] The potential for innovation will surely increase as the Federal Register finally stops being printed on physical media except for archival purposes,[239] thus allowing agencies to frolic in the open expressive pastures of the Internet.

Much more work remains to be done to fully realize the candor required in a popular preamble in the context of the administrative process. I hope to have shown, however, some outline of the road to follow and suggest that it is a road capable of being traversed.

CONCLUSION

As we have seen, the prolix preamble is truly the worst of all worlds: created by accident, contrary to the intent of Congress, it survives only because of a century-old doctrine that should never have been applied to preambles in the first place. We have seen the subtle but profound costs of the prolix preamble: diminishing to the point of nothingness the popular accountability on which the APA was based. And we have seen that although conventional remedies are unlikely to redress these costs, with some inventiveness and adventurism from the courts or from Congress it would be possible to reclaim the preamble for the public and—though not without difficulty and complication—at least begin to move it in a democratic direction.

In making this argument, I want to underline the broader implications it has for the administrative process more generally. Since the APA was passed,

---

238. Porter & Watts, *supra* note 42, at 1198–1218 (2016).

239. Robert Jackel, *Federal Register Will No Longer Be Printed, Obama Says*, REG. REV. (June 22, 2011), https://www.theregreview.org/2011/06/22/federal-register-will-no-longer-be-printed-obama-says/. For statutory reasons, however, a limited print run still occurs. However, the *Federal Register 2.0* project is already making impressive strides in the direction of greater accessibility, though the content of the *Register* remains—because of the Show Your Working doctrine—sadly incomprehensible. *See* David Ferriero, *Federal Register 2.0*, WHITE HOUSE (July 26, 2010, 12:53 PM), https://www.whitehouse.gov/blog/2010/07/26/federal-register-20 (announcing the project). This is a pig and lipstick situation.

administrative law has depended for its legitimacy on the twin ideas of transparency and participation of a certain sort. Transparency has meant revealing as much information as possible to the public, but participation has, ironically, involved engaging only those parts of the public that have useful things to say to comment directly to the agency. The more useful commentators there are, the better, at least as administrative law tells the tale. Omitted from any of these accounts has been the lived experience of the vast majority of persons affected by agency rulemaking, who have been disabled from any vocal engagement with the administrative process because they are unable to see, in an unmediated way, what the agency has actually done.

Viewing the administrative process through the lens of popular accountability allows us to start thinking critically about how the administrative process might be made *practically* more democratic, rather than engaging with essentially fictional constructs of representational democracy or participatory democracy that, whatever their theoretical appeal, do not in any sense resemble democracy as it is practiced in the American political system today.

Just as importantly, applying popular accountability to the administrative process ought to remind us about the essential importance of *candor*, not just transparency, in keeping an agency accountable in any normatively rich sense of the term. There is a natural human tendency to be very impressed with any claim presented at great length and to laud those who are capable of writing extremely lengthy works.[240] Closer to home, even the Supreme Court is not immune to the allure of prolixity—once opining that a Court of Appeals might have justified its decision if only it had written an opinion *as long* as the concurrence in that case penned by Justice Breyer.[241] The Founders themselves placed a premium—literally—on lengthy documents by linking the compensation of the Secretary of State with the number of pages of documents he generated (and requiring each page to have at least one hundred words).[242]

Yet, in all of these instances where length itself was held up as a virtue of a public document, what could be said to really be occurring was spectacle—

240. Of course, this is a generalization. Indeed, the single most prolific academic author of all time—one Yuri Struchkov, of Institute of Organoelemental Compounds in Moscow—published nearly 948 scientific papers between the years 1981 and 1990, averaging more than one every 3.9 days. He was nonetheless of relatively minor note in his field. *See* Marc Abrahams, *948 Titles in Search of an Author*, *in* IG NOBEL PRIZES: THE ANNALS OF IMPROBABLE RESEARCH 286–88 (2002) (noting that Struchkov nonetheless won the 1992 Ig Nobel Prize in Literature).

241. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999).

242. *See* An Act to Provide for the Safe-Keeping of the Acts, Records and Seal of the United States, and for other Purposes, 1 Stat. 68, ch. 14, § 6 (1789).

the spectacle of excessive information—standing in for the information itself.[243] Just as a politician disempowers citizens when she asserts control over the conditions of her own publicity,[244] so too are the public disempowered when agencies prepare explanations of their activities too lengthy to be effectively read. This is not merely because the explanation then *is not* read, but because the length of the document is a means of substituting substance for spectacle. A first step to ridding agencies of this control over their own publicity—and thus remedying somewhat the deficit of candor in their explanations—is to enhance the role of the concise general statement as a site for candor rather than performative prolixity.

In its own way, restoring "concise" in an agency preamble would itself be a candor-enhancing act, an eventful recognition of a new kind of responsibility on the part of the government to empower the public at large. As we continue to confront democratic questions arising from administrative actions and the administrative process, it behooves us to consider whether we ought to expand the purposes of administrative explanations beyond simply judicial review and pluralism toward the public at large—and then craft explanations truly fit for that purpose.

243. Indeed, the spectacle of document size standing in for document substance perhaps reached its apogee this year, when the President-elect chose to demonstrate the extent to which he was handing over control of his financial interests by gesturing to a very large (and quite possibly blank) pile of papers. Jonathan Lemire, *Contents of Trump's Folders Spark Speculation*, ASSOC. PRESS (Jan. 12, 2017), https://apnews.com/50b799be59cf4cf9b9b4e1341462428c.

244. GREEN, *supra* note 135, at 157–66.