

ARTICLES

RULES ABOUT RULEMAKING AND THE RISE OF THE UNITARY EXECUTIVE

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The unitary executive is no longer a theory; it is real. The President operates on the premise that, because all executive power is vested in him, his appointees merely assist him in performing his constitutional duty. The rise of the unitary executive is not a new phenomenon, but it has reached a new pinnacle. This Article demonstrates that among the contributing causes to that climb are the judicial rules about rulemaking.

The provisions governing agency rulemaking in the Administrative Procedure Act of 1946 (APA) are barebones. Congress intended to leave much to agency discretion, preferring agency decisionmaking to the autocracy recently defeated in Europe. In the seventy years since then, Congress has not revised the APA's rulemaking provisions significantly. In the absence of legislative updating, the courts stepped in and imposed rulemaking requirements that contradict the APA's text and history. Rulemaking has become difficult at least in part due to the increasingly onerous judicial rules about rulemaking. As a consequence, agencies are unable to respond to elections and changed circumstances in a timely and effective manner. In recent years, as Congress and agencies have lost their policymaking agility, the President has stepped in to make key decisions himself.

The judicial rules about rulemaking were well intentioned, but their unintended consequences have reached a frightening extreme. Our nation is moving toward the kind of executive authoritarianism the APA was designed to avoid. The courts should retreat and take refuge in the text and history of the APA until Congress amends it, and Congress should require rulemaking procedures that are effective, but not overly burdensome.

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I. INTRODUCTION

The theory of the unitary executive is a theory no longer. The President now operates on the premise that, because the Constitution vests all executive power in him, his appointees merely assist him in performing his constitutional duty to take care that the laws are faithfully executed. Even statutory delegations to a particular officer are read as within the President's authority. The rise of the unitary executive is not a new phenomenon. Each President exceeds his predecessor's control of the Fourth Branch. "Presidential administration"¹ is morphing into autocracy.²

Among the many causes of this devolution is the fact that agencies have lost their policymaking agility. It is commonly accepted that congressional

1. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2310 (2001).

2. See *infra* Section IV.C.2.

inertia foments presidential policymaking. Agency inertia does as well.³ Thus, while President Reagan left immigration policy to Congress, President Obama executed immigration policy by redirecting agency enforcement priorities, and President Trump did it by Proclamation.⁴ As Congress and federal agencies loosen their grip on policymaking, the President picks up the slack.⁵

Agencies are having an increasingly difficult time responding to changing circumstances and changing political realities in a timely and effective manner. A heavy, patchwork quilt of judicially created administrative law now overlays agency functions diminishing their policymaking agility. One thread in that quilt is the judicial rules of rulemaking.

The Administrative Procedure Act of 1946 (APA) left rulemaking procedure largely to agency discretion. The requirements were clear and simple and did not inspire much conflict. Members of Congress on both sides of the aisle preferred agency rulemaking to the autocracy recently defeated in Europe. The fear that that kind of government might take hold in the United States inspired the APA.⁶

Times changed. In the 1960s and 1970s, Congress gave agencies the duty to write rules that would have enormous impacts on the economy and people's lives. But Congress did not update the APA. So the courts did it themselves. Courts, however, are institutionally unsuited for balancing the myriad concerns that must be weighed in designing administrative procedure and anticipating the consequences of various alternatives.⁷ The courts' attempts to remedy the perceived problems with agency rulemaking had unanticipated consequences. Among other things, those rules have contributed to rulemaking ossification, which in turn contributes to presidential direct action.⁸

My goals in this Article are two-fold. First, I will provide a definitive account of why the judicial rules about rulemaking conflict with the text and history of the APA and why that is so problematic. Second, I will make a unique contribution to the discourse on rulemaking ossification by showing that it has contributed to the rise of the unitary executive. I want to pull on one thread in the quilt of judicially created administrative law in the hope that the quilt will begin to unravel and inspire Congress to resume weav-

3. *See infra* Section IV.C.1.

4. *See infra* text accompanying notes 347–352.

5. *See infra* text accompanying notes 330–332, 361.

6. *See infra* Part II.

7. *See infra* Section IV.A.

8. *See infra* Section IV.B.

ing.⁹

Part II of this Article builds a foundation in history by telling the story of Section 4 of the APA. The APA followed years of deliberation and debate. It was a monumental compromise, and Congress necessarily left much of the Act vague. The rulemaking provisions, however, are quite clear, and they did not spark much controversy.

Part III explains how the judicial rules about rulemaking contradict the text and history of the APA. The rules requiring agencies to produce a rulemaking record, provide notice of the information considered in drafting a proposed rule, disclose *ex parte* contacts, and accompany the final rule with a lengthy explication and response to comments not only lack grounding in the text, but they contradict Congress's considered and uniform judgment.

Part IV elucidates the unintended consequences of those rules. It begins by explaining the courts' institutional incapacity for fashioning rules of administrative procedure. Then it explains how these rules, despite their well-intentioned origins, have contributed to rulemaking ossification, which in turn has contributed to the devolution from presidential administration to the very autocracy the Greatest Generation¹⁰ designed the APA to avoid.

II. THE APA'S RULEMAKING PROVISIONS

I begin with a detailed statutory history of the APA's rulemaking provisions. As I have explained elsewhere, the importance of that history exceeds that of a typical legislative history; it is critical to understanding the APA. The APA is a superstatute that arose from an exceptional legislative effort.¹¹ William Eskridge and John Ferejohn established that courts should respect the deliberation underlying superstatutes, taking "the deliberative process seriously, as having significant normative force," and defer to "the deliberated views of Congress and the President."¹² The APA is an unusual superstatute, however, in that its implementation is not delegated to a single agency. Thus, unlike other superstatutes, no single agency interprets the Act on an ongoing basis, updating its application in a deliberative web with

9. *Cf.* JONATHAN SAFRAN FOER, *EXTREMELY LOUD AND INCREDIBLY CLOSE* 17 (2005) ("I wanted to pull the thread, unravel the scarf of my silence and start again from the beginning . . .").

10. TOM BROKAW, *THE GREATEST GENERATION* xxx (1998) (dubbing the people who came of age during World War II "the greatest generation any society has ever produced").

11. *See generally* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 *IND. L.J.* 1207 (2015) (discussing the history of the Administrative Procedure Act (APA)).

12. WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 435–36 (2010).

Congress, the President, the courts, and the public.¹³ Consequently, unlike other superstatutes, interpretations of the APA may not exceed the scope of the text Congress enacted and the President signed. To determine the scope of the text in turn requires a close examination of the full context and history of each provision of the APA.¹⁴

The history below shows that, as compared to the rest of the APA, the rulemaking provisions largely were undisputed. When Congress first began to debate administrative reform in the 1930s, the debate focused on adjudication and judicial review. Early on, the only real controversy about rulemaking concerned the burden of requiring agencies to hold public hearings in all rulemakings. That controversy dissipated by the time the Attorney General's Committee issued its report in 1940. Even the conservative minority of that Committee advised against imposing such rigid requirements across the board. Congress left rulemaking procedure largely to agency discretion.

A. Before 1937

Before the APA, agencies employed a "multitudinous variety of procedures" for promulgating rules with "no unifying principle."¹⁵ Though some agencies consulted with interested parties in rulemaking,¹⁶ generally statutes did not specify rulemaking procedures or require notice to interested parties.¹⁷

13. See Kovacs, *supra* note 11, at 1238–39.

14. *Id.* at 1250–51.

15. A.H. Feller, *Administrative Law Investigation Comes of Age*, 41 COLUM. L. REV. 589, 595 (1941).

16. See COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 103 (1941) [hereinafter AG'S COMMITTEE REPORT]; JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 310 (2012) (noting that before the APA, some agencies informed the public of rules and guidelines and consulted with interested groups); see also TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31 (1947) [hereinafter AG'S MANUAL] (explaining that federal agencies already "extensively employed" informal rulemaking procedures like "informal hearings (with or without a stenographic transcript), conferences, . . . submission of written views").

17. See AG'S COMMITTEE REPORT, *supra* note 16, at 102; Symposium, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 520 (1986); *Report of the Special Committee on Administrative Law*, 62 ANN. REP. A.B.A. 789, 809 (1937) ("Generally speaking, the practice in this country has not been to issue rules and regulations after notice and hearing of interested parties.").

As I have detailed elsewhere,¹⁸ the drive for administrative reform started to gain steam in 1933 when Franklin Delano Roosevelt became president and kicked off the New Deal. The American Bar Association (ABA) responded by establishing a Special Committee on Administrative Law.¹⁹ That Committee played a “pivotal role” in the development of the APA.²⁰

The Committee’s early efforts focused on agency adjudication.²¹ The Federal Register Act of 1935 implemented the Committee’s recommendation that agencies be required to publish their rules in the Federal Register.²² But it was not until 1937 that the Committee first addressed agency rulemaking procedures.²³ By then the Supreme Court had begun to approve New Deal programs; recession had set in; and President Roosevelt’s court-packing plan had failed.²⁴ “Roosevelt suddenly was not infallible.”²⁵

At the same time, the liberal faith in agency expertise was giving way to a fear that agencies would become tools of autocracy.²⁶ As Reuel Schiller explained, by the mid-1930s, Americans were aware of “the true dimensions of European totalitarianism.”²⁷ By the late 1930s, Americans had begun to fear that President Roosevelt would go down the same road.²⁸ Indeed, those fears even spread to New Deal supporters.²⁹ “That shift put wind in the sails of administrative reform in Congress.”³⁰

18. See Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 683–84 (2010).

19. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1569–70 (1996).

20. Kovacs, *supra* note 18, at 682.

21. Shepherd, *supra* note 19, at 1573, 1575, 1583 (“The committee had almost completely ignored rulemaking, although it was the category of agency activity by which agencies had the greatest impact.”).

22. Pub. L. No. 74-220, ch. 417, 49 Stat. 500 (codified as amended at 44 U.S.C. §§ 1501–1511).

23. See Shepherd, *supra* note 19, at 1583.

24. See *id.* at 1580–82; Kovacs, *supra* note 18, at 683–84.

25. Shepherd, *supra* note 19, at 1582.

26. See Kovacs, *supra* note 18, at 683.

27. See Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II 188 (Daniel R. Ernst & Victor Jews eds., 2002) [hereinafter Schiller, *Reining*]; see also Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 77 (2000) [hereinafter Schiller, *Free Speech*].

28. See Schiller, *Reining*, *supra* note 27, at 188–89.

29. *Id.* at 189; Schiller, *Free Speech*, *supra* note 27, at 85–86.

30. Kovacs, *supra* note 18, at 684.

B. The Walter-Logan Bill

The ABA Committee proposed a bill in 1937 that would have required all agencies to implement “every statute affecting persons or property” through rules.³¹ Rulemaking would have to be completed within one year and “after the publication of notice to and hearing interested parties.”³² The Committee chair explained that the proposal was intended “to enable the citizen and his attorney to find out in advance of litigation or in advance of taking action what the administrative officers of the government or of the particular agency understand the law to be.”³³ The point was to give “businessmen . . . more certainty.”³⁴ Requiring agencies to issue rules also would avoid separation of powers problems: “law-making, whether by statute or rules and regulations, is essentially a political function, and to require the courts to legislate from case to case in filling in the details of statutes is to bring them into conflict with the other two political branches of our Government.”³⁵ Lastly, requiring notice and hearings before issuing rules “would be helpful to the government officers” and prevent agencies from exceeding their delegated powers.³⁶

The following year, the Committee urged the ABA Board of Governors to approve its proposal. Among other things, the Committee implied that the Roosevelt Administration was starting to resemble the Soviet Union’s Marxist dictatorship.³⁷ “The Committee’s bitter critique of the administrative state was suffused with accusations of totalitarianism.”³⁸ The Board of Governors approved the proposal in 1938.³⁹

After Congressman Francis Walter and Senator Mills Logan introduced modified versions of the ABA’s proposed bill, it came to be known as the Walter-Logan bill.⁴⁰ The bill passed both houses of Congress in 1940 with the support of Republicans and conservative Democrats.⁴¹ Among other

31. *Report of the Special Committee on Administrative Law*, *supra* note 17, at 846.

32. *Id.*

33. *Id.* at 263; *see also id.* at 813 (Committee report).

34. *Id.*

35. *Id.* at 813.

36. *Id.* at 809–10.

37. *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 343 (1938); *see also* Reuel E. Schiller, *The Era of Difference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 422–23 (2007).

38. Schiller, *Free Speech*, *supra* note 27, at 86.

39. *Report of the Special Committee on Administrative Law*, *supra* note 37, at 334.

40. *See* Shepherd, *supra* note 19, at 1598; *see also* S. 915, 76th Cong. (1939); H.R. 6324, 76th Cong. (1939).

41. 86 CONG. REC. 4742, 13,747–48, 13,815–16 (1940); *see also* Shepherd, *supra* note

things, it required agencies to issue rules within one year of the enactment of any new statute.⁴² New rules or amendments of existing rules that “fill[ed] in the details of any statute affecting the rights of persons or property” could be issued only following notice and public hearings.⁴³ Notice had to be published in the Federal Register, state the date of the hearing, and set forth the language of the proposed rule.⁴⁴

At the House Judiciary Committee’s hearings on the bill, the chair of the ABA Committee, O.R. McGuire, testified in support of the bill, reiterating the Committee’s report.⁴⁵ Numerous agencies objected that the bill’s rule-making provisions were too ambiguous because the text did not specify the types of regulations covered.⁴⁶ Agencies also objected that the public notice and hearing requirement would impose a heavy burden and expense on agencies and prevent them from performing their functions.⁴⁷ The Department of Agriculture thought that requirement was “nothing short of

19, at 1619, 1622.

42. H.R. 6324 § 2(b).

43. *Id.* § 2(a).

44. *Id.* In its entirety, § 2(a) provided:

Hereafter administrative rules and all amendments or modifications or supplements of existing rules implementing or filling in the details of any statute affecting the rights of persons or property shall be issued by the head of the agency and by each independent agency respectively charged with the administration of any statute only after publication of notice and public hearings. (1) Such notice shall be published in the Federal Register, shall state the date of the public hearing, which shall be not less than ten days after the date of the notice, and shall set forth the language of the rules proposed to be adopted.

Id. (emphasis omitted).

45. *Bills to Provide for the More Expeditious Settlement of Disputes with the United States, and for Other Purposes: Hearings on H.R. 4236, HR 6198, and H.R. 6324 Before the Subcomm. No. 4 of the H. Comm. on the Judiciary*, 76th Cong. 23–24, 26 (1939) (opining that hearings would give agencies and interested parties the benefit of hearing each other’s views and make everyone involved “more tolerant and considerate;” ensure that agencies stay within the bounds of their statutory authority; and avoid concrete controversies, delays, and separation of powers problems).

46. *Id.* at 70 (Interior); *id.* at 77 (Agriculture).

47. *Id.* at 39 (SEC, the provision for hearings on existing rules might “tie up the work of administrative agencies for months, even years, to come”); *id.* at 66–67 (FTC, rules hearings would leave little time for violations in specific cases); *id.* at 69 (Interior, “lays burdens of almost inestimable magnitude upon the executive branch of the Government”); *id.* at 71 (Interior, “heavy burden” and “expense”); *id.* at 102 (War, “tremendous additional burden”); *id.* at 105 (Treasury, “undue burden”); *id.* at 109 (FCC, “render impossible the efficient performance” of the agency’s functions).

fantastic” when applied to statutes that affect numerous individuals.⁴⁸ Several agencies believed that public hearings were unnecessary because they could better obtain the expert knowledge they needed through informal conferences or written comments.⁴⁹ Others were concerned that opponents of proposed regulations could filibuster public hearings, preventing agencies from issuing regulations.⁵⁰ The War Department minced no words in declaring the bill “gravely subversive . . . , destructive of efficiency . . . , obstructive to progress . . . , and generally disastrous.”⁵¹

In its favorable report, the Senate Judiciary Committee reiterated the ABA Committee’s concern about separation of powers. The Committee explained that agencies had failed to exercise their discretion to issue rules interpreting statutes, leaving that task to the courts.⁵² Case-by-case interpretation may have been acceptable, the Committee opined, when agencies “were not concerned with present-day economic and social problems.”⁵³ Rules would inform individuals of what the agency believed the statute to mean, provide consistency, and provide “great assistance to the court in reaching a correct interpretation.”⁵⁴ Yet, although the Committee was willing to force agencies to issue rules,⁵⁵ it professed a desire “to leave the administrative agencies as free as possible to function consistent with the supremacy of the law.”⁵⁶

The Senate Committee defended the requirement for public notice and hearings, explaining that, in the states and federal agencies that already provided such process, it had “operated to make the rules more reasonable and to reduce litigation to a minimum.”⁵⁷ The Senate Committee further

48. *Id.* at 78 (Agriculture).

49. *Id.* at 38 (SEC, agencies would not acquire the necessary “detail of expert knowledge” at a hearing); *id.* at 70 (Interior, the agency could obtain the same results as public hearings by soliciting written comments or having informal consultations); *id.* at 109 (FCC, public hearings would have “practically . . . no value,” and it was better to proceed by conferences with experts).

50. *Id.* at 70 (Interior); *id.* at 111 (Federal Power Commission).

51. *Id.* at 102 (War).

52. S. REP. NO. 76-442, at 11 (1939). The House Judiciary Committee report parroted the Senate report and added: “This has involved the courts in serious conflicts with administrative agencies and with pressure groups friendly to such agencies.” H.R. REP. NO. 76-1149, at 5 (1939).

53. S. REP. NO. 76-442, at 11.

54. *Id.*; see also H.R. REP. NO. 76-1149, at 5.

55. The bill was intended to require agencies to issue rules to “fill[] in the details of the statutes” they administered. S. REP. NO. 76-442, at 6.

56. *Id.* at 14; see also H.R. REP. NO. 76-1149, at 8.

57. S. REP. NO. 76-442, at 12. The House report did not include this discussion.

reasoned that, because agencies were exercising delegated quasi-legislative authority from Congress, they should employ the same procedures as Congress.⁵⁸ Finally, the Senate Committee said that public notice and hearings would give agencies the benefit of “the viewpoints and experience” of those who might be affected by the rules and give advance notice of the agency’s position to the public and the courts.⁵⁹

The minority of the House Judiciary Committee included a report objecting to the “heavy unnecessary burden” of providing a public hearing before adopting any rule “no matter of how minor a character” and regardless of the suitability of the subject matter for public discussion.⁶⁰ Public hearings, the minority believed, would expose agencies to “obstructive and dilatory tactics” and prevent prompt action when needed.⁶¹

When the Walter-Logan bill hit the floor, members of Congress debated the judicial review provisions extensively, but mentioned rulemaking procedure only a few times.⁶² Some members objected to providing public notice and hearings because it would be excessively burdensome.⁶³ Representative Sabath pointed out that such procedures would be unsuitable for certain types of rules and impractical in situations where prompt rulemaking was needed.⁶⁴ Representative Sabath also objected that the bill would “leave the administration of a statute open to obstructive and dilatory tactics on the part of interests who are opposed to its effective enforcement and who might intentionally prolong hearings inordinately.”⁶⁵ Congressman Cochran opposed the Senate amendment requiring notice of the language of a proposed rule because often agencies hold “informational hearings” to determine if a rulemaking is necessary; “It would defeat the whole purpose of such a hearing if the agency had to issue in advance a proposed draft of a rule.”⁶⁶ Congressman Bulwinkle thought the bill “might result in ill-considered and hasty regulations, which could be corrected only after the

58. *Id.*

59. *Id.*

60. H.R. REP. NO. 76-1149, pt. 2, at 6.

61. *Id.*

62. *See* Shepherd, *supra* note 19, at 1610 (“proponents focused on the benefits of increased judicial review”); *id.* at 1613 (“Opponents concentrated their arguments on the bill’s provision of broader judicial review.”).

63. 86 CONG. REC. 4738–39 (1940).

64. *Id.* at 4739.

65. *Id.*; *see also id.* at 4600 (statement of Rep. Ford) (requiring public hearings would mean that “the great and powerful groups . . . could employ batteries of high-priced lawyers who, by interposing unlimited objections, could thus block all restraint while the rank and file . . . would be barred from being heard”).

66. *Id.* at 13,808.

hearing and notice procedure, and so ad infinitum.”⁶⁷ Congressman Walter countered that if Congress could manage to hold hearings on proposed statutes, “certainly we ought to insist that hearings be held when rules are being considered.”⁶⁸

The bill’s supporters echoed the ABA’s rhetoric. The floor debates “were riddled with comparisons of the administrative state to fascist and communist governments and accusations that administrative agencies were [being] used to advance [Roosevelt’s] totalitarian ambitions.”⁶⁹ Opponents answered “in equally hyperbolic terms.”⁷⁰

The Walter-Logan bill passed the House by a vote of 282 to 96.⁷¹ Voting in favor were “all but two Republicans, 83% of Southern Democrats, and 41% of Northern Democrats.”⁷² All voting Republicans and ten conservative Democrats passed the bill in the Senate by a vote of 27 to 25.⁷³ The House, with many members absent, concurred in the Senate’s amendments by a vote of 176 to 51.⁷⁴

President Roosevelt vetoed the bill. He objected that the bill would undermine agency adjudication and drive too many disputes into court, and he thought the bill would have an unacceptable effect on defense functions.⁷⁵ The President preferred to await the report of the committee he had asked the Attorney General to form to study administrative reform “before approving any measure in this complicated field.”⁷⁶ He did not mention rulemaking.

The House failed to override the President’s veto when “many conservative Democrats . . . defected from their coalition with Republicans.”⁷⁷

C. *The Attorney General’s Committee*

The Attorney General’s Committee on Administrative Procedure sub-

67. *Id.* at 4666.

68. *Id.* at 4667.

69. Schiller, *Free Speech*, *supra* note 27, at 87.

70. Kovacs, *supra* note 18, at 686.

71. 86 CONG. REC. 4742–44 (1940).

72. Shepherd, *supra* note 19, at 1619.

73. 86 CONG. REC. 13,747–48 (1940); *see also* Shepherd, *supra* note 19, at 1622.

74. 86 CONG. REC. 13,815–16 (1940).

75. Franklin Delano Roosevelt, *The President Vetoes the Bill Regulating Administrative Agencies, Note to the House of Representatives (Dec. 18, 1940)*, in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 616–17, 621 (1941).

76. *Id.* at 620.

77. Shepherd, *supra* note 19, at 1630; 86 CONG. REC. 13,953 (1940).

mitted its report about a month later.⁷⁸ The report included two proposed bills: one from the liberal majority and one from the conservative minority.⁷⁹ In addition, the most conservative member of the committee, Duncan Lawrence Groner, then-Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit,⁸⁰ submitted a bill “which combined the most restrictive sections of the Walter-Logan bill and the minority bill.”⁸¹

The majority professed a desire to “improve, without rigidifying, the rule-making process by emphasizing the importance of outside participation prior to the issuance of rules.”⁸² The majority thought it “essential” that the public participate in rulemaking to inform the agency and protect private interests.⁸³ Yet the majority bill “imposed no additional controls on agency rulemaking.”⁸⁴ It required agencies to designate someone to “expedite” rulemaking “subject to the control and supervision of the agency” and make their regulations available to the public,⁸⁵ but it did not mandate rulemaking or any particular rulemaking procedure.

The minority bill declared a policy that agencies “shall issue rules” through procedures designed to “secur[e] the participation of interested parties” and “shall . . . prefer . . . rule making” to case-by-case adjudication.⁸⁶ The bill required agencies to issue substantive rules “as rapidly as deemed practicable,” but it softened that requirement by specifying that agencies only had to issue rules “so far as applicable or appropriate in view of the legislation and subject matter.”⁸⁷ Judge Groner’s proposal reiterated the policy statement and rulemaking requirement, but omitted the softening caveat.⁸⁸

The minority bill required agencies to give notice of proposed rulemaking “wherever practicable,” inviting interested parties “to make written

78. AG’S COMMITTEE REPORT, *supra* note 16.

79. *Id.* at 191, 217; *see also* Shepherd, *supra* note 19, at 1632.

80. Daniel R. Ernst, *Dicey’s Disciple on the D.C. Circuit: Judge Harold Stephens and Administrative Law Reform, 1933–1940*, 90 GEO. L.J. 787, 788 (2002); Blake B. Hulnick, *Consumer Crusade: Justice Hugo Black As Senate Investigator*, 24 J.S. LEGAL HIST. 69, 82 n.86 (2016).

81. Shepherd, *supra* note 19, at 1636; *see also id.* at 1633. Judge Groner’s bill became S. 918, 77th Cong. (1941). Shepherd, *supra* note 19, at 1636. The majority and minority bills became S. 675, 77th Cong. (1941), and S. 674, 77th Cong. (1941), respectively. Shepherd, *supra* note 19, at 1636.

82. AG’S COMMITTEE REPORT, *supra* note 16, at 6.

83. *Id.* at 103.

84. Shepherd, *supra* note 19, at 1634.

85. AG’S COMMITTEE REPORT, *supra* note 16, at 195.

86. *Id.* at 224–25.

87. *Id.* at 225–26.

88. S. 918, 77th Cong. §§ 300, 302 (1941).

suggestions or to participate in rule-making proceedings.”⁸⁹ The notice had to identify the “issues or scope of the proposed rules . . . with as much particularity and definiteness as deemed practicable.”⁹⁰ The bill allowed agencies to give notice by providing “tentative drafts of rules” or “reports or summaries of hearings, investigations, or conferences.”⁹¹ Judge Groner’s proposal was similar, except that it specified that notice of a proposed rulemaking had to “set forth the substance of the rules proposed to be adopted.”⁹²

The minority bill authorized agencies to employ, as “deemed appropriate by them,” written comments, consultation and conferences, informal hearings, or formal hearings.⁹³ The minority advised against requiring agencies to use “any one procedure” preferring instead to give them “wide discretion” over rulemaking.⁹⁴ Imposing rigid procedural requirements, as the Walter-Logan bill would have, would lead agencies either to avoid rulemaking or to issue “secret rules.”⁹⁵ In contrast, Judge Groner would have required agencies to provide public hearings “if requested.”⁹⁶

By the end of 1941, the United States was at war, and Congress suspended its work on administrative reform.⁹⁷ I have explained elsewhere the developments during the war years that “paved the path to the APA.”⁹⁸ In short, congressional Democrats lost some political power; Roosevelt retreated from the New Deal; and the ABA withdrew from its previously “combative approach.”⁹⁹ The federal bench had shifted to the left, making judicial review less of a hot button issue on both sides of the aisle.¹⁰⁰ The federal bureaucracy had exploded in size and reached the lives of more individuals through price controls and rationing, which highlighted the need to rein agencies in.¹⁰¹ As Americans’ faith in expertise continued to wane,

89. AG’S COMMITTEE REPORT, *supra* note 16, at 228.

90. *Id.*

91. *Id.*

92. S. 918 § 303.

93. AG’S COMMITTEE REPORT, *supra* note 16, at 228–29.

94. *Id.* at 229.

95. *Id.*

96. S. 918 § 303.

97. *See* Shepherd, *supra* note 19, at 1641.

98. *Id.*

99. *Id.* at 1645–46; *see also* Kovacs, *supra* note 18, at 694–96.

100. Kovacs, *supra* note 18, at 694.

101. *Id.* at 695; *see also* S. REP. NO. 79-752 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONG., 1944–46, at 248 (1946) [hereinafter LEGISLATIVE HISTORY] (“[W]ar legislation, administration, and congressional investigations brought administrative processes more and more into prominence.”).

“the belief that administrative power could pave the road to totalitarianism gained prominence ‘across the political spectrum and had even entered mainstream culture.’”¹⁰²

D. *The APA of 1946*

While Congress focused on the war, the ABA Committee continued its work.¹⁰³ The Committee’s new chairman, Carl McFarland, had served in the Justice Department in the Roosevelt Administration,¹⁰⁴ but he was in the minority on the Attorney General’s Committee.¹⁰⁵ As Chair of the ABA Administrative Law Committee, McFarland drafted a new bill designed as a compromise.¹⁰⁶ Senator McCarran and Representative Sumners introduced the ABA’s bill shortly after D-Day in 1944.¹⁰⁷ The bill required what we now call notice-and-comment rulemaking.¹⁰⁸ Agencies would have to publish notice of proposed rulemaking including “a description of the subjects and issues involved;” afford interested parties an opportunity to participate through written submissions, conferences or consultations, or informal hearings; give “all relevant matter . . . full consideration;” and publish the agency’s “reasons and conclusions.”¹⁰⁹ Formal hearings would be held only if another statute required it.¹¹⁰

McCarran and Sumners revised their bill in response to “a volume of further suggestions from every quarter.”¹¹¹ The only significant difference in the new bill’s rulemaking provisions was that in the notice of proposed rulemaking, the revised bill allowed agencies to provide “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”¹¹² The provision regarding rulemaking procedures also was revised slightly to require agencies to give interested parties “an opportunity

102. Kovacs, *supra* note 18, at 695 (quoting Schiller, *Free Speech*, *supra* note 27, at 88).

103. *Proceedings of the House of Delegates*, 68 A.B.A. 115, 147 (1943).

104. See *Addendum to the Papers of Carl McFarland [a]*, ARTHUR J. MORRIS L. LIBR., <http://archives.law.virginia.edu/records/mss/85-3a> (last visited July 30, 2018).

105. AG’S COMMITTEE REPORT, *supra* note 16, at 203. See generally Ashley Sellers, *Carl McFarland—The Architect of the Federal Administrative Procedure Act*, 16 VA.J. INT’L L. 12 (1975).

106. *Supplemental Report of the Special Committee on Administrative Law*, 68 A.B.A. 254, 256 (1943); Shepherd, *supra* note 19, at 1649–50.

107. S. 2030, 78th Cong. (1944); H.R. 5081, 78th Cong. (1944).

108. S. 2030 § 3.

109. *Id.*

110. *Id.*

111. S. REP. NO. 79-752 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 101, at 190.

112. S. 7, 79th Cong. § 4(a) (1945); H.R. 1203, 79th Cong. § 4(a) (1945).

to participate in the rule making through submission of written data, views, or argument with or without opportunity to present the same orally in any manner.”¹¹³

Following closed door discussions with the Truman Administration, the ABA, and others, the Senate Judiciary Committee revised the bill again.¹¹⁴ A June 1945 Committee print showed the original bill, revisions, explanations, and a summary of comments received.¹¹⁵ The Committee revised the explanation requirement: instead of requiring agencies to publish their “reasons and conclusions,” the new draft required agencies to “incorporate in any rules adopted a concise general statement of their basis and purpose.”¹¹⁶ The ABA had not explained why it chose to use language apparently more suited to adjudication in the rulemaking provisions.¹¹⁷ Unidentified “private parties” thought the Senate Committee’s revision inadequate, but the Committee felt that “a concise general statement of basis and purpose” would explain fully the factual and legal basis for the rule, “as well as the real object or objects sought.”¹¹⁸ As the Committee later explained, the “concise general statement” language required agencies to “analyze and consider all relevant matter presented” and “explain the actual basis and objectives of the rule” “with reasonable fullness.”¹¹⁹ The Attorney General submitted a letter supporting the bill with an appendix analyzing the bill’s provisions.¹²⁰ The Attorney General said that the “concise general statement” was “not intended to require an elaborate analysis of rules,” but rather was designed to give the public “a general idea of the purpose of, and . . . basic justification for” the rule.¹²¹

The House Judiciary Committee held hearings in 1945,¹²² but those

113. S. 7 § 4(b); H.R. 1203 § 4(b).

114. See LEGISLATIVE HISTORY, *supra* note 101, at 11, 191; Shepherd, *supra* note 19, at 1656.

115. LEGISLATIVE HISTORY, *supra* note 101, at 11–44, 191.

116. *Id.* at 19.

117. See generally Shepherd, *supra* note 19, at 1660 (discussing the testimony of ABA representatives before the House Judiciary Committee).

118. LEGISLATIVE HISTORY, *supra* note 101, at 20.

119. *Id.* at 201.

120. *Id.* at 223–24.

121. *Id.* at 225; see also *id.* at 20 (Senate Judiciary Committee stating that “a concise general statement . . .’ would seem to achieve all that more elaborate procedure could do effectively”); *id.* at 358–59 (Congressman Walter explaining that notice-and-comment rulemaking would inform the public of the agency’s intentions).

122. See *Administrative Procedure: Hearings on Federal Administrative Procedure and H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before H. Comm. On the Judiciary, 79th Cong. (1945)*, reprinted in LEGISLATIVE HISTORY, *supra* note 101, at 45.

hearings were “a side show” to the “main act” namely, more private negotiations with the Truman Administration and private parties.¹²³ At the hearings, there was very little discussion of rulemaking at all, much less any significant debate about it.¹²⁴

The bill passed the Senate Judiciary Committee unanimously¹²⁵ and passed the Senate on a voice vote with no debate.¹²⁶ The House Judiciary Committee’s report was similar to the Senate report for purposes of the discussion here.¹²⁷ The bill passed the House Committee unanimously¹²⁸ with “corrections and clarifications”¹²⁹ and passed the House on voice vote, again with little debate.¹³⁰ Republicans did not think the bill went far enough, but they were loath to upset the compromise. “Although flawed, the bill was better than nothing.”¹³¹ The Senate concurred in the House amendments on a voice vote,¹³² and President Truman signed the bill into law on June 11, 1946.¹³³

Section 4 of the APA of 1946 requires agencies to publish notice of proposed rulemaking in the Federal Register including “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”¹³⁴ Interested persons are entitled “to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner.”¹³⁵ The agency is required to consider “all relevant matter presented” and “incorporate in any rules adopted a concise general statement of their basis and pur-

123. Shepherd, *supra* note 19, at 1659–60; *see also id.* at 1661; LEGISLATIVE HISTORY, *supra* note 101, at 191, 246.

124. *See generally* Shepherd, *supra* note 19, at 1659–60 (providing an overview of the testimony and discussion before the House Judiciary Committee).

125. *See* LEGISLATIVE HISTORY, *supra* note 101, at 187; Shepherd, *supra* note 19, at 1662.

126. LEGISLATIVE HISTORY, *supra* note 101, at 344; Shepherd, *supra* note 19, at 1666, 1668.

127. *See generally* H.R. REP. NO. 79-1980 (1946), *reprinted in* LEGISLATIVE HISTORY, *supra* note 101, at 233.

128. LEGISLATIVE HISTORY, *supra* note 101, at 347; Shepherd, *supra* note 19, at 1669.

129. LEGISLATIVE HISTORY, *supra* note 101, at 250.

130. *Id.* at 406; Shepherd, *supra* note 19, at 1670–74.

131. Shepherd, *supra* note 19, at 1672.

132. LEGISLATIVE HISTORY, *supra* note 101, at 423.

133. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

134. *Id.* at § 4.

135. *Id.*

pose.”¹³⁶

E. Post Script

The APA was a compromise that left both conservatives and liberals disappointed.¹³⁷ That compromise was possible because the bill was so ambiguous.¹³⁸ Rather than attempt to iron out their differences in the text, the parties tried to create legislative history that would lead the courts to interpret the Act in their favor.¹³⁹ A majority of the Senate Judiciary Committee would have preferred to restrict agencies more.¹⁴⁰ Hence, their report “interpreted the bill’s ambiguous provisions as imposing strict new controls on agencies.”¹⁴¹ The Attorney General, on the other hand, would have preferred less control of agencies. He interpreted the bill as restating existing law and imposing limited constraints on agencies.¹⁴²

The Attorney General’s view has largely prevailed. Following enactment, the Attorney General issued the Attorney General’s Manual on the Administrative Procedure Act, in which he interpreted the APA section by section.¹⁴³ The Supreme Court has given the Attorney General’s Manual varying levels of deference over the years.¹⁴⁴

Unlike many other provisions in the APA, however, the Attorney General’s interpretation of the rulemaking provisions did not differ materially from that of congressional conservatives. The Attorney General said that the Act’s rulemaking provisions simply were intended to ensure the public

136. *Id.*

137. Kovacs, *supra* note 18, at 705; Shepherd, *supra* note 19, at 1674, 1678.

138. Shepherd, *supra* note 19, at 1665; Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1138 (2009). As the Supreme Court observed: “The Act thus represents a long period of study and strife; it settles long-continued and hard fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities.” *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40–41 (1950).

139. Shepherd, *supra* note 19, at 1665.

140. *Id.* at 1663.

141. *Id.*

142. *Id.* at 1663, 1666.

143. AG’S MANUAL, *supra* note 16, at 6, 7.

144. See *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (“persuasive”); *Darby v. Cisneros*, 509 U.S. 137, 148 n.10 (1993) (citing *Steadman v. SEC*, 450 U.S. 91, 102 n.22 (1981)) (“some deference”); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (“some weight”); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978) (“some deference”); see also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (“great weight”).

an opportunity to participate in rulemaking.¹⁴⁵ The notice of proposed rulemaking could contain either the rule itself, the substance of the rule, or a more general statement, so long as it was “sufficiently informative to assure interested persons an opportunity to participate intelligently in the rule making process.”¹⁴⁶ The mode of public participation was left to agency discretion.¹⁴⁷ The Act required agencies to consider “all relevant matter presented,” but the Attorney General clarified that agencies were not required to formulate rules based exclusively on “any ‘record’ made in informal rule making proceedings.”¹⁴⁸ Rather, agencies also could rely on “materials in its files and the knowledge and experience of the agency.”¹⁴⁹ Finally, the Attorney General reiterated his view that the “concise general statement of . . . basis and purpose” need not contain any “elaborate analysis,” but must merely “advise the public of the general basis and purpose of the rules.”¹⁵⁰

III. EXCEEDING THE SCOPE OF THE APA

In *Vermont Yankee Nuclear Power Corp. v. NRDC*,¹⁵¹ the Supreme Court recognized that the APA left rulemaking procedure “basically . . . within the discretion of the agencies.”¹⁵² Section 4 “established the maximum procedural requirements” courts may impose on agencies, unless due process requires more.¹⁵³ The Court considered it a “very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.”¹⁵⁴ The congressional reports and the Attorney General’s Manual supported the Court’s reading.¹⁵⁵ The Court also found “compelling reasons” for its interpretation.¹⁵⁶ Judicial tailoring of agency procedures would make judicial review “totally unpredictable.”¹⁵⁷ Agencies would respond to that uncertainty by providing too much procedure, thus

145. AG’S MANUAL, *supra* note 16, at 26.

146. *Id.* at 29–30.

147. *Id.* at 31.

148. *Id.*

149. *Id.* at 31–32.

150. *Id.* at 32.

151. 435 U.S. 519 (1978).

152. *Id.* at 524.

153. *Id.* at 524, 542.

154. *Id.* at 544.

155. *Id.* at 545–46.

156. *Id.* at 546.

157. *Id.*

negating the advantages of informal rulemaking.¹⁵⁸ The Court also emphasized that in informal rulemaking agencies are not required to produce the kind of record that comes from a formal hearing.¹⁵⁹ “Congress intended that the discretion of the agencies and not that of the courts be exercised in determining when extra procedural devices should be employed.”¹⁶⁰ Thus, the D.C. Circuit exceeded its authority in requiring trial-type procedures in an informal rulemaking.¹⁶¹

Nonetheless, federal courts have continued to impose rulemaking requirements that exceed the simple formula in the APA. As Sydney Shapiro and Richard Murphy wrote recently, “the marvelously simple and speedy rulemaking procedures of 1946 . . . bear about as much resemblance to the rulemaking procedures of 2016 as an acorn does to a mighty seventy-year-old oak.”¹⁶²

Some of these judicially created rules about rulemaking are true common law in that they “venture too far afield from statutory text or discernible legislative purpose to count simply as statutory interpretation.”¹⁶³ Others at least arguably interpret provisions of the APA, albeit quite broadly.

158. *Id.* at 547.

159. *Id.* at 547–48.

160. *Id.* at 546.

161. *Id.* at 523–24. The Court reinforced *Vermont Yankee* when it adhered to the APA’s text in *Darby v. Cisneros*, 509 U.S. 137, 154 (1993) (holding that the APA cabins common law exhaustion doctrine); *Director, Office of Workers’ Compensation Programs, Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267, 280–81 (1994) (invalidating a burden-shifting rule as inconsistent with the APA); *Dickinson v. Zurko*, 527 U.S. 150, 155, 161 (1999) (holding § 559 did not preserve the courts’ ability to continue to fashion administrative common law, but merely “grandfathered common-law variations” that were clearly established when the APA was enacted); and *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1208–09 (2015) (holding § 553 does not require notice-and-comment for interpretive rules). See generally Kathryn E. Kovacs, *Pixelating Administrative Common Law in Perez v. Mortgage Bankers Association*, 125 YALE L.J. F. 31 (2015) (urging the Supreme Court to admonish lower courts for creating administrative common law rules “that exceed the boundaries of the APA”).

162. Sydney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the Hard Look*, 92 NOTRE DAME L. REV. 331, 332–33 (2016).

163. Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012); see also Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 3 (2011) (arguing that common law reflects “a degree of creativity beyond that expected of a court engaged in the construction and application of an authoritative text”); Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 3 (“Common law is law that courts have created without interpreting a constitutional or statutory provision.”); Kovacs, *supra* note 11, at 1212 (“Common law exceeds the boundaries of any permissible interpretation.”).

The line between common law and broad interpretation is difficult to draw,¹⁶⁴ and it is not necessary to attempt that feat here.¹⁶⁵ Whether these rules about rulemaking are a product of judicial interpretation or judicial creativity, they have contributed to the ossification of federal rulemaking with dangerous consequences. In this part, I demonstrate how these rules contradict the text and history of the APA. I explore the consequences in Part IV.

A. *The Rulemaking Record*

First, § 553 does not mention anything resembling a record or docket for informal rulemaking; it merely requires agencies to explain the “basis and purpose” of the rule concisely.¹⁶⁶ Jeffrey Lubbers, a leading authority on rulemaking, observed that “[t]he development of the concept of the rulemaking record or file has been one of the most significant changes in informal rulemaking procedure since the APA was enacted.”¹⁶⁷

This development is attributable to other common law doctrines. One is “hard-look” review. The traditional deference to agency determinations began to erode with *Citizens to Preserve Overton Park, Inc. v. Volpe*.¹⁶⁸ There the Court held that the Secretary of Transportation’s decision to spend federal funds on building a highway through a park in Memphis was subject to “substantial,” “thorough, probing, in-depth,” “searching and careful” inquiry under the APA.¹⁶⁹ In addition, “[i]n yet another deviation from the traditional APA treatment of informal agency action, *Overton Park* essentially required agencies to produce the kind of record characteristic of formal proceedings.”¹⁷⁰ The Supreme Court instructed the lower court to review the decision by examining “the full administrative record that was before

164. See Kovacs, *supra* note 11, at 1212.

165. Cf. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (explaining that one reason to distinguish between true common law and broad statutory interpretation is that “[s]tatutory precedents . . . often enjoy a super-strong presumption of correctness.”).

166. 5 U.S.C. § 553 (2012).

167. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 287 (5th ed. 2012); see also SECTION OF ADMIN. LAW & REGULATORY PRACTICE, AM. BAR ASS’N, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 28 (2d ed. 2013) [hereinafter A BLACKLETTER STATEMENT] (explaining that the rulemaking record includes all notices, materials the agency relied on, and public comments).

168. 401 U.S. 402 (1971).

169. *Id.* at 415–16.

170. Patrick M. Garry, *Judicial Review and the “Hard Look” Doctrine*, 7 NEV. L.J. 151, 155 (2006).

the Secretary at the time he made his decision.”¹⁷¹

Although *Overton Park* did not concern rulemaking, it was “a major influence” in rulemaking cases.¹⁷² In *Overton Park*, the agency lost because the Secretary had given no explanation of how his decision met the relevant statutory constraints.¹⁷³ But the D.C. Circuit read the case more broadly.¹⁷⁴ More in-depth review of agency decisions necessitated a more in-depth record for review.¹⁷⁵

Common law ripeness doctrine also necessitates rulemaking records. In 1946, rules were generally challenged in enforcement actions, which necessarily would generate an administrative or judicial record.¹⁷⁶ In *Abbott Laboratories. v. Gardner*,¹⁷⁷ the Supreme Court opened the door to pre-enforcement review of “ripe” challenges to rules, there a Food and Drug Administration rule regarding labeling of prescription drugs.¹⁷⁸ Instead of producing a record in the context of a particular enforcement action, pre-enforcement review necessitates the production of a rulemaking record just after the final rule is published. Thus, “reviewing courts responded to *Abbott* by demanding that agencies support rules with increasingly elaborate

171. *Id.* (citing *Overton Park*, 401 U.S. at 420).

172. LUBBERS, *supra* note 167, at 288–89; cf. Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 974 (1980) (“There is little doubt, however, that the expectations set forth in *Overton Park* with respect to the administrative record are more appropriate in the informal adjudication setting.”).

173. 401 U.S. at 408, 413, 417, 420.

174. See Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 437 (2009).

175. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977) (“As a practical matter, *Overton Park*’s mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings.”).

176. LUBBERS, *supra* note 167, at 288; Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 755 (1975); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 89 (1995); Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 205 (1974).

177. 387 U.S. 136 (1967).

178. *Id.* at 138, 148; see also LUBBERS, *supra* note 167, at 407. Since then, Congress has explicitly allowed pre-enforcement review in some contexts. *E.g.*, 15 U.S.C. § 57a(e) (2012) (allowing review of certain FTC rules); 28 U.S.C. § 2342 (2012) (giving courts of appeals exclusive jurisdiction over petitions for review of certain agency rules); 29 U.S.C. § 655(f) (2012) (allowing review of certain occupational safety and health standards); 42 U.S.C. § 7607(b) (2012) (prescribing review of certain Clean Air Act rules).

records.”¹⁷⁹

The need for a rulemaking record was fully established by 1977 when the D.C. Circuit said in *Home Box Office, Inc. v. FCC*¹⁸⁰ that the rulemaking record must “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.”¹⁸¹ The court acknowledged arguments that the APA itself did not require agencies to produce a record in informal rulemakings.¹⁸² Nonetheless, implicit in the decision to treat rules as “final” for judicial review “is an assumption that an act of reasoned judgment has occurred.”¹⁸³ If that is so, then there must be “a body of material . . . with reference to which such judgment was exercised” and against which the court may “test the actions of the [agency] for arbitrariness or inconsistency with delegated authority.”¹⁸⁴

Requiring agencies to produce a record in informal rulemaking, however, contradicts the text of the APA.¹⁸⁵ In contrast to § 553’s silence about the record for *informal* rulemaking, it provides that any rulemaking that is “on the record” must adhere to the requirements for *formal* rulemaking in §§ 556 and 557.¹⁸⁶ Among other things, § 556 provides that “the exclusive record for decision” in a formal proceeding consists of the “transcript of testimony and exhibits, together with all papers and requests filed in the proceeding.”¹⁸⁷ Jeffrey Lubbers suggested that “[t]he power to require submission of a record for judicial review is inherent in the review function.”¹⁸⁸ Certainly, courts may require agencies to justify their decisions, and agencies are well advised to produce a robust explanation of a rule’s basis and

179. Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 192 (1996); see also Verkuil, *supra* note 176, at 198, 205 (explaining that when review came after enforcement, “the circumstances surrounding the rule’s enactment [were] secondary,” but pre-enforcement review “leads to a vigorous judicial scrutiny of the rulemaking model”).

180. 567 F.2d 9 (D.C. Cir. 1977).

181. *Id.* at 36.

182. *Id.* at 54 n.118.

183. *Id.* at 54.

184. *Id.*

185. Keller, *supra* note 174, at 443–44; Richard B. Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 HARV. L. REV. 1805, 1816 (1978).

186. 5 U.S.C. § 553(c) (2012).

187. *Id.* § 556(e) (2012); see also Garry, *supra* note 170, at 152 (“*Overton Park* effectively required agencies to create a record in their informal procedures and to base their decision on that record—a requirement that under the APA had applied only to formal rulemaking and adjudication.”).

188. LUBBERS, *supra* note 167, at 293.

purpose for review. But courts are not authorized effectively to amend the APA to impose a record-keeping requirement across the board.

Requiring rulemaking records also is inconsistent with the history of the APA. The common law in 1946 presumed the existence of facts supporting a rulemaking; the plaintiff challenging the rule bore the burden of alleging specific facts to invalidate the rule.¹⁸⁹ Congress anticipated the need for records in informal rulemaking.¹⁹⁰ But it chose not to overturn the common law and *require* agencies to produce a record in such proceedings.¹⁹¹ Indeed, Congress chose the APA over H.R. 339 and H.R. 1117, both of which would have required rulemaking records.¹⁹² Even the minority on the Attorney General's Committee did not support such a requirement.¹⁹³

189. *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935); *see also* Richard Murphy, *Chenery Unmasked: Reasonable Limits on the Duty to Give Reasons*, 80 U. CIN. L. REV. 817, 818 (2012); Shapiro & Murphy, *supra* note 162, at 333, 337 (pointing out that courts applied this approach into the 1960s).

190. H.R. REP. NO. 79-1980 (1946), *reprinted in* LEGISLATIVE HISTORY, *supra* note 101, at 259 (“The agency must keep a record and analyze and consider all relevant matter presented prior to the issuance of rules.”).

191. Since then, Congress has imposed rulemaking record requirements in particular circumstances. *See* 15 U.S.C. § 57a(e)(1)(B) (2012) (regarding certain FTC rules); *id.* § 2060(a) (regarding consumer product safety rules); *id.* § 2618(a)(2) (regarding EPA rules on toxic substances); 42 U.S.C. § 7607(d)(2)–(4), (7)(A) (2012) (regarding certain Clean Air Act rules); *cf.* 28 U.S.C. § 2112 (2012) (authorizing the Supreme Court to issue rules requiring agencies to file administrative records in cases seeking review or enforcement of agency orders).

192. *See* LEGISLATIVE HISTORY, *supra* note 101, at 140, 148 (“All relevant matter presented shall be recorded or summarized and given full consideration by the agency.”). In 1982, the Senate passed a bill that would have required all agencies to “maintain a file for each rule making proceeding . . . and . . . a current index to such file.” The file would have to be made public with the first publication concerning the rule and would constitute the record for purposes of judicial review. S. 1080, 79th Cong. § 3 (1982), *available at* 128 CONG. REC. 5298 (Mar. 24, 1982). The bill died in the House. *See Regulatory Reform Bill Stalled in House*, 38 CQ ALMANAC 523 (1982), *available at* <https://library.cqpress.com/cqalmanac/document.php?id=cqal82-1163389&type=hitlist&num=0>.

The E-Government Act requires agencies to keep online “electronic dockets for rulemakings under [5 U.S.C. § 553].” Pub. L. No. 107-347, § 206(d), 116 Stat. 2899, 2916 (2002). That Act, however, does not specify the content of the docket, but merely requires that it include “all submissions” under § 553(c) and “other materials that by agency rule or practice are included in the rulemaking docket under” § 553(c). *Id.*

193. AG’S COMMITTEE REPORT, *supra* note 16, at 229 (providing in minority bill that if an agency chooses to hold public hearings on a proposed rule, “[r]ecords of such hearings may be kept”). Under the Walter-Logan bill, all rulemaking would have involved a public hearing. H.R. 6324, 76th Cong. § 2(a) (1939). Yet, agencies would not have been required to keep a rulemaking record. Rather, courts reviewing rules simply would have considered

Thus, the Attorney General's Manual found it "entirely clear . . . that section 4(b) does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rule making proceedings."¹⁹⁴

B. *Notice of Information Considered*

A second area in which the courts have exceeded the terms of the APA concerns the notice of proposed rulemaking. Section 553 simply requires a notice of proposed rulemaking to include "either the terms or substance of the proposed rule or a description of the subjects or issues involved."¹⁹⁵ Yet, federal courts require agencies to provide notice of the information the agency considered in drafting the proposed rule. In *Portland Cement Ass'n v. Ruckelshaus*,¹⁹⁶ the D.C. Circuit said "information should generally be disclosed as to the basis of a proposed rule at the time of issuance."¹⁹⁷ In that case, the court found a "critical defect in the decision-making process" the EPA had used to establish emissions standards for cement plants, namely, the EPA did not release for public comment the location or methodology of its testing.¹⁹⁸ As the court later explained, "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."¹⁹⁹ Hence, Jeffrey Lubbers recommends that agencies make available for public comment all information generated before a notice of proposed rulemaking.²⁰⁰

any "material and relevant" evidence. *Id.* § 3.

194. AG'S MANUAL, *supra* note 16, at 31; *see also* Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L. REV. 377, 388 (1978) (finding "no affirmative support . . . in the legislative history" for interpreting § 553 to require a rulemaking record, "nor was there any early practice by the agencies to conform with such an interpretation"); Murphy, *supra* note 189, at 839 ("At the time of the APA's adoption, it was widely understood that . . . this quasi-legislative model of rulemaking did not require creation of a formal record . . .").

195. 5 U.S.C. § 553 (2012).

196. 486 F.2d 375 (D.C. Cir. 1973).

197. *Id.* at 394.

198. *Id.* at 392.

199. *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530–31 (D.C. Cir. 1982) ("it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules"); *accord* *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977).

200. LUBBERS, *supra* note 167, at 277. The Office of Information and Regulatory Affairs (OIRA) made a similar recommendation. Cass R. Sunstein, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE PRESIDENT'S MANAGEMENT COUNCIL: INCREASING OPENNESS IN THE RULEMAKING PROCESS – IMPROVING ELECTRONIC DOCKETS (2010), *available at* <https://obamawhitehouse.archives>.

As Judge Kavanaugh observed, however, *Portland Cement* doctrine “cannot be squared with the text of § 553.”²⁰¹ The ABA implicitly acknowledged that *Portland Cement* doctrine is textually ungrounded when it supported codifying the requirement.²⁰² In *Portland Cement*, the Court tied the requirement to § 553(c) with the observation: “Obviously a prerequisite to the ability to make meaningful comment is to know the basis upon which the rule is proposed.”²⁰³ Ronald Levin rejected this weak attempt, commenting that “that interpretation is so far removed from the Act’s actual language as to make the line between ‘interpretation’ and straightforward judicial common law very blurry indeed.”²⁰⁴

More importantly, *Portland Cement* doctrine tilts the careful balance Congress and the President achieved in the APA in 1946. Congress anticipated that agencies might conduct studies or investigations to formulate the issues in a notice of proposed rulemaking, but it declined to require agencies to release that information to the public with the notice.²⁰⁵ The conservative minority of the Attorney General’s Committee would have allowed but not required this.²⁰⁶ Even the Walter-Logan bill would not have required agencies to include such information in the notice.²⁰⁷ For courts to impose such a requirement after the fact contradicts Congress’s considered judg-

gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf.

201. *Am. Radio Relay League v. FCC*, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) (“One searches the text of APA § 553 in vain for a requirement that an agency disclose other agency information as part of the notice or later in the rulemaking process.”); see also Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 894–96 (2007).

202. American Bar Association Section of Administrative Law and Regulatory Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 624, 646 (2012); see also 106 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 785–86 (1981). FOIA might require agencies to disclose this information in any event. See Matthew S. Brooker, *Taking the Path Less Travelled: FOIA’s Impact on the Tension Between the D.C. Circuit and Vermont Yankee*, 102 VA. L. REV. 1101, 1102 (2016).

203. *Portland Cement*, 486 F.2d at 393 n.67.

204. Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 328 (2005).

205. H.R. REP. NO. 79-1980 (1946), in LEGISLATIVE HISTORY, *supra* note 111, at 258 (“Summaries and reports may also be issued as aids in securing public comment or suggestions.”).

206. AG’S COMMITTEE REPORT, *supra* note 16, at 228 (“The submission of reports or summaries of hearings, investigations, or conferences, or the publication of tentative drafts of rules, may be utilized as methods of notice of issues in rule-making.”).

207. See *supra* note 44.

ment and distorts a carefully constructed statute.²⁰⁸

C. Disclosure of Ex Parte Contacts

Section 553 says nothing about ex parte contacts in informal rulemaking. In *Sangamon Valley Television Corp. v. United States*,²⁰⁹ however, the D.C. Circuit vacated an FCC rule because a representative of a particular television station discussed the proposed rule with FCC Commissioners after the public comment period had closed and without the knowledge of competing television stations.²¹⁰ The court recognized that the proceeding was a rulemaking and not subject to any ban on ex parte communications under the APA. Nonetheless, the court reasoned that the FCC's decision had to be "reopened" because it concerned "resolution of conflicting private claims to a valuable privilege."²¹¹

The court generalized that holding to all rulemaking in *Home Box Office, Inc. v. FCC*, where the court addressed FCC rules and orders concerning the kinds of programs paid television stations could show.²¹² During the rulemaking, the FCC had "widespread" ex parte communications with various participants.²¹³ The record would not suffice for judicial review, the court held, because it did not reveal all of the information that was before the Commission when it made its decision.²¹⁴ Even if the Commission had disclosed all of its ex parte contacts, the court continued, the lack of "adversarial discussion among the parties" would still conflict with "fundamental notions of fairness" and "reasoned decisionmaking" and thus necessitate invalidating the decision.²¹⁵ Thus, the court concluded that all agency offi-

208. In 1982, the Senate passed a bill that would have required the notice of proposed rulemaking to include:

a description of any data, methodologies, reports, studies, scientific evaluations, or other similar information on which the agency plans to substantially rely in the rule making, including an identification of each author or source of such information and the purposes for which the agency plans to rely on such information.

S. 1080, 79th Cong. § 3 (1982), available at 128 CONG. REC. 5297 (1982). The bill died in the House. See *Regulatory Reform Bill Stalled in House*, 38 CQ ALMANAC 523 (1982), available at <https://library.cqpress.com/cqalmanac/document.php?id=cqal821163389&type=hitlist&num=0>.

209. 269 F.2d 221 (D.C. Cir. 1959).

210. *Id.* at 224–25.

211. *Id.* at 224.

212. 567 F.2d 9, 17, 35–36 (D.C. Cir. 1977).

213. *Id.* at 52.

214. *Id.* at 54.

215. *Id.* at 55–56.

cial and employees involved in rulemaking should refuse to discuss the rulemaking with interested parties.²¹⁶ “If ex parte contacts nonetheless occur,” the court thought, “any written document or a summary of any oral communication must be placed in the public file . . . immediately after the communication is received so that interested parties may comment thereon.”²¹⁷ The court remanded to the FCC to hold an evidentiary hearing “to determine the nature and source of all ex parte pleas” during the rulemaking.²¹⁸

Later that year in *Action for Children’s Television v. FCC*,²¹⁹ a different panel of the D.C. Circuit backed off of *Home Box Office*, opining that ex parte contacts should invalidate a rule only if the contacts materially influenced the agency decision and only where the rulemaking involved competing claims to a valuable privilege, like the *Sangamon Valley* case.²²⁰ But of course one panel of the D.C. Circuit cannot overrule another.²²¹ The actual holding in *Action for Children’s Television* was that *Home Box Office* did not apply retroactively to the case at bar.²²² The Administrative Conference of the United States joined the fray a few months later, opposing a general prohibition on ex parte communications in rulemaking, but recommending that agencies “experiment” with procedures to disclose ex parte communication of “significant information or argument” using techniques appropriate to the circumstances.²²³

The following year, the Supreme Court decided *Vermont Yankee*, throwing *Home Box Office*’s holding on ex parte contacts into doubt.²²⁴ Since then, the D.C. Circuit has continued to criticize the holding in *Home Box Office*,²²⁵ go-

216. See Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 537 (2011) (“in [*Home Box Office*], the court effectively announced a per se ban on ex parte communications in notice-and-comment rulemaking”).

217. *Home Box Office*, 567 F.2d at 57.

218. *Id.* at 58.

219. 564 F.2d 458 (D.C. Cir. 1977).

220. *Id.* at 476–77. As Richard Pierce pointed out, this “narrow form” of the prohibition on ex parte contacts reflects due process concerns. Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 912 (2007).

221. See *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (citing *United States v. Caldwell*, 543 F.2d 1333, 1370 n.19 (D.C. Cir. 1974)).

222. 564 F.2d at 474. Moreover, *Action for Children’s Television* concerned an order in which the FCC declined to adopt a rule. *Id.* at 461 n.1.

223. Administrative Conference of the United States, Recommendation 77-3 (1977), available at 42 Fed. Reg. 54,253 (Oct. 5, 1977).

224. See *supra* text accompanying notes 152–161.

225. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 400–02 (D.C. Cir. 1981).

ing so far as to say that it has been “sharply limited” and “undermined.”²²⁶ But the court has “never expressly disavowed the doctrine.”²²⁷ Regardless of its continuing validity, *Home Box Office* and the uncertainty in the law pushed agencies toward documenting ex parte contacts.²²⁸

The prohibition on ex parte communications in *Home Box Office* is entirely inconsistent with the text and history of the APA.²²⁹ Long before Congress began contemplating administrative reform, the Supreme Court held in *Bi-Metallic Investment Co. v. State Board of Equalization*²³⁰ that the judicial model of adjudication does not apply when the government makes general policy.²³¹ The APA reflects that judgment by providing for notice-and-comment rulemaking. It is not required to be “on the record;” rather, agencies may rely on information and communications outside the public record.²³² Moreover, in the Government in the Sunshine Act of 1976, Congress added a prohibition on ex parte communications in formal proceedings but not informal rulemaking.²³³ “If Congress wanted to forbid or limit ex parte contacts in every case of informal rulemaking, it certainly had a perfect opportunity of doing so when it enacted the Government in the Sunshine Act.”²³⁴

226. *Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 7 n.5 (D.C. Cir. 1999).

227. Beermann & Lawson, *supra* note 201, at 885; *see also* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1788 (2007) (“[T]he D.C. Circuit has vacillated as to whether a ban on ex parte communications in informal proceedings is consistent with *Overton Park* or at odds with *Vermont Yankee*.”); *cf.* *Marine Eng'rs' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 42–43 (D.C. Cir. 2000) (implying that *Home Box Office* conflicts with *Vermont Yankee*).

228. *See* LUBBERS, *supra* note 167, at 307–09; Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking Via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 698 (2012) (“it seems that many agencies are striving to ensure transparency of contacts after some formal, public step has been taken to initiate a rulemaking process”) (emphasis omitted).

229. *See* Beermann & Lawson, *supra* note 201, at 883–88.

230. 239 U.S. 441 (1915).

231. *Id.* at 445; *see also* Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1117–18 (1984); Nathanson, *supra* note 194, at 383.

232. *See supra* text accompanying notes 185–194.

233. Government in the Sunshine Act, Pub. L. No. 94-409 § 4(a), 90 Stat. 1241 (1976), codified at 5 U.S.C. § 557(d)(1) (2012).

234. *Action for Children's Television v. FCC*, 564 F.2d 458, 474 n.28 (D.C. Cir. 1977); *see also* Nathanson, *supra* note 194, at 390 (opining that the history of the Government in the Sunshine Act “seems to reflect a general consensus that a ban on ex parte communications in section 553 rulemaking proceedings would be undesirable”).

D. The Concise General Statement

Section 553 of the APA requires agencies to incorporate in their final rules “a concise general statement of their basis and purpose.”²³⁵ “[I]n the hands of judges,” however, that statement has “turned out to be not at all concise.”²³⁶ Hard-look doctrine is the prime culprit, with pre-enforcement review as its co-conspirator.²³⁷ As Richard Pierce noted, “[a]ny agency that has the temerity to comply with [the] statutory command [for a ‘concise general statement’] in any rulemaking that is subjected to judicial review is virtually certain to be reversed through application of the hard-look doctrine.”²³⁸

As enunciated in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*,²³⁹ an agency must “articulate a satisfactory explanation for its action.”²⁴⁰ Now, such explanations must be robust.²⁴¹ Moreover, agencies cannot rely in court on post hoc explanations,²⁴² another rule that has no apparent link to the APA’s text or history.²⁴³ Thus, “an agency must invest a great deal of time and effort in preparing the statement of basis and purpose if its rule is to withstand close judicial review.”²⁴⁴ Among other things, an agency must explain why it rejected alternatives,²⁴⁵ “what major

235. 5 U.S.C. § 553(c).

236. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1432 (2004); see also *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (cautioning against “an overly literal reading of the statutory terms ‘concise’ and ‘general’”).

237. See Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 783 (2015); Richard J. Pierce, Jr., *Which Institution Should Determine Whether an Agency’s Explanation of a Tax Decision is Adequate?: A Response to Steve Johnson*, 64 DUKE L.J. ONLINE 1, 8–10 (2014); Shapiro & Murphy, *supra* note 162, at 342.

238. Pierce, *supra* note 220, at 906.

239. 463 U.S. 29 (1983).

240. *Id.* at 43.

241. See A BLACKLETTER STATEMENT, *supra* note 167, at 29–30.

242. *State Farm*, 463 U.S. at 43, 50 (applying *SEC v. Chenery*, 332 U.S. 194, 196 (1947), to informal rulemaking); see also Murphy, *supra* note 189, at 839–42 (explaining how the Supreme Court in *State Farm* rejected its own precedent and applied the prohibition on post-hoc justifications to informal rulemaking).

243. Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 974 (2007); see also Shapiro & Murphy, *supra* note 162, at 334, 362 (arguing that the Supreme Court should allow agencies to rely on post hoc rationales “based on information exposed to outside scrutiny during the notice-and-comment process”).

244. LUBBERS, *supra* note 167, at 341.

245. *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987); LUBBERS, *supra* note 167, at 341. Other statutes might require discussion of alternatives. See

issues of policy were ventilated by the informal proceedings[,] and why the agency reacted to them as it did.”²⁴⁶ Agencies must also respond to “significant points raised by the public.”²⁴⁷ That is, the agency must discuss “points . . . which, if adopted, would require a change in an agency’s proposed rule.”²⁴⁸

Again, this doctrine is inconsistent with the text and history of the APA.²⁴⁹ The Walter-Logan bill did not require any statement to accompany a final rule. It gave the D.C. Circuit exclusive jurisdiction over challenges to rules and limited such challenges to questions of law: claims that the rule was unconstitutional, in conflict with a statute, lacking statutory authority, or in violation of the bill’s procedural requirements. The court could take evidence if necessary to answer those questions.²⁵⁰ Similarly, the AG’s Committee minority bill would not have required a statement to accompany a final rule. A rule would either be reviewed “upon contest of its application to particular persons or subjects, or upon proper application for declaratory judgment,” which, like the Walter-Logan bill, would be limited to purely legal questions.²⁵¹

The ABA’s post-war proposal would have required agencies to provide “reasons and conclusions” for rules.²⁵² The Senate Judiciary Committee changed that language to “concise general statement.”²⁵³ As explained above, there was little disagreement about that provision. The Senate Committee explained that a “concise general statement” would be adequate to ensure that agencies explained the factual and legal bases for rules and their objects “with reasonable fullness.”²⁵⁴ The Attorney General did not disagree, but took a different tone in opining that a “concise general statement” would not require any “elaborate analysis;” it was just meant to

LUBBERS, *supra* note 167, at 341.

246. *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

247. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977); *see also* *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1217 (D.C. Cir. 1983).

248. *Home Box Office*, 567 F.2d at 35 n.58; *accord* *Am. Min. Cong. v. EPA.*, 965 F.2d 759, 771 (9th Cir. 1992). Other statutes or executive orders may require agencies to respond to comments as well. *See* LUBBERS, *supra* note 167, at 343–44.

249. *Keller*, *supra* note 174, at 443–44.

250. H.R. 6324, 76th Cong. § 3 (1939).

251. AG’S COMMITTEE REPORT, *supra* note 16, at 230; *see also id.* at 231 (explaining that any necessary factual development would occur in the agency, not the court). Under the common law, any factual predicate for a rule would be presumed. *See supra* note 189.

252. S. 2030, 78th Cong. § 3(b) (1944).

253. *See supra* text accompanying notes 116–121.

254. LEGISLATIVE HISTORY, *supra* note 101, at 18–19, 223–24.

inform the public of the purpose and justification for a rule.²⁵⁵ When the Supreme Court opened the door to pre-enforcement review under the hard-look standard in the 1960s and 1970s, the purpose of the “concise general statement” shifted from informing the public to enabling judicial review.²⁵⁶ Clearly the courts, in employing the “concise general statement” for that purpose, have far exceeded the Senate’s “reasonable fullness” standard.

IV. UNINTENDED CONSEQUENCES

The fact that the judicial rules about rulemaking contradict the text and history of the APA is sufficient to warrant their reversal. But these rules, although well intentioned, have had unintended consequences that have reached a frightening crescendo.

A. Institutional Competence

Courts are not well positioned to adjust the benefits and burdens of the regulatory state. As Judge Henry Friendly observed, “Courts are good at deciding cases, [but] bad at drafting legislation.”²⁵⁷ In particular, courts should avoid disturbing the balance Congress, the Executive Branch, the ABA, and other interested parties achieved in the APA after years of intensive deliberation.²⁵⁸

I have demonstrated elsewhere that administrative common law lacks public deliberation and raises separation of powers and electoral accountability concerns.²⁵⁹ Administrative common law suffers from a deliberation deficiency because “it is virtually unmoored from public deliberation.”²⁶⁰ Unlike other statutes, no single agency issues binding interpretations of the APA in an ongoing dialogue with the public and the courts.²⁶¹ Indeed, Gillian Metzger, administrative common law’s best advocate, admits that it is hard “to square with the principle of democratic government” because it

255. *Id.* at 225; see also AG’S MANUAL, *supra* note 16, at 32.

256. See *supra* text accompanying notes 168–184.

257. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1302 (1975).

258. Cf. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1452 (1992) (suggesting that judges should approach review of rules with caution because “[s]tringent substantive judicial review can frustrate the implementation of congressionally articulated policies”).

259. Kovacs, *supra* note 11, at 1254–60.

260. *Id.* at 1257.

261. *Id.*

is “shielded from public acknowledgment and scrutiny.”²⁶²

Administrative common law also raises distinct separation of powers and electoral accountability concerns. The Constitution assigned to Congress the power to make policy in an effort to avoid tyranny, safeguard liberty, and ensure political accountability.²⁶³ Thomas Merrill argued that federal common law shifts policymaking power from Congress to the judiciary and erodes electoral accountability and thus legitimacy.²⁶⁴ That argument would invalidate all federal common law, and thus goes too far.²⁶⁵ Administrative common law, however, is different because Congress, the Executive Branch, and other interested parties spent so much time and effort building the APA. For the courts to ignore or contradict that exceptional effort raises particular concern.²⁶⁶ “The Act’s history raises the separation-of-powers stakes.”²⁶⁷

Those concerns extend beyond true common law to interpretations of the APA that clearly contradict the statutory text and history. The quality of public deliberation underlying the APA is not unique, but it is certainly unusual. The APA developed over seventeen years, with numerous, voluminous reports, hundreds of pages of hearing transcripts, multiple drafts, and hours and hours of debate.²⁶⁸ That deliberation led the APA to become a superstatute, deeply entrenched in our law.²⁶⁹ For the courts to disrespect that deliberation and readjust the balance embodied in the APA raises grave concerns. As William Eskridge and John Ferejohn showed, courts should take the “deliberative process seriously, as having significant normative force,” and defer to statutes and policies that reflect substantial republican deliberation.²⁷⁰

On a more practical level, generally the courts hear from one agency at a time in one case at a time.²⁷¹ Congress, on the other hand, hears from multiple agencies and interest groups and considers varied contexts and approaches to solving problems.²⁷² Thus, in administrative law, Congress is

262. Metzger, *supra* note 163, at 1356.

263. Kathryn E. Kovacs, *Scalia’s Bargain*, 77 OHIO ST. L.J. 1155, 1191 (2016).

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

265. Kovacs, *supra* note 11, at 1256; Metzger, *supra* note 163, at 1347–48.

266. Kovacs, *supra* note 161, at 36.

267. Kovacs, *supra* note 11, at 1257.

268. See generally Shepherd, *supra* note 19.

269. Kovacs, *supra* note 11, at 1223–37.

270. ESKRIDGE & FEREJOHN, *supra* note 12, at 435–36.

271. See Friendly, *supra* note 257, at 1302.

272. See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1322 (2014); Kovacs, *supra* note 161, at 36.

better situated to determine the most effective approach and anticipate the consequences of its decisions.²⁷³ Nicholas Bagley demonstrated that when a statute balances “a host of incommensurate values . . . [t]he courts have no constitutional authority to revise that judgment and no epistemic basis for thinking they can make a better one.”²⁷⁴ The judicial rules about rulemaking arose from valid concerns, and the courts’ attempts to remedy those concerns were well intentioned. But the courts could not foresee the wide-ranging effects of their doctrinal shifts.²⁷⁵

Clark Byse’s words from forty years ago hold true today. He said that judicial intrusion in rulemaking procedure conflicts with “the appropriate institutional roles of court, legislature, and agency in our form of government.”²⁷⁶ It reflects

insensitivity to the concerns of the agency in deploying its resources to conduct its business, undue self-confidence in the assumption that the court’s procedural prescription is ‘best,’ and lack of trust in the political process in failing to recognize that Congress and the agencies do respond to representations by the public and by private interests.²⁷⁷

Conflict with the text and history of the APA provides reason enough to abandon the judicial rules about rulemaking. Those rules, however, also have had significant, negative, unintended consequences.

B. *Stifling Agency Policymaking*

1. *Rulemaking Ossification*

The judicially created rules about rulemaking have contributed to the “ossification” of rulemaking.²⁷⁸ Ossification literally refers to the process of creating bone. In this context, it refers to the increasing time and resources needed to issue a rule.²⁷⁹ There is some debate about the extent to which

273. Bagley, *supra* note 272, at 1322, 1330.

274. *Id.* at 1330.

275. Cf. Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 900 (1936) (“situations which demand . . . immediate action of some sort, will usually involve ignorance of certain aspects of the situation and will bring about unexpected results”).

276. Clark Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1831–32 (1978).

277. *Id.*

278. See McGarity, *supra* note 258, at 1386.

279. Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1494 (2012).

rulemaking has become ossified.²⁸⁰ I have no doubt, however, that rulemaking is time and resource intensive, sufficiently so that it dissuades agencies from undertaking the effort and presidents from relying on it.²⁸¹

Of course, other factors contribute to rulemaking ossification, including the requirements of executive orders and other statutes,²⁸² as well as agency mismanagement.²⁸³ Richard Murphy observed that “[t]he result of all of these encrustations on the rulemaking process is that significant legislative rulemaking via notice-and-comment rulemaking, which was once easy and supposed to be so, is now a complex, time-consuming, resource-intensive procedural maze.”²⁸⁴

Most proponents of the ossification thesis, however, attribute it “primarily to the courts.”²⁸⁵ Richard Pierce believes that hard-look doctrine is “the most important factor”²⁸⁶ and that *Abbott Laboratories’* authorization of pre-enforcement review “played a major role leading to ossification of rulemaking.”²⁸⁷ The extent to which those doctrines contribute to rulemaking ossi-

280. Compare *id.* with 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 (2012).

281. Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 89 (2018) (“nearly everyone agrees that those same procedures that give rise to ossification make it harder for agencies to regulate”); see also *id.* at 116 (stating that the ossification thesis is “common ground among many administrative law scholars”); Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1709 (2008) (“the conclusion that agencies are regulating too little and too slowly seems hard to dispute”); *A Review of Regulatory Reform Proposals, Hearing Before the S. Comm. on Homeland Security and Government Affairs*, 114th Cong. 132 (2015) (statement of Sidney A. Shapiro) (“the regulatory process has become so ossified by needless or duplicative procedures and analyses that larger rulemakings commonly require several years—possibly more than a decade—to complete”); Shapiro & Murphy, *supra* note 162, at 354 (pronouncing as “beyond reasonable controversy” the observations that much rulemaking is resource intensive and that “agencies are commonly starved for resources”).

282. See LUBBERS, *supra* note 167, at 12, 16–30, 129–63; Murphy, *supra* note 228, at 687; Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533 (2000).

283. See McGarity, *supra* note 258, at 1437–38.

284. Murphy, *supra* note 228, at 687–88.

285. Pierce, *supra* note 279, at 1494; see also Pierce, *supra* note 176, at 65.

286. Pierce, *supra* note 220, at 920; see also Blais & Wagner, *supra* note 281, at 1705–06 (“most scholars agree that the predominant culprit is . . . probing judicial scrutiny”).

287. Pierce, *supra* note 176, at 89. Pierce concludes that eliminating pre-enforcement review is “too high a price to pay to obtain a modest step toward deossification of rulemaking.” *Id.* at 93. While the ossification thesis is more or less accepted, “there is no general consensus that the costs of ossification outweigh the benefits of close and sustained judicial

fication is unclear, but clearly they contribute to some degree. The arguments I present here could apply to these judicially created rules about judicial review as well. But that inquiry raises additional concerns and complexities that warrant separate treatment. In any event, I take it as beyond debate that the judicial rules about rulemaking also increase the burden of rulemaking.²⁸⁸ And any contribution to that burden is too much, particularly when it comes from the courts and contradicts the APA.

2. *Rules About Rulemaking*

Among the judicial rules about rulemaking, the prime culprit may be judicial enhancement of the “concise general statement” requirement, which flowed in large part from pre-enforcement review under the hard-look doctrine.²⁸⁹ In the 1960s and 1970s, the federal government morphed, and we entered the “age of rulemaking.”²⁹⁰ The Supreme Court essentially killed formal rulemaking in 1973.²⁹¹ Thus, new agencies implemented policy through informal rulemakings “that would have a sweeping impact across the American economy.”²⁹² Scholars began to appreciate that generally informal rulemaking is easier and more participatory than adjudication, and enables avoidance of agency capture.²⁹³ The courts’ responses to these de-

oversight.” Blais & Wagner, *supra* note 281, at 1709.

288. See McGarity, *supra* note 258, at 1400–01; Nielson, *supra* note 281, at 10–11; Shapiro & Murphy, *supra* note 162, at 332–33, 339–42; Alec Anthony Webley, *Seeing through a Preamble, Darkly: Administrative Verbosity in an Age of Populism and “Fake News”*, 70 ADMIN. L. REV. 1 (2018).

289. See *supra* text accompanying note 237.

290. Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 544 (1989); see also Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1159 (2001); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 688 (2016).

291. See *United States v. Fla. East Coast Ry. Co.*, 410 U.S. 224, 237–40 (1973); see also Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. 1, 5–10 (2017); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 247–53 (2014); Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 660 (2017).

292. Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755 (1996); see also PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 146 (2009); Bruff, *supra* note 290, at 544; Shapiro & Murphy, *supra* note 162, at 338 (pointing out that the EPA’s first regulation establishing air quality standards under the Clean Air Act was accompanied by a one-page explanation).

293. Strauss, *supra* note 292, at 755–56; see also Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW &

velopments, though well intentioned to support judicial review and enhance accountability, fairness, and accuracy, resulted at least in part from the mistaken application of adjudicative principles to informal rulemaking.²⁹⁴

The augmentation of the “concise general statement” requirement is a case in point. Requiring agencies to explain their rules thoroughly improves accuracy and “demonstrate[s] responsiveness to commenters, which arguably enhances accountability, fairness, and thus legitimacy.”²⁹⁵ The result, however, is that rulemaking preambles are getting longer, independent of the length of the rule text.²⁹⁶ As it gets easier to submit comments, the agency’s burden of processing and responding to those comments grows.²⁹⁷ Thomas McGarity said that the “modest obligation” to provide a “concise general statement” “has blossomed” and invited abuse by regulated entities “who hire consultants and lawyers to pick apart the agencies’ preambles and background documents and launch blunderbuss attacks on every detail of the legal and technical bases for the agencies’ rules.”²⁹⁸

No doubt, Alec Webley is correct in supposing “that agencies would make rules faster if they did not have to respond to commentators with a preamble of tremendous length.”²⁹⁹ I also have no doubt that, if courts are to review agency rulemakings, agencies must provide some sort of explanation. But judicial distortion of Congress’s considered judgment in the APA has had unintended and unfortunate consequences.³⁰⁰

CONTEMP. PROBS. 185, 185–86 (1994) (“Regulatory reform movements in the 1960s emphasized rulemaking and extolled its virtues of efficiency, fairness, and political accountability.”).

294. Beermann & Lawson, *supra* note 201, at 901; Nielson, *supra* note 281, at 11; Shapiro & Murphy, *supra* note 162, at 335; Strauss, *supra* note 292, at 757 (“To some extent, these and other developments were the product of mistaken judicial analogies between the newly important rulemakings and what were for judges the more familiar forms of adjudicative action.”).

295. Shapiro & Murphy, *supra* note 162, at 349.

296. Webley, *supra* note 288, at 34–35, 39.

297. Nielson, *supra* note 281, at 11; *see also* Stuart Shapiro, *Does the Amount of Participation Matter? Public Comments, Agency Responses and the Time to Finalize a Regulation*, 41 POLICY SCI. 33 (2008) (concluding that the volume of public comments can influence the time required to complete a complex rule).

298. McGarity, *supra* note 258, at 1400; *see also* Pierce, *supra* note 237, at 10; Shapiro & Murphy, *supra* note 162, at 351.

299. Webley, *supra* note 288, at 9; *see also* NICHOLAS R. PARRILLO, ADMIN. CONFERENCE OF THE U.S., FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 146 (2017), <https://www.acus.gov/report/agency-guidance-final-report>.

300. *See* Shapiro & Murphy, *supra* note 162, at 336 (“[T]he courts’ transformation of rulemaking has undermined agency effectiveness in significant and unnecessary ways, neces-

Closely related to the blossoming preamble is the need to produce a rulemaking record. This requirement too grew out of pre-enforcement review under the hard-look standard, and it too serves laudable goals: it “allows the public to fully assess and effectively comment on the agency’s proposed rule” and “ensures that the reviewing court can evaluate the propriety of the agency’s rulemaking process and of the final rule.”³⁰¹ But it too has contributed to the burden of rulemaking.³⁰² Aside from the hours of staff time required to produce a record one must add the payments to contractors³⁰³ as well as increased litigation.³⁰⁴ Again, judicial review necessitates some sort of record, but the courts should respect the deliberation embodied in the APA and leave judgments about balancing the benefits and burdens of rulemaking procedure to Congress.

Providing notice of the information considered in drafting a notice of proposed rulemaking should not overburden agencies in most cases. And certainly, as the Attorney General’s Manual states, agencies must provide notice that is “sufficiently informative to assure interested persons an opportunity to participate intelligently in the rulemaking process.”³⁰⁵ As Sydney Shapiro and Richard Murphy explained, enhanced notice requirements improve both the “fairness” of the rulemaking process and the “quality” of the final product.³⁰⁶ They also help to provide a “foundation for a serious adversarial critique” of agency rules.³⁰⁷

sitating a rebalancing of administrative law values.”).

301. See Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 641 (2017); see also Beermann & Lawson, *supra* note 201, at 900; Charles H. Koch, Jr. & Richard Murphy, 1 ADMIN. L. & PRAC. § 4:44 (3d ed. 2018) (“The rulemaking record serves three major purposes. First, the record provides the body of information necessary to participate in the rulemaking. Second, the record is the body of information the agency relies on in promulgating its final rule. Third, the record provides support for the final rule at judicial review.”).

302. See Shapiro & Murphy, *supra* note 162, at 341. But see William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 167 (1991) (opining that “as a procedural requirement, the need for a record for rulemakings imposes minimal burdens on agencies”).

303. See Paul R. Verkuil, *The Wait Is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 928 (2007) (“The use of consultants to prepare rules for review has become a common practice.”).

304. Cf. Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 745 (2016) (arguing that the risk of litigation arising from the rulemaking record pressures agencies to shift their information gathering to before the public comment period).

305. AG’S MANUAL, *supra* note 16, at 30; see also Nielson, *supra* note 281, at 10–11.

306. Shapiro & Murphy, *supra* note 162, at 349.

307. *Id.* at 340; see also Beermann & Lawson, *supra* note 201, at 900; Walker, *supra* note

But moving from the EPA's obvious abuse in *Portland Cement* to an across-the-board judicial rule was unjustified. In some circumstances, requiring such notice will overburden the agency, inundate the public, and provide hypertechnical grounds for seeking remands.³⁰⁸ As David Pozen explained, increasing transparency provides diminishing returns:

As public institutions have become the targets of more and more policies of formal openness and accountability . . . , demands for greater transparency from those same institutions have generally become less and less capable of producing significant democratic or procedural benefits—and potentially more and more threatening to the capacity and legitimacy of the institutions.³⁰⁹

Likewise, citizens' limited capacity for putting information to use reduces the benefits of increased transparency.³¹⁰ Perhaps more importantly, this requirement blurs the line between formal rulemaking—in which the agency's decision is limited to the record—and informal rulemaking—in which it is not.³¹¹ The courts should not have taken it on themselves to amend the APA in this manner.

Similarly, the rule requiring disclosure of ex parte contacts was inspired by a desire to ensure that agencies act in the best interest of the public, rather than that of regulated industries, and that the public discussion in rulemaking not be “reduced to a sham.”³¹² It too resulted from application of adjudicative principles to rulemaking.³¹³ As a practical matter, it does not seem like a big deal, but requiring it in all cases imposes yet another burden that may become unwieldy in some circumstances. Moreover, requiring disclosure of ex parte contacts in rulemaking actually may hinder dialogue with regulated parties and the public and thus undermine regula-

301, at 640.

308. Cf. *Pierce*, *supra* note 220, at 917 (“Of course, the requirement to disclose the studies and other data sources on which the agency proposes to rely must be limited in ways that avoid imposing large unnecessary burdens on the informal rulemaking process.”); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1331–32 (2010) (detailing the downsides of information overload).

309. David Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. (forthcoming 2018) (manuscript at 48), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120807.

310. *Id.* at 43.

311. Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1816 (1978).

312. See *Home Box Office v. FCC*, 567 F.2d 9, 53, 54 (D.C. Cir. 1977); see also *id.* at 56 (finding secrecy inconsistent with “fundamental notions of fairness”); Murphy, *supra* note 228, at 694–95.

313. See *Home Box Office*, 567 F.2d at 55 (expressing a desire to ensure “adversarial critique” of the agency); Beer mann & Lawson, *supra* note 201, at 884.

tory legitimacy.³¹⁴ Standing alone, each of these judicial rules about rulemaking may seem reasonable, but taken together, they impose a significant burden on agency rulemaking.

3. *Subregulatory Policy*

The difficulty of rulemaking pushes agencies to make policy through subregulatory means.³¹⁵ The conservative minority of the Attorney General's Committee anticipated that if rulemaking were made too difficult, "rules will either not be made or policy will be driven underground, as it were, and remain inarticulate or secret."³¹⁶ The minority did not anticipate that agencies would find other ways to communicate their policy decisions such as memoranda, manuals, handbooks, letters, and litigating positions.³¹⁷

Such subregulatory policy is an attractive alternative to rulemaking because it is less time and resource intensive. It is faster and more flexible. It dispels uncertainty within an agency and gives regulated parties increased predictability without the burden of rulemaking.³¹⁸

Subregulatory policy is limited, however, insofar as it cannot carry the force of law.³¹⁹ When an agency attempts to make such policies binding or if the policies are binding as a practical matter, courts fault the agency for not going through notice-and-comment rulemaking.³²⁰ If instead agencies permit "ad hoc departures" from subregulatory policies—as they must if their policies are truly non-binding—they often face "criticism and antagonism" from industry, NGOs, the media, and Congress because individual-

314. See *Sierra Club v. Costle*, 657 F.2d 298, 400–01 (D.C. Cir. 1981) (criticizing *Home Box Office*); see also Murphy, *supra* note 228, at 696–97.

315. Blais & Wagner, *supra* note 281, at 1705; Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767, 778 (2008); Mashaw, *supra* note 293, at 186; McGarity, *supra* note 258, at 1386; PARRILLO, *supra* note 299, at 31–32.

316. AG'S COMMITTEE REPORT, *supra* note 16, at 225.

317. Cf. PARRILLO, *supra* note 299, at 186 ("Guidance consists of agency statements of general applicability, not binding on members of the public, that advise the public of the manner in which the agency proposes to exercise a discretionary power or of the agency's construction of the statutes and legislative rules it administers.").

318. *Id.* at 7, 30–31; see also Stephen M. Johnson, *In Defense of the Short Cut*, 60 U. KAN. L. REV. 495, 507–08 (2012).

319. PARRILLO, *supra* note 299, at 23.

320. *E.g.*, *Agric. Retailers Ass'n v. Dept. of Labor*, 837 F.3d 60, 65 (D.C. Cir. 2016); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 384 (D.C. Cir. 2002).

ized departures may carry an implication of impropriety.³²¹ Maintaining “principled flexibility” in implementing subregulatory policy is expensive and “logistically challenging.”³²² Agencies end up unable to respond to elections or changing circumstances in a timely and effective manner.³²³

4. *Congressional Ossification*

Ideally, Congress would make key policy decisions following serious deliberation. Congress is capable of such action and deliberation “even in periods of divided government and partisan acrimony.”³²⁴ More often, however, Congress fails to prescribe policy. Even when Congress manages to act, it often does so with insufficient deliberation.

One might thank the federal courts for keeping administrative law up to date in the face of congressional inaction.³²⁵ But the courts’ willingness to make law has enabled Congress’s inaction. Instead of making Congress’s decisions for Congress, the courts should make decisions that inspire Congress to deliberate. William Eskridge and John Ferejohn refer to this as “[d]eliberation-inducing” review.³²⁶ The courts should try to reverse congressional inertia, they argued, and “jump-start the political process by forcing a fundamental normative discussion.”³²⁷

The courts have not followed Eskridge and Ferejohn’s advice in administrative law. Thus, more often than not, Congress abdicates its responsibility to make key policy decisions. At the same time, it has become increasingly difficult for agencies to pick up the slack through rulemaking.³²⁸ In

321. PARRILLO, *supra* note 299, at 98.

322. *Id.* at 107.

323. Many of the recent agency attempts to change policy quickly have failed in the courts. *See, e.g.*, *Nat. Res. Def. Council v. Nat’l Hwy. Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018); *Clean Air Council v. Pruitt*, 862 F.3d 1, 4 (D.C. Cir. 2017); *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062 (N.D. Cal. 2018); *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018); *Nat. Res. Def. Council, Inc. v. Perry*, No. 17-CV-03404-VC, 2018 WL 922032 (N.D. Cal. Feb. 15, 2018).

324. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1460 (2014); *see also* Kovacs, *supra* note 11, at 1258–59.

325. *See, e.g.*, Metzger, *supra* note 163, at 1322, 1329, 1331.

326. ESKRIDGE & FEREJOHN, *supra* note 12, at 289, 436.

327. *Id.* at 56; *see also* Kovacs, *supra* note 11, at 1249.

328. Agencies might turn to adjudication instead. *See* Brian J. Shearer, *Outfoxing Alaska Hunters: How Arbitrary and Capricious Review of Changing Regulatory Interpretations Can More Efficiently Police Agency Discretion*, 62 AM. U. L. REV. 167, 170 (2012); Michael A. Livermore, *Revising Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL.

INS v. Chadha,³²⁹ the Supreme Court observed that each branch of government exerts hydraulic pressure “to exceed the outer limits of its power.”³³⁰ By the same token, when a branch of government does not exercise its power, it creates a decisional vacuum into which one of the other branches gets drawn.³³¹ When neither Congress nor agencies make policy efficiently, the President naturally fills the void.³³²

C. *Fomenting the Unitary Executive*

1. *Presidential Direct Action*³³³

The burden of rulemaking makes agencies less able to respond to elections and other changes in circumstances, which drives the President to make key decisions himself. Sometimes the President orders an agency head to take a certain action;³³⁴ other times he takes action himself.³³⁵ Recent examples of the latter include President Trump’s Proclamation ban-

L.J. 311, 338 (2007). The apparatus required for case-by-case decisionmaking may impose even more of a burden than rulemaking. See Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 454 (1979).

329. 462 U.S. 919 (1983).

330. *Id.* at 951 (1983); see also Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 689 (1978) (critiquing the “‘hydraulic’ model” in which “[t]he fluid nature and scope of each branch’s functions expand to fit circumstances until they reach the limit set by a competing branch’s function”).

331. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (observing that even if the Supreme Court says that Congress has a certain power, that power will slip through Congress’s fingers if it “is not wise and timely in meeting its problems”).

332. The courts may step in as well. See Jud Mathews, *Presidential Administration in the Obama Era* (draft at 3), available at <https://ssrn.com/abstract=2927494> (arguing that new Supreme Court administrative law doctrines seek to “hold the line on executive branch aggrandizement”); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3, 38 (2017) (“the most common response to these fears of unaccountable and aggrandized executive power is an assertion of a greater role for Article III courts”).

333. The term “direct action” comes from PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* 4 (2d ed. 2014).

334. See generally Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (discussing the occasions when the President has the authority to direct the administration of laws).

335. See generally Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43 (2017); COOPER, *supra* note 333 (providing an exhaustive analysis of the many forms of executive direct action including executive orders, memoranda, and proclamations).

ning immigration from certain countries,³³⁶ his Executive Order rescinding federal climate change policies,³³⁷ his Executive Order requiring that two regulations be repealed for every one promulgated,³³⁸ and his Tweet banning transgendered people from serving in the military.³³⁹

Clearly, there are other reasons for this phenomenon: among them, the President's desire to take political credit or, on the flip side, his recognition that, whatever the outcome, he will be saddled with the political blame.³⁴⁰ The American public seems to equate the President with the Fourth Branch.³⁴¹ Advances in technology and media may be exacerbating this effect.³⁴² This phenomenon, however, cuts both ways. The President may be inclined to make policy decisions himself so that he can take the credit if the outcome is politically popular, but he may prefer to leave policymaking to his subordinates so that he can distance himself if the outcome is not politically popular.³⁴³ This does not, therefore, account fully for the dramatic

336. Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8977, 8978 (Feb. 1, 2017); *see also* Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. REG. (forthcoming 2018) (manuscript at 30), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3018618.

337. Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017); *see also* Mashaw & Berke, *supra* note 336, at 52.

338. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017); *see also* Mashaw & Berke, *supra* note 336, at 70.

339. *See* Abby Phillip, Thomas Gibbons-Neff, & Mike DeBonis, *Trump Announces That He Will Ban Transgender People from Serving in the Military*, WASH. POST (July 26, 2017), https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7_story.html?utm_term=.76454357e11f.

340. Daniel A. Farber, *Presidential Administration Under Trump* 23 (Aug. 9, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591 (envisioning a “feedback cycle in which presidents take control of major agency decisions, fortifying the public’s tendency to assign blame to the president for unpopular outcomes, which in turn strengthens the pressure on the president to assert control”); *see also* COOPER, *supra* note 333, at 65, 95; Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Power*, 164 U. PA. L. REV. 1869, 1900 (2016) (finding that people are more likely to blame the President for poor agency outcomes than they are to credit him for positive agency outcomes); Kagan, *supra* note 1, at 2310; Stack, *supra* note 334, at 264, 317.

341. Mashaw & Berke, *supra* note 336, at 41.

342. *See* John Dickerson, *The Hardest Job in the World*, THE ATLANTIC (May 2018), <https://www.theatlantic.com/magazine/archive/2018/05/a-broken-office/556883/> (explaining how the presidency has become an unwieldy job).

343. *Cf.* COOPER, *supra* note 333, at 107 (pointing out that presidential direct action “often makes the White House a lightning rod for criticism”).

rise in presidential direct action described below.

The President also may feel the need to make policy himself because Congress's capacity for legislating has atrophied.³⁴⁴ Moreover, a President can only rely on Congress to make policy when the President's party controls both houses, which has been rare since World War II.³⁴⁵ When Congress is held by the opposing party, it may try to stymie the President's agenda.³⁴⁶ "The more the demands on the President for policy leadership increase and the less he can meet them through legislation, the greater his incentive to tap the alternate source of supply deriving from his position as head of the federal bureaucracy."³⁴⁷

There may be many other inspirations for presidential direct action as well, including "paying political debts, demonstrating action for a constituency, responding to political adversaries, or sending political signals."³⁴⁸ Rulemaking ossification also must be included in that list. As Phillip Cooper explained, presidents may use executive direct action to avoid lugubrious congressional procedures or "to avoid the sometimes equally time-consuming administrative procedure," particularly rulemaking.³⁴⁹ Indeed, agencies may ask the President to establish policy himself to avoid the burden of rulemaking and to make it more difficult for adversaries to challenge the policy in court.³⁵⁰

President Trump may not have made immigration policy by presidential fiat if the Department of Homeland Security could issue a rule more quickly. He could have left the matter to a friendly majority in Congress, as

344. *Id.* at 79, 395; Kagan, *supra* note 1, at 2310; Mashaw & Berke, *supra* note 336, at 57; Mathews, *supra* note 332, at 13–14; Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 856–57 (2017).

345. Kagan, *supra* note 1, at 2311.

346. Stack, *supra* note 334, at 321 (citing Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 688–715 (2000)); see also COOPER, *supra* note 333, at 143–45, 388 (demonstrating the use of presidential direct action to circumvent Congress); Kagan, *supra* note 1, at 2250 (tying presidential administration to the "re-emergence of divided government").

347. Kagan, *supra* note 1, at 2312.

348. COOPER, *supra* note 333, at 66, 138–39. Presidents may take direct action as well when they do not trust their own appointees, much less civil servants, to implement their policies faithfully.

349. *Id.* at 85.

350. *Id.* ("There is nothing new about the practice of generating executive orders from outside the White House."). Cooper recognized the irony that rulemaking ossification may inspire presidential direct action, yet presidential direct action has contributed to rulemaking ossification. *Id.* at 86, 108–09.

President Reagan did.³⁵¹ Or he could have taken credit for the policy change like President Obama did—by making a Rose Garden announcement of a policy, which later would be encapsulated in a secretarial memorandum.³⁵² Instead, Trump issued a Proclamation banning immigration from certain countries immediately.³⁵³ Trump's desire for fast results explains his decision to change policy himself without going through agency processes.³⁵⁴

Other recent examples of presidential actions that may have been inspired in part by a desire to bypass rulemaking include the order directing the Secretary of the Interior to expand broadband in rural areas;³⁵⁵ the order establishing a policy regarding mental healthcare for veterans;³⁵⁶ the memorandum dictating timing and testing requirements under the Clean Air Act;³⁵⁷ and the memorandum establishing a new policy regarding arms transfers.³⁵⁸ The President's desire to avoid a lengthy rulemaking process was evident in his Executive Order establishing new procedures for firing federal employees and ordering the Director of the Office of Management and Budget to "propose for notice and public comment appropriate regulations to effectuate the principles set forth in" the President's order.³⁵⁹ The President's authority to take such actions when statutes delegate authority

351. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3445 (1986).

352. U.S. DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; see also Mashaw & Berke, *supra* note 336, at 22–23.

353. Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8977, 8978 (Feb. 1, 2017). The means the President chose for making immigration policy required his action and could not have been accomplished via rulemaking. 8 U.S.C. § 1182(f) (authorizing the President to suspend entry of aliens). Yet, he could have chosen to make policy by other means that did not require his signature.

354. Cf. COOPER, *supra* note 333, at 386 (explaining that presidents often take direct action because they believe traditional approaches will be too slow). The desire for fast results also may partially explain Congress's invalidation of rules from the prior Administration under the Congressional Review Act, Pub. L. No. 104-121, title II, § 251 (1996), codified at 5 U.S.C. §§ 801–808 (2012).

355. Exec. Order No. 13,821, 83 Fed. Reg. 1507 (Jan. 11, 2018).

356. Exec. Order No. 13,822, 83 Fed. Reg. 1513 (Jan. 12, 2018).

357. Memorandum on Promoting Domestic Manufacturing and Job Creation—Policies and Procedures Relating to Implementation of Air Quality Standards, 2018 DAILY COMP. PRES. DOC. (Apr. 12, 2018).

358. National Security Presidential Memorandum on United States Conventional Arms Transfer Policy, 2018 DAILY COMP. PRES. DOC. (Apr. 19, 2018).

359. Exec. Order No. 13,839 § 7, 83 Fed. Reg. 25,343, 25,345–46 (June 1, 2018).

to one of the President's political appointees is questionable,³⁶⁰ which makes it all the more remarkable that the President bypasses rulemaking so readily.

In the absence of empirical data, it is fair to assume that, if rulemaking were quicker and easier, the President would be less inclined to rule by decree. In the very least, the pressure on the President to make policy himself would decrease. If we are willing to accept that congressional inertia has contributed to the rise of the unitary executive, we must accept that agency inertia has as well. In a hydraulic system of government, power, "like water, has to go somewhere."³⁶¹

Gillian Metzger argued recently that the fundamental features of the administrative state—"bureaucratic oversight, expertise, professionalism, structural insulation, procedural requirements, and the like . . . hold[] the key to securing accountable, constrained, and effective exercises of executive power."³⁶² In particular, the structure of the federal bureaucracy helps to "forestall presidential aggrandizement."³⁶³ Conversely, making the federal bureaucracy dysfunctional removes one check on presidential power. Avoiding authoritarianism while maintaining effective governance requires functional agencies. Ineffective agencies enable presidential unilateralism.

Obviously, reversing the tide on the judicial rules of rulemaking would not halt the rise of the unitary executive. Power once acquired is not easily abandoned.³⁶⁴ Nonetheless, pulling on this thread may unravel a larger body of judicially created administrative law and move us closer to the balance envisioned in the APA. Moreover, it may be easier to convince the Supreme Court to overrule some precedent than to stimulate Congress to amend the APA.

360. See generally Stack, *supra* note 334 (arguing that the President may only do so when expressly permitted by statute).

361. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) ("Our account, then, is 'hydraulic' in two senses. First, we think political money, like water, has to go somewhere. It never really disappears into thin air. Second, we think political money, like water, is part of a broader ecosystem. Understanding why it flows where it does and what functions it serves when it gets there requires thinking about the system as a whole.").

362. Metzger, *supra* note 332, at 78.

363. *Id.* at 83.

364. See C. M. Hudspeth, *Presidential Government in the United States: The Unwritten Constitution* by C. Perry Patterson, 26 TEX. L. REV. 375, 376 (1948) (book review) ("The skeptical American of today may feel, however, that finding a President who would willingly abdicate his political power and become a mere executive would be more difficult than Diogenes' search.").

2. *From Nixon to Trump*

Presidential direct action is not a new phenomenon.³⁶⁵

American history provides myriad examples of presidential interpretations of the faithful execution duty that can either delight or dismay the observer. Lincoln's Emancipation Proclamation stands at the apex At the nadir sit actions such as Jackson's Indian removal, Andrew Johnson's conduct of Reconstruction, and Franklin Roosevelt's wartime internment of Japanese Americans.³⁶⁶

Presidential direction of agency rulemaking, however, has increased over the past several decades.³⁶⁷

Harold Bruff credits President Nixon with the first foray into presidential management of agency rulemaking with his "Quality of Life" review, which in practice targeted EPA regulations.³⁶⁸ President Ford initiated fiscal impact review with Inflation Impact Statements.³⁶⁹ President Carter continued the trend by creating the Regulatory Analysis Review Group to review analyses of proposed rules. He also created the Regulatory Council to publish a semiannual synopsis of major regulations under development.³⁷⁰

Within a month of his inauguration, President Reagan empowered the Office of Management and Budget (OMB) with review of proposed regulations.³⁷¹ He followed up four years later by giving OMB the authority to review agencies' statements of their "policies, goals, and objectives for the coming year" for consistency with administration policy.³⁷² By the end of the Reagan Administration, OMB regulatory review had "achieved a tentative acceptance in the executive branch."³⁷³ George H.W. Bush followed in

365. COOPER, *supra* note 333, at 20 ("Rule by presidential decree has been the subject of serious controversy since the administration of George Washington, and the debates continue.").

366. Harold H. Bruff, *The President's Faithful Execution Duty*, 87 U. COLO. L. REV. 1107, 1125–26 (2016); *see also* COOPER, *supra* note 333, at 9; Kagan, *supra* note 1, at 2291.

367. *See* COOPER, *supra* note 333, at 118 (arguing that each President learns the tools of executive direct action from his predecessors and adapts those tools to new uses).

368. Bruff, *supra* note 290, at 546–47.

369. *Id.* at 547.

370. *Id.* at 548–49; *see also* Shane, *supra* note 292, at 148–49 (discussing increasing presidential oversight of agencies in the Nixon, Ford, and Carter Administrations).

371. Exec. Order No. 12,291, 46 Fed. Reg. 12,291 (Feb. 17, 1981); *see also* Bruff, *supra* note 290, at 549–50; Watts, *supra* note 290, at 689–90. Congress had created OIRA the prior year. Paperwork Reduction Act, Pub. L. No. 96-511 § 2, 94 Stat. 2812, 2814 (1980) (codified at 44 U.S.C. § 3503 (2012)).

372. Exec. Order 12,498 § 1, 50 Fed. Reg. 1036, 1036 (Jan. 8, 1985); *see also* Bruff, *supra* note 290, at 551; Shane, *supra* note 292, at 150–51.

373. Bruff, *supra* note 290, at 562.

Reagan's footsteps, adding the antiregulatory Council on Competitiveness to his arsenal.³⁷⁴

"[P]residential control of administration, in critical respects, expanded dramatically during the Clinton years."³⁷⁵ Clinton controlled agencies through "formal directives" that "set the terms of administrative action and prevent[ed] deviation from his proposed course."³⁷⁶ His executive orders went further than prior presidents by "implicitly suggest[ing] that the President had ultimate power to direct an agency's rule-making decisions."³⁷⁷ He also publicly appropriated agency actions as his own.³⁷⁸

President George W. Bush continued issuing directives to agencies and used signing statements as well "to build a unified executive branch under the undisputed control of the president."³⁷⁹ He also required each agency to employ a presidentially appointed Regulatory Policy Officer to approve all rulemaking before it began.³⁸⁰ In addition, he controlled agencies covertly, in particular by working "behind-the-scenes . . . to influence agencies' scientific findings."³⁸¹

Presidential control of the administrative state reached a new high under President Obama.³⁸² Like George W. Bush, Obama's efforts were both covert and "splashed across the headlines."³⁸³ Among other things, Obama employed more White House "czars"—policy advisors who lack Senate confirmation—than any prior president,³⁸⁴ thus extending "presidential control beyond episodic directive authority."³⁸⁵ He also "publicly appropriate[d] agency decisions to an unprecedented degree"³⁸⁶ with the new

374. COOPER, *supra* note 333, at 136–38.

375. Kagan, *supra* note 1, at 2248; *see also* Shane, *supra* note 292, at 153.

376. Kagan, *supra* note 1, at 2249; *see also id.* at 2285, 2290, 2293. President Reagan issued nine such directives; Clinton issued 107. *Id.* at 2294. "Presidential Memoranda" differ from executive orders only insofar as the former do not meet the legal requirements of the latter, such as numbering and publishing. J.B. Ruhl et al., *Topic Modeling the President: Conventional and Computational Methods*, 86 GEO.WASH. L. REV. (forthcoming 2018) (manuscript at 7–8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3086226.

377. Farber, *supra* note 340, at 21; *see also* Kagan, *supra* note 1, at 2288–89; Watts, *supra* note 290, at 690–91.

378. Kagan, *supra* note 1, at 2249, 2299.

379. COOPER, *supra* note 333, at 332; *see also* Mashaw & Berke, *supra* note 336, at 13.

380. Shane, *supra* note 292, at 157; Watts, *supra* note 290, at 693–94.

381. Watts, *supra* note 290, at 685, 693, 695–98; *see also* Shane, *supra* note 292, at 157.

382. Watts, *supra* note 290, at 698; *see also* Coglianese, *supra* note 335, at 47–49.

383. Mathews, *supra* note 332, at 6; *see also* Watts, *supra* note 290, at 685, 698.

384. Mashaw & Berke, *supra* note 336, at 61–62; Watts, *supra* note 290, at 704.

385. Mashaw & Berke, *supra* note 336, at 21.

386. Watts, *supra* note 290, at 703; *see also* Mathews, *supra* note 332, at 7.

twist of announcing policies on blogs or websites instead of in formal statements.³⁸⁷

The current Administration again has taken presidential direct action to a new level.³⁸⁸ Daniel Farber concluded that although “the Trump Administration does not seem to be entirely *sui generis*,” it differs from its predecessors “in degree if not in kind.”³⁸⁹ For example, instead of using policy czars in the White House, President Trump inserted “political aides” who reported directly to the White House in at least sixteen agencies.³⁹⁰ Unitary executive theory is a theory no longer.³⁹¹ President Trump operates on the premise that all executive power is vested in him alone, regardless of statutory delegations to the contrary.³⁹² The presidency has become what the APA was designed to avoid.³⁹³

3. *Rules, Not Rulers*

Putting aside the question of whether such presidential direct action is constitutional,³⁹⁴ it has serious downsides. Elena Kagan defended presidential administration on the grounds that the President is more democratically accountable than agencies both because he provides an “electoral link between the public and the bureaucracy” and because he “enhances transparency.”³⁹⁵ She further argued that presidential administration is effective because it lends consistency and dynamism to the process.³⁹⁶ The President

387. COOPER, *supra* note 333, at 175.

388. Farber, *supra* note 340, at 4.

389. *Id.* at 30.

390. *Id.* at 18; Mashaw & Berke, *supra* note 336, at 77, 80.

391. *See generally* Farber, *supra* note 340 (critiquing Kagan’s *Presidential Administration*); Mashaw & Berke, *supra* note 336 (same).

392. *Cf.* Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 596 (1994) (“the Constitution establishes that the President exclusively controls the power to execute all federal laws, and therefore it must be the case that all inferior executive officers act in his stead”) (emphasis omitted); Saikrishna B. Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 991–94 (1993) (similar); Shane, *supra* note 292, at 34, 37, 145 (explaining unitary executive theory).

393. Kathryn Watts argues that presidential control of agencies has both “positive and negative attributes.” Watts, *supra* note 290, at 706. No doubt, she is correct, but since she wrote that, the negatives have come to outweigh the positives.

394. *See* Kagan, *supra* note 1, at 2326. I also put aside the pros and cons of regulatory review in OIRA, focusing instead on policymaking by the President himself.

395. *Id.* at 2331–32.

396. *Id.* at 2339.

provides more coherent, less factional leadership than Congress.³⁹⁷ His national constituency makes his decisions less parochial, and he acts more decisively and applies general principles across a range of issues.³⁹⁸

But the President often makes his decisions in a black box with little to no transparency, much less public participation or deliberation.³⁹⁹ The President has no obligation to solicit feedback from effected parties to hone his policy and no obligation to reveal who influenced his decision or what information he considered in reaching it.⁴⁰⁰ To the contrary, presidents often assert executive privilege to keep their involvement out of the public eye.⁴⁰¹

Rulemaking, on the other hand, entails more transparency, public participation, and deliberation.⁴⁰² Jerry Mashaw and David Berke posit that rulemaking may be “the most open and deliberative of any processes in American federal governance.”⁴⁰³ The APA obligates agencies to share their proposals, solicit public input, and consider any comments before promulgating a final policy.⁴⁰⁴ Presidential involvement in rulemaking short circuits that deliberative process.⁴⁰⁵ Peter Shane demonstrated that presidential administration “breeds an insularity, defensiveness, and even arrogance within the executive branch that undermines sound decision making, discounts the rule of law, and attenuates the role of authentic deliberation in shaping political outcomes.”⁴⁰⁶

Kagan argued that presidential administration might open the decisionmaking process to a broader array of interests because the President has

397. *Id.* at 2349.

398. Farber, *supra* note 340, at 25 (citing Kagan, *supra* note 1, at 2332, 2335, 2339); *see also* Watts, *supra* note 275, at 706 (arguing that presidential control can inject coherence and accountability).

399. *See* COOPER, *supra* note 333, at 109 (detailing the differences between presidential direct action and rulemaking and stating that executive orders “are usually not the result of an open process, provide little or no procedural regularity, and involve limited participation”); Lisa Heinzerling, *A Pen, A Phone, and the U.S. Code*, 103 *GEO L.J. ONLINE* 59, 64 (2016); Renan, *supra* note 344, at 896 (pointing out that in the Executive Branch, legal conclusions can change in secret, without “public notice or democratic feedback”); Watts, *supra* note 290, at 711–16 (comparing decisions made by G.W. Bush and Obama).

400. Mashaw & Berke, *supra* note 336, at 15–16, 88.

401. *Id.* at 15–16.

402. *See id.* at 88.

403. *Id.* at 89.

404. 5 U.S.C. § 553 (2012).

405. Mashaw & Berke, *supra* note 336, at 89; Shane, *supra* note 292, at 183.

406. Shane, *supra* note 292, at 25; *see also* Mashaw & Berke, *supra* note 336, at 31 (detailing the lack of deliberation in Trump’s travel ban).

a national constituency.⁴⁰⁷ Mashaw and Berke, however, were far more realistic in their observation that presidential administration “tends by its very nature to limit the actors who are engaged in policy discussions and conceal the real motivations and considerations behind the administrative policies.”⁴⁰⁸ Moreover, “any president necessarily has limited individual bandwidth”⁴⁰⁹ and cannot possibly spend as much time on a rule as agency officials can. Indeed, in the current Administration, the President sometimes makes policy on Twitter without consulting his cabinet officers.⁴¹⁰

Kagan argued that the President’s national constituency makes him more responsive to “the preferences of the general public, rather than merely parochial interests.”⁴¹¹ Absent presidential involvement, she argued, the rulemaking process has only a “tenuous connection to national majoritarian preferences.”⁴¹² Kathryn Watts agreed that political control justifies the existence of the Fourth Branch and can enhance accountability.⁴¹³

The presidential accountability argument, however, “exalts a one-time electoral majority (perhaps only in the Electoral College) as the sole touchstone of democratic legitimacy over the pluralist and deliberative processes of standard administrative action.”⁴¹⁴ The fact that the President need not win a majority of the vote to be elected (or reelected) further undermines his potential democratic accountability.⁴¹⁵ Mashaw and Berke observed that “[c]urrying favor with particular constituencies and avoiding political

407. Kagan, *supra* note 1, at 2360–61.

408. Mashaw & Berke, *supra* note 336, at 89; *see also* Bruff, *supra* note 366, at 1113 (“Presidents normally respond to elite groups that either support them or can cause trouble by opposing them in Congress, not to those at the fringes of society.”).

409. Farber, *supra* note 340, at 15.

410. *See id.* at 17; Defendants’ Supplemental Submission at 4, James Madison Project v. Dep’t. of Justice, No. 1:17-cv-00144-APM (D.D.C. Nov. 13, 2017), ECF No. 29 (“the government is treating the President’s statements . . . —whether by tweet, speech or interview— as official statements of the President of the United States”).

411. Kagan, *supra* note 1, at 2335.

412. *Id.* at 2336.

413. Watts, *supra* note 290, at 724–25.

414. Mashaw & Berke, *supra* note 336, at 93.

415. Shane, *supra* note 292, at 180; *cf.* Farber, *supra* note 340, at 34 (arguing that receiving less than a majority of the vote undermines arguments for deference to the President’s views); Webley, *supra* note 288, at 25 (arguing that “the occasional interventions of a single individual living in a palace elected by a minority of the population seems a poor substitute for the kind of direct popular participation that would signify ‘people’s rule’ in a strong sense”).

backlash are in some sense tied to electoral accountability.⁴¹⁶ But neither lends sufficient accountability to support Kagan's normative case for presidential administration.⁴¹⁷ Moreover, presidential electoral accountability depends on transparency, which is sorely lacking in presidential direct action.⁴¹⁸ Agencies, on the other hand, answer to Congress and the courts to a far greater extent than the President, and their political heads may be removed from office far more easily than the President. This makes them in effect more accountable than the President himself and more likely to make decisions consistent with the "array of political forces embodied in a statute."⁴¹⁹

Furthermore, the President lacks the expertise of agencies.⁴²⁰ Kagan's endorsement of presidential administration hinged on the President's respect for expertise.⁴²¹ Daniel Farber observed, though, that "there are clear reasons for concern about Trump's respect for expertise, whether in agencies or elsewhere."⁴²² Absent that respect, politics supplants expertise, undermining the purpose for and benefits of administrative agencies.⁴²³

Kathryn Watts contended that "expertise forcing"—trying to force regulators to base decisions on "apolitical, technocratic" grounds—is "misguided."⁴²⁴ She argued that agency rulemaking cannot be isolated from political influence, nor should we want it to be.⁴²⁵ Expertise forcing may "sweep policy choices under the rug" or, worse, inspire agency officials to bend the facts to reach their desired policy outcomes.⁴²⁶ The crux of Watts's argument is that presidential influence in rulemaking should not exceed the permissible boundaries of the agency's statutory authority.⁴²⁷ To keep pres-

416. Mashaw & Berke, *supra* note 336, at 43–44.

417. *Id.*; see also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 493–94 (2003) (questioning the normative value of majoritarianism); Shane, *supra* note 292, at 161 (opining that there is no reason to believe that the President will reflect majoritarian preferences on policy issues more than his appointees).

418. See Mashaw & Berke, *supra* note 336, at 87.

419. Shane, *supra* note 292, at 163.

420. See Farber, *supra* note 340, at 5, 14.

421. Kagan, *supra* note 1, at 2356.

422. Farber, *supra* note 340, at 28; see also *id.* at 3.

423. See Shane, *supra* note 292, at 164; cf. Renan, *supra* note 344, at 880–81 ("the relationship between administrative judgment and presidential politics has become more porous").

424. Watts, *supra* note 290, at 720.

425. *Id.* at 724.

426. *Id.* at 725.

427. *Id.* at 731.

idental influence in bounds, she advocates doctrines that incentivize agencies to reveal presidential influence in rulemaking.⁴²⁸

Watts's point is well taken, but recent events inspire a second look. There are many other ways for the first three branches of government to control the fourth that do not resemble autocracy to the same degree as direct presidential control of agency decisionmaking.⁴²⁹ Agencies are not simply tools of the President, and the transparency on which Watt's normative argument depends is unfortunately not forthcoming.

Moreover, "White House intervention in rulemaking has at times induced agencies to exceed their statutory powers or to ignore the permissible fact and policy bases for regulations that are contained in administrative records."⁴³⁰ Daphna Renan argued that "considerations of legality and considerations of politics or policy are no longer institutionally distinct and sequential inside the executive; they are intermingled."⁴³¹ In the rulemaking arena, this intermingling of law and politics could well lead to arbitrary, capricious, or unlawful agency actions.⁴³²

Kagan acknowledged this danger, but thought that judicial review would provide an adequate backstop.⁴³³ She contended that *Franklin v. Massachusetts*⁴³⁴ holding that the President is not an "agency" under the APA should not apply when the President "step[s] into the shoes of an agency head."⁴³⁵ Even if that distinction were upheld, however, and enabled some APA suits against the President, applying the rulemaking provisions of the APA to the President would be another battle.⁴³⁶ Unless the President is obligated to consider a multiplicity of public views in an open decisionmaking process, he should not be engaged in the quasi-legislative function of rulemaking.

428. *Id.* at 735–40.

429. Appointments and removal, the budget, advancing legislative and litigation priorities, congressional inquiries, and judicial review come to mind. See Mashaw & Berke, *supra* note 336, at 6.

430. Bruff, *supra* note 366, at 1121; see also Heinzerling, *supra* note 399, at 63; Lisa Heinzerling, *The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L & POL. REV. (forthcoming 2018) (manuscript at 3, 7–8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049004 (detailing the illegality of many Trump Administration rule delays); Kagan, *supra* note 1, at 2394.

431. Renan, *supra* note 344, at 835 (emphasis omitted).

432. Indeed, it already has. See *supra* note 323.

433. Kagan, *supra* note 1, at 2349–50.

434. 505 U.S. 788 (1992).

435. Kagan, *supra* note 1, at 2351.

436. *Cf.* Shane, *supra* note 292, at 29 (explaining judicial reluctance to interfere with presidential direct action).

V. CONCLUSION

The APA needs updating; it has been forty years since the last significant amendment. One might laud the courts for stepping into the breach left by Congress's inaction. But allowing the courts to update the statute enables congressional inaction, further exacerbating the problem. Moreover, courts are ill equipped to weigh the many competing considerations underlying rules of administrative procedure. They are structurally unsuited to foreseeing the consequences of the rules they establish for agencies. Thus, judicial updating of the APA inevitably has had unanticipated consequences. Among other things, the judicial rules about rulemaking have contributed to rulemaking ossification. Rulemaking has become enormously time and resource intensive, making it difficult for agencies to make policy quickly and efficiently.

Many of the judicial rules about rulemaking are good and should be codified in some form,⁴³⁷ but they should be debated thoroughly, and the overall burden on rulemaking procedure should be reduced. The courts should back off of rules that burden rulemaking and stick to the text of the APA until Congress amends it. Similarly, Congress and the President should be careful not to make rulemaking too difficult.⁴³⁸

If agencies, like Congress, continue to lose their policymaking agility, the President increasingly will fill the gap and make policy himself, coming closer and closer to true authoritarianism. The further we get from the text of the APA, the further we fall into the trap the Greatest Generation designed the APA to avoid.

Eliminating the judicial rules about rulemaking will not solve the problem of rulemaking ossification entirely, much less prevent authoritarianism from taking hold. But it is a modest step in the right direction. I have demonstrated that the judicial rules about rulemaking are inconsistent with the APA's text and history and have had unforeseen negative consequences. They are merely one thread in the quilt of court-made administrative law. Pulling on that thread, however, may help to unravel the whole quilt.

437. See Walker, *supra* note 301, at 640.

438. Shapiro, *supra* note 281, at 16 ("Congress should consider ways that it can reinvigorate agencies, enabling them to carry out their statutory missions of protecting people and the environment in a more timely and effective manner.").