

ENVISIONING ADMINISTRATIVE PROCEDURE ACT ORIGINALISM

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INTRODUCTION

The Administrative Procedure Act of 1946 (APA) sets forth the primary legal framework in which the modern administrative state operates.¹ It has been called a “superstatute,”² a “fundamental charter,”³ and even a “sub-constitution.”⁴ Indeed, in certain respects, the APA resembles the amended federal Constitution. Like the Constitution, the APA imposes both procedural and substantive limits on a vast swath of governmental decisionmaking. Also like the Constitution, with the exception of its preamble,⁵ the APA does not expressly state the normative principles that animate it—both documents consist primarily in “seemingly endless, tedious, soporific paragraphs laying out detailed rules.”⁶ Finally, like that of the Constitution,

1. 5 U.S.C. §§ 551–559, 561–570a, 701–706 (2012).

2. See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015).

3. See ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 39 (2016).

4. See Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363 (1978).

5. Administrative Procedure Act, Pub. L. No. 79-404 (1946) (providing in its full title, “An act to improve the administration of justice by prescribing fair administrative procedure”).

6. See Gary Lawson, *Reflections of an Empirical Reader, or, Could Fleming Be Right This Time?*,

the text and history of the APA often do not play a role in litigated cases. Much of our administrative law, like much of our constitutional law, is governed by judicially-created “common law” doctrines that seem untethered to any text or history.⁷ Yet, the text and history of both the Constitution⁸ and the APA⁹ have played a role in a number of important Supreme Court decisions; consequently, a significant turn towards what Michael Herz has termed “APA originalism”¹⁰ may be on the horizon.

In recent years, scholars have produced a number of articles questioning the consistency of long-settled administrative common law doctrines and agency practices with the APA’s original meaning.¹¹ As of this writing, Congress is considering amendments to the APA which rest upon the premise that the Supreme Court has departed from the original APA in developing common law doctrines of judicial deference to agency interpretations of statutes and regulations.¹² It would be an exaggeration to say that there is a movement afoot to restore a lost administrative constitution¹³—and with it what Daniel Farber and Anne Joseph O’Connell have described

96 B.U. L. REV. 1457, 1476 (2016) (describing the Constitution).

7. See KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 2:18 140 (2d ed. 1978) (writing that “about nine-tenths of American administrative law is judge-made law, and the other tenth is statutory”); Davis A. Strauss, *Foreword: Does the Constitution Mean What It Says?* 129 HARV. L. REV. 2, 12 (2011) (arguing that the “text of the Constitution routinely plays only a token role in litigated cases”).

8. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004); *INS v. Chadha*, 462 U.S. 919 (1983).

9. See, e.g., *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015); *Darby v. Cisneros*, 509 U.S. 137 (1993); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

10. Michael E. Herz, *Breaking News: New Form of Superior Agency Guidance Discovered Hiding in Plain Sight*, JOTWELL (Feb. 16, 2017), <https://adlaw.jotwell.com/breaking-news-new-form-of-superior-agency-guidance-discovered-hiding-in-plain-sight/>.

11. See, e.g., Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2016); Kent H. Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1 (2017); William Funk, *Slip Slidin’ Away: The Erosion of APA Adjudication*, 122 PENN ST. L. REV. 141 (2017); Kovacs, *supra* note 2; Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237 (2014); Jeffrey Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J. L. & PUB. POL’Y 87 (2018).

12. See Regulatory Accountability Act of 2017, S. 951, 115th Cong.; Regulatory Accountability Act of 2017, H.R. 5, 115th Cong.; Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. The content and constitutional premises on which this proposed legislation rests will be discussed in Part II.

13. See generally RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

as a “lost world of administrative law.”¹⁴ But, the newfound interest in the original APA merits careful attention. Efforts to “turn back the clock” to 1946 could have a wide-ranging impact on administrative law doctrine, the regulatory activity that is governed by that doctrine, and the lives of Americans whose daily affairs are affected by that regulatory activity in countless ways.

This Article comes neither to praise nor bury APA originalism—it is far too early to do either. No full-fledged originalist methodology for interpreting the APA has yet been developed. Instead, this Article envisions what such a methodology might look like, *were it to be developed*. It then proceeds to consider some of the doctrinal implications of putting that methodology into institutional practice and to sketch the terms of the normative debate over whether that methodology (or something similar to it) *ought* to be adopted by judges, as well as the prospects of that adoption actually taking place.

Part I situates the enactment of the APA in political and legal context and describes its subsequent judicial implementation. Part II describes the recent turn towards the APA’s original meaning. It summarizes scholarship exploring the APA’s original meaning and casting doubt on administrative common law both generally and particularly as to administrative common law doctrines and agency practices. It also describes proposed legislation that is designed to abolish administrative common law doctrines that are thought to violate the APA’s original meaning. Lastly, it highlights judicial opinions that suggest receptivity to arguments that certain administrative common law doctrines violate the original meaning of the APA.

Part III lays the theoretical foundation for an originalist approach to interpreting the APA. It canvasses the present state of originalist theory and explains why originalist methodology is applicable to statutes. It then devotes attention to a distinction that adherents to the ascendant form of originalism—the “New Originalism”¹⁵—have drawn between the activity

14. See Daniel Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1137, 1141 (2014) (cataloging the differences between “the world envisioned by the [Administrative Procedure Act (APA)] and key judicial rulings” and the “contemporary realities of the administrative state”).

15. The term “New Originalism” took off after being deployed by Keith Whittington and Randy Barnett. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599, 599 (2004). For a summary and critique of the rise of the New Originalism, see Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011). Among the distinguishing features of the New Originalism are 1) its pursuit of the original meaning that the constitutional text communicated to ratifying public, rather than the intentions of the text’s framers; and 2) its embrace of the interpretation-construction distinction. See Randy E. Barnett &

of ascertaining the linguistic meaning or communicative content of legal texts and the activity of giving those texts legal effect. This is known as the *interpretation-construction distinction*.¹⁶ New Originalists generally accept the proposition that constitutional decisionmakers must, in some cases, develop doctrines that are not part of the Constitution’s communicative content—but which do not contradict that content—in order to resolve legal questions.

Part IV outlines a provisional methodology for ascertaining the APA’s original meaning. It then uses that methodology to evaluate several administrative common law doctrines: “hard look” judicial review of agency actions challenged as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” under APA § 706(2)(A); “*Chevron* deference”¹⁷ to reasonable agency interpretations of ambiguous statutory language; “*Auer* deference”¹⁸ to reasonable agency interpretations of ambiguous regulatory language; and the “logical outgrowth” rule, which requires a measure of fit between informal rules proposed by agencies and final rules issued after the completion of the notice-and-comment process.¹⁹

Part V sketches some normative arguments for and against the judicial adoption of APA originalism and briefly assesses the prospects of that adoption taking place. A conclusion follows.

I. THE ADMINISTRATIVE CONSTITUTION, WRITTEN AND UNWRITTEN

It is beyond the scope of this Article to provide a comprehensive history of the APA or an exhaustive account of the case law that it has generated. But understanding the present state of administrative law and assessing the potential impact of APA originalism on that law requires some familiarity

Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. (forthcoming 2018) (manuscript at 2–3, 7–11), <https://scholarship.law.georgetown.edu/facpub/2000> (discussing these features).

16. For overviews of the interpretation-construction distinction, see Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65 (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2011). Part IV will elucidate the distinction and its significance. For present purposes, the reader should understand *interpretation* “to refer to the activity of discovering the linguistic meaning or communicative content of the constitutional text” and *construction* “to refer to the activity of determining the legal effect given to the text.” See Solum, *Originalism and Constitutional Construction*, *supra*, at 468.

17. See generally *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

18. See generally *Auer v. Robbins*, 519 U.S. 452 (1997).

19. First articulated in *South Terminal Corp. v. EPA*, 504 F.2d 646 (1981).

with the political and legal contexts in which the APA was enacted; what the APA was designed to achieve; and how it has been judicially implemented.

A. *The Written Administrative Constitution*

Justice Robert Jackson's opinion for the Supreme Court in the 1950 case of *Wong Yang Sung v. McGrath*²⁰ contains what may be the best-known short description of the APA: "[It] 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."²¹ As George Shepherd has documented,²² Jackson's description was roughly accurate. Far from being "so carefully and scientifically drafted that to know it was to admire it," the APA was met with unanimous support only because "many legislators recognized that, although the bill was imperfect, it was better than no bill."²³ The debate over administrative reform over the course of the preceding decade amounted to nothing less than a "pitched political battle for the life of the New Deal"—pro-New Deal Roosevelt Democrats and anti-New Deal Southern Democrats and Republicans recognized that the administrative reform "would determine the shape of the policies that the New Deal administrative agencies would implement."²⁴ Given this context, anything but a "hard-fought compromise that left many legislators and interest groups far from completely satisfied" could not reasonably have been expected.²⁵

Whether and in what respects the APA was designed to transform administrative procedure and judicial review of agency action or merely to codify existing practice has been disputed.²⁶ The APA implicitly accepts the legitimacy of the defining feature of the post-New Deal administrative

20. 339 U.S. 33 (1950).

21. *Id.* at 40.

22. See generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1995).

23. *Id.* at 1559–60.

24. *Id.* at 1560.

25. *Id.*

26. Compare John Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 114–15 (1998) (arguing that the APA was designed to displace the judge-made law of judicial review of agency action that had developed), with Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 10 (1980) (arguing that "[i]f one were to subtract from American administrative law all portions that are the product of judicial creativity, what would be left would be pitifully unsatisfactory" and denying that the APA was designed to prohibit the common-lawmaking that preceded its enactment).

state—the consolidation of quasi-legislative, quasi-judicial, and executive functions in entities that do not fit comfortably within any of the three departments of the federal government described in the 1788 Constitution.²⁷ It provides for intra-agency separation of investigative, prosecutorial, and adjudicative functions that was at the time of the APA's enactment best agency practice.²⁸ It states that fact-finding by agencies in formal administrative adjudications may be overturned by reviewing courts only when those findings are “unsupported by substantial evidence,”²⁹ thus ratifying what Thomas Merrill has termed an “appellate review model”³⁰ of judicial review of agency action that the Supreme Court had developed in the early twentieth century. As Merrill and Caleb Nelson have shown, judicial deference to agency fact-finding marked a break with traditional judicial practice.³¹ Since the Founding Era, complaints arising from governmental burdens on “core private rights”³² to life, liberty, or property had triggered independent determination of the relevant facts—generally by juries—without regard to the government’s factual assertions.³³

But there is much in the APA that was genuinely new in 1946. Section 553(b)'s requirement that agencies publish not only substantive “legislative” rules that bind members of the public but statements of general policy and interpretations of substantive rules can be traced to proposals by a minority of the Attorney General’s Committee on Administrative Procedure, which was assembled in 1939 by President Franklin Delano Roosevelt.³⁴ Section 553(c)'s requirement that interested persons be given notice and an oppor-

27. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 446 (1987) (“[T]he New Deal agency combines executive, judicial, and legislative functions.”).

28. JOANNA GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 77 (2012).

29. 5 U.S.C. § 706(2)(E) (2012).

30. See Thomas Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 959–63 (2011) (describing the Court’s development of fact deference in the wake of the enactment of the Hepburn Act in 1906).

31. See *id.* at 946–47; Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566–74 (2007).

32. See Nelson, *supra* note 31, at 568.

33. See *id.* at 566–74. Core private rights were distinguished from government-created “privileges” that were “created purely for reasons of public policy and which had no counterpart in the Lockean state of nature” as well as “public rights” that were understood to be held by the people as a whole. *Id.* at 567.

34. See FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) [hereinafter FINAL REPORT]. The Attorney General’s Committee was charged with comprehensively investigating administrative practice and recommending reforms where necessary. GRISINGER, *supra* note 28, at 64–65.

tunity to participate in rulemaking by commenting on proposed rules was novel. The intra-agency separation of investigative, prosecutorial, and adjudicative functions mandated by § 554(d) may have been best agency practice in 1946, but enacting it into statutory law and imposing it upon all agencies marked a decisive break with the past.³⁵

The APA's judicial review provisions also were designed to change the status quo in subtle but significant ways. In a 1947 American Bar Association (ABA) Journal article, John Dickinson—a pioneering scholar of administrative law who was then Vice President-General Counsel of the Pennsylvania Railroad—described how the Supreme Court had recently departed from a longstanding tradition of independent, non-deferential judicial determination of questions of law.³⁶ Specifically, the Court had in certain cases deferred to agencies when reviewing so-called mixed questions of law and fact—questions that were, as the Court put it in *NLRB v. Hearst Publications, Inc.*,³⁷ “of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially.”³⁸ In Dickinson's view, these questions, “when subjected to adequate analysis, would be seen to be issues of law,” but the Court had started treating them as non-reviewable on the ground that they fell within agencies' discretion.³⁹

Dickinson interpreted the APA's mandate that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action” as a reaffirmation of the traditional rule of independent judicial determination of questions of law.⁴⁰ He pointed out that the APA adopted many of the judicial review provisions proposed by the minority of the Attorney General's Committee,⁴¹ but that the APA omitted language from the minority bill which provided that “upon [judicial] review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the dis-

35. GRISINGER, *supra* note 28, at 61 (finding that the separation of functions “reflected existing practice in many agencies”).

36. John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A.J. 434, 434–35 (1947).

37. 322 U.S. 111 (1944).

38. *Id.* at 131.

39. Dickinson, *supra* note 36, at 516 (citing, as support for the traditional rule, Justice Brandeis's concurring opinion in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73–92 (1936)).

40. *Id.*

41. See FINAL REPORT, *supra* note 34, at 217–47.

cretionary authority conferred upon it.”⁴² Dickinson inferred from this omission that Congress “deliberately decided not to include a provision making possible in that manner a judicial failure” to independently determine questions of law.⁴³ Similarly, Dickinson wrote that although substantial evidence review of agency fact-finding had long been the norm, judges had in some recent cases failed to consider whether opposing evidence defeated apparently substantial evidence that supported an agency’s finding.⁴⁴ Dickinson interpreted the inclusion of the requirement that reviewing courts “shall review the whole record” to forbid courts from failing to consider such opposing evidence.⁴⁵

In the final analysis, the APA was designed both to codify *and* transform. It enshrined the broad contours of judicial review doctrine and agency practice that had developed in preceding years, but it also altered those contours in subtle but important ways. It was neither designed to leave the administrative state “broken and bleeding,”⁴⁶ nor designed to allow business to go on as usual.

B. *The Unwritten Administrative Constitution*

Initially, agencies proceeded as if the APA was not designed to change much of anything. Beginning in the 1960s, agency practices did change dramatically, but for reasons that had little to do with the APA. Rather than relying upon adjudication as a means of regulation, agencies turned to informal “notice-and-comment” rulemaking. Courts responded by developing a body of common law doctrines to constrain rulemaking. Today, much administrative law related to the APA is administrative common law that has never been grounded in the APA’s text or history.

1. *The Rise and Rise of Administrative Common Law*

When President Harry Truman signed the APA into law, he did not do

42. *Id.* at 246–47.

43. Dickinson, *supra* note 36, at 518 n.40.

44. *Id.* at 517–18.

45. *Id.*

46. See James M. Landis, *Crucial Issues in Administrative Law—The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1102 (1940) (arguing that this would have been the effect of the Walter-Logan Act of 1940, a considerably more rigid administrative reform statute that would have—among other things—enabled any individual or corporation substantially interested in the effects of any administrative rule to challenge it in federal court before it went into effect and keep it from being enforced until the litigation was resolved). The Act was ultimately vetoed by President Roosevelt.

so without reservations. The Truman Administration took a dim view of the APA from the outset and only declined to oppose it because of its wide support and the presence of more pressing political priorities—namely, implementing Truman’s domestic agenda.⁴⁷ Predictably, then, the Executive Branch sought to minimize the significance of the APA for agency practice after it was enacted. The Department of Justice’s 1947 *Attorney General’s Manual on the Administrative Procedure Act*, issued as an interpretive guide for the Executive Branch, described the APA’s judicial review section as a “general restatement” of “principles” that needed to be “interpreted in light of” existing case law.⁴⁸ Reports from agencies indicated that officials did not believe that the APA required much change, and that not much did change.

Meanwhile, new concerns were raised about the bureaucracy. Conservative fears about the abuse of administrative power were supplemented by progressive fears of “regulatory capture” of agencies by industry groups.⁴⁹ These fears were stoked by case studies,⁵⁰ which purported to document “cycles of decay”⁵¹ within particular agencies that began by faithfully pursuing the public interest and ended up catering to private interests, as well as by muckraking monographs.⁵²

Finally, agencies began to rely upon informal notice-and-comment rulemaking, which the APA placed few constraints upon. When Congress began extending the reach of the administrative state into new areas and expanding the scope of agencies’ jurisdictions, it became all but impossible for agencies to rely upon case-by-case adjudication or the trial-like formal rulemaking process set forth in the APA.⁵³

Judges developed novel agency-constraining doctrines during the late 1960s and early 1970s because of newfound distrust of agencies and the

47. GRISINGER, *supra* note 28, at 75–76.

48. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93, 101 (1947).

49. For an account of the influence of capture theory, see generally Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997).

50. For a prominent example, see GABRIEL KOLKO, RAILROADS AND REGULATION 1887-1916 (1965).

51. See MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 74–76 (1955) (describing the “life cycle” of regulatory commissions).

52. See, e.g., JOHN C. ESPOSITO, VANISHING AIR (1970); JAMES S. TURNER, THE CHEMICAL FEAST (1970); DAVID ZWICK & MARCY BENSTOCK, WATER WASTELAND (1971).

53. Among other things, Congress enacted broad consumer and environmental protection laws and required the Food and Drug Administration to engage in pre-marketing review of drug efficacy. See Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1146–48 (2001).

APA's failure to anticipate agency reliance upon such rulemaking.

The APA was enacted at a time when a kind of "federal common law" had been revived after long having lain dormant.⁵⁴ Judges, encouraged by prominent administrative law professors (including Louis Jaffe and Kenneth Culp Davis) and influential peers on the bench (including Judge Harry Friendly), found in that common law an authorization to depart from the APA's text.⁵⁵

No court developed agency-constraining doctrines as enthusiastically as did the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). In *Greater Boston Television Corp v. FCC*,⁵⁶ Judge Harold Leventhal wrote an influential opinion in which he declared that "[the judiciary's] supervisory function calls on the court to intervene . . . if the court becomes aware . . . that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."⁵⁷ Although *Greater Boston* concerned the renewal of a television broadcast license, the "hard look" approach was soon applied to informal rulemaking. In 1973, the D.C. Circuit decided two cases involving challenges to informal rulemaking by the Environmental Protection Agency (EPA).⁵⁸ Judge Leventhal wrote the panel opinions in both cases, and asserted in each that courts are duty-bound to examine concededly complex administrative records to determine whether agencies have exercised "reasoned discretion."⁵⁹ In neither case did Judge Leventhal endeavor to link the hard-look approach to the text or history of the APA—the hard look was presented as a requirement of the judicial role.⁶⁰

In *Home Box Office Inc. v. FCC*,⁶¹ the D.C. Circuit limited ex parte contacts between agency officials and outside parties during informal rulemaking by constructing a set of procedures for such contacts outside of the notice-and-comment process.⁶² In setting forth these requirements, the court alluded to "often-voiced claims of undue industry influence over Commission pro-

54. Duffy, *supra* note 26, at 134–38.

55. *Id.*

56. 444 F.2d 841 (D.C. Cir. 1970).

57. *Id.* at 851.

58. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

59. See *Int'l Harvester Co.*, 478 U.S. at 641–48 ("The legal issues are intermeshed with technical matters, and as yet judges have no scientific aides . . . Nevertheless we must proceed to the task of judicial review assigned by Congress.")

60. *Id.* at 647 ("[A] court's role on judicial review embraces that of a constructive cooperation with the agency involved in furtherance of the public interest.")

61. 567 F.2d 9 (D.C. Cir. 1977).

62. *Id.* at 54–59.

ceedings”⁶³ and invoked “fundamental notions of fairness implicit in due process and . . . the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law.”⁶⁴

The Supreme Court created administrative common law as well. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,⁶⁵ the Court assessed a challenge by a citizens group to a decision by the Secretary of Transportation to authorize the use of federal funds for the construction of a highway through a public park in Memphis, Tennessee. The citizens group argued that either the “substantial evidence” requirement of APA § 706(2)(E) applied or the Secretary’s decision should be subjected to independent judicial review pursuant to § 706(2)(F).⁶⁶ The Court determined that neither provision applied but went on to hold that a record should be developed below and subjected to “thorough, probing, [and] in-depth” review—in essence, hard-look review.⁶⁷ Although the Court cited § 706(2)(E)’s requirement that agency decisions not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” it did not explain why that language should be understood to require a “searching and careful” judicial effort to determine whether “the decision was based on a consideration of the relevant factors.”⁶⁸

In *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Insurance Co.*,⁶⁹ the Court formally embraced hard look review. The Court in *State Farm* held that President Ronald Reagan’s National Highway Traffic Safety Administration (NHTSA) acted arbitrarily and capriciously in revoking regulations (issued under the Carter Administration) that would have required vehicles produced after a certain date to include either airbags or automatic seatbelts.⁷⁰ The Court determined that NHTSA had erred both by failing to consider viable alternatives⁷¹ and by making a policy choice that was unreasonable in light of the evidence in the administrative record.⁷² It further stated that, as a general matter, agency rules were “arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, of-

63. *Id.* at 53.

64. *Id.* at 56.

65. 401 U.S. 402 (1971).

66. *Id.* at 414.

67. *Id.* at 415.

68. *Id.* at 416.

69. 463 U.S. 29 (1983).

70. *Id.* at 41–42.

71. *Id.* at 50–51.

72. *Id.* at 52–53.

ferred an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise”—and courts had to inquire into all of those possibilities.⁷³ Again, no serious effort was made to ground hard look review in the text or history of the APA.

Judicial review of agency interpretations of law also generated administrative common law. The doctrine of judicial deference to agency statutory interpretation that is associated with the Supreme Court’s decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷⁴ is a product of administrative common law that has, in turn, given rise to common law subdoctrines. Thomas Merrill has shown that *Chevron* was almost certainly not understood by its author, Justice John Paul Stevens, or any of the Justices who joined the Court’s unanimous opinion, to set forth a new, uniform rule of deference to agency statutory interpretation.⁷⁵ The development of what we now refer to as *Chevron* deference came later, thanks in part to the efforts of Justice Antonin Scalia, who was elevated from the D.C. Circuit to the Supreme Court by President Ronald Reagan in 1986.⁷⁶ In a 1989 article, Justice Scalia championed his view of *Chevron* as an “across-the-board” rule requiring judges to defer to agencies when they interpret ambiguous statutes.⁷⁷ Despite suffering an early setback in *INS v. Cardoza-Fonseca*,⁷⁸ wherein the Court held that agencies were not entitled to *Chevron* deference when confronting “pure” questions of statutory law,⁷⁹ Justice Scalia’s view of *Chevron* as an across-the-board rule would eventually command a majority of the Court.⁸⁰ At no point did Justice Scalia devote any significant atten-

73. *Id.* at 43.

74. 467 U.S. 837 (1984).

75. See generally Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253 (2014).

76. See Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 62–69 (2013) (tracing Justice Scalia’s influence on *Chevron* doctrine).

77. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989)

78. 480 U.S. 421 (1987).

79. *Id.* at 446. In a spirited concurrence, Justice Scalia argued that this holding was “flatly inconsistent” with the “well-established interpretation” of *Chevron* by the Court and by lower courts of appeal “as holding that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent.” *Id.* at 421, 454–55 (Scalia, J., concurring).

80. See *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987). Scalia, joined by three other Justices, affirmed that *Chevron* required deference when “‘the statute is silent or ambiguous’ with respect to an issue relevant to the agency’s admin-

tion to the question of whether his understanding of *Chevron* was compatible with the text or history of the APA.

In *United States v. Mead Corp.*,⁸¹ the Court—much to Scalia’s dismay⁸²—narrowed *Chevron*’s domain by holding that judges must make an initial determination that Congress *intended* to statutorily delegate authority to an agency “to make rules with force of law” before granting *Chevron* deference.⁸³ Absent such congressional intent to delegate, the Court stated that agency statutory interpretation was to receive only “respect according to its persuasiveness,” pursuant to a rule articulated in *Skidmore v. Swift & Co.*,⁸⁴ a pre-APA case decided in 1944.⁸⁵ In subsequent cases, the Court held that *Chevron* may not apply when questions of great “economic and political significance” are at stake and Congress has not clearly delegated the authority to resolve them to an agency;⁸⁶ that a “statute’s complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience” may trigger *Chevron* deference, even absent notice-and-comment rulemaking;⁸⁷ and that *Chevron* applies when agencies resolve ambiguous statutory questions concerning the scope of their jurisdiction.⁸⁸ Neither the text nor the history of the APA has played any significant role in the development of these sub-doctrines.

There is also the rule of judicial deference to agency interpretations of their own regulations—a rule sometimes associated with *Bowles v. Seminole Rock & Sand Co.*,⁸⁹ sometimes with *Auer v. Robbins*.⁹⁰ (I will refer to this as “*Auer* deference” for simplicity’s sake). *Seminole Rock* was decided a year before the APA was enacted, and Justice Scalia did not cite the APA in his

istration of the law committed to its charge.” *Id.* at 133–34 (Scalia, J., concurring). On the significance of this concurrence, see Lawson & Kam, *supra* note 76, at 72 (“Through a process that we can observe but do not purport to explain, the 4–4 split in *United Food* was almost universally taken by the lower courts as a vindication of Justice Scalia’s position in his concurrence, that *Chevron* would extend deference to agency determinations involving pure legal questions.”).

81. 533 U.S. 218 (2001).

82. *See id.* at 239–60 (Scalia, J., dissenting) (castigating what he described as an “avulsive change in judicial review of federal administrative action” as “neither sound in principle nor sustainable in practice”).

83. *Id.* at 237.

84. 323 U.S. 134 (1944).

85. *See Mead*, 533 U.S. at 237.

86. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000).

87. *See Barnhart v. Walton*, 535 U.S. 212, 225 (2002).

88. *See City of Arlington v. FCC*, 668 F.3d 229, 260 (2012).

89. 325 U.S. 410 (1945).

90. 519 U.S. 452 (1997).

opinion for the Court in *Auer*.⁹¹ Rather than grounding *Auer* deference in the text or the history of the APA, the Court has grounded it in agencies' policymaking expertise.⁹² In developing sub-doctrines that limit *Auer*'s domain—denying deference in contexts where agency interpretations create unfair surprise⁹³ and to agency interpretations of regulations that merely parrot statutory text⁹⁴—the Court has been forthrightly pragmatic, sounding concerns about agency opportunism.⁹⁵ The APA's text and history have played no significant role.

Administrative law today is positively saturated with common law doctrines.⁹⁶ It is possible that all of these doctrines can be grounded in the text and history of the APA. It is certain that they have not yet been so grounded.

2. Challenges to Administrative Common Law

In *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*,⁹⁷ the Supreme Court held that the D.C. Circuit's imposition of procedural requirements on agency decisionmaking which were not specified in the text of the APA was unlawful.⁹⁸ The message was clear: administrative

91. See generally *id.*

92. See *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (highlighting agencies' "knowledge, expertise, and constitutional office"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (finding that deference was warranted because regulation involves "a complex and highly technical regulatory program" that "required significant expertise" to administer).

93. See, e.g., *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012).

94. See *Gonzales*, 546 U.S. at 257.

95. See *SmithKline Beecham Corp.*, 567 U.S. at 158 (emphasizing the "risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking'").

96. See, e.g., *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (agencies must follow their own rules); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993) (agency decisions held to be arbitrary or capricious may be remanded to the agency rather than being vacated); *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) (agencies may not receive *Chevron* deference if they insist that a statute's text is unambiguous and compels a particular interpretation); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) (agencies must respond to certain significant public comments); *S. Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974) (agencies must disclose the studies upon which they rely in rulemaking); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) (final agency rules that are not a logical outgrowth of proposed rules must go through additional rounds of notice-and-comment).

97. 435 U.S. 519 (1978).

98. *Id.* at 525.

common law has its limits.

Vermont Yankee involved a rulemaking by the Nuclear Regulatory Commission (NRC) that was designed to assess the environmental hazards of nuclear fuel cycling and waste disposal.⁹⁹ The rulemaking took place pursuant to notice-and-comment and included written documents, public comments, and oral statements, but did not allow for cross-examination.¹⁰⁰ The NRC relied on the results generated by the rulemaking process to grant licenses to two power plants, including the Vermont Yankee Power Plant.¹⁰¹ The D.C. Circuit invalidated¹⁰² the rulemaking on the grounds that opponents of the rule had not been provided with an opportunity to challenge the testimony of the agency's experts—of particular importance, the testimony of Dr. Frank Pittman, the director of the waste management and transportation division of the Atomic Energy Commission (AEC), which detailed the AEC's plans for dealing with high-level nuclear waste and upon which the NRC drew in reaching its conclusion.¹⁰³

A unanimous Supreme Court reversed.¹⁰⁴ The opening sentence of Justice William Rehnquist's opinion set the tone for what followed:

In 1946, Congress enacted the Administrative Procedure Act, which . . . was not only 'a new, basic, and comprehensive regulation of procedures in many agencies,' . . . but was also a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'¹⁰⁵

The Court sought to discover what Congress originally "intended" in enacting the APA.¹⁰⁶ It ascertained that Congress sought to "establish[] the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."¹⁰⁷ As then-Professor Scalia observed, the Court in *Vermont Yankee* treated the APA as "a basic framework that was not lightly to be supplanted or embel-

99. *Id.* at 528.

100. Notice of Proposed Rulemaking: Environmental Effects of the Uranium Fuel Cycle, 37 Fed. Reg. 24,191, 24,193 (Nov. 15, 1972).

101. *See In re Vt. Yankee Nuclear Power Corp.*, 4 A.E.C. 930 (1972); *In re Vt. Yankee Corp.*, 5 A.E.C. 297 (1972).

102. *See Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 547 F.2d 633 (D.C. Cir. 1976).

103. *Id.* at 647–51.

104. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 521 (1978).

105. *Id.* at 523 (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)).

106. *Id.* at 546.

107. *Id.* at 524.

lished.”¹⁰⁸

The Court did not say, however, that the APA could not be embellished *at all*. As discussed above, the Court itself had embellished the APA in earlier cases.¹⁰⁹ Further, the Court in *Vermont Yankee* instructed the D.C. Circuit to determine whether the NRC’s decision was “sustainable on the administrative record made.”¹¹⁰ As authority for this procedural requirement, the Court cited its decision in *Camp v. Pitts*,¹¹¹ which in turn relied upon *Overton Park*, as well as a pre-APA decision: *SEC v. Chenery Corp.*,¹¹² in which the Court—without citing *any* statute as authority¹¹³—stated that agency decisions can only be upheld on the basis of considerations that actually informed those decisions.

The Court has rejected administrative common law in other cases. In *Darby v. Cisneros*,¹¹⁴ a unanimous Court held that the APA prohibits federal courts from requiring parties to exhaust all administrative remedies, including intra-agency appeals, before seeking judicial review.¹¹⁵ Writing for the Court, Justice Harry Blackmun focused on APA § 704. Section 704 provides that judicial review is available for “final agency action for which there is no other adequate remedy in a court,” and that “preliminary, procedural, or intermediate agency action . . . is subject to review on the review of the final agency action.”¹¹⁶ Section 702 further states that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”¹¹⁷ Justice Blackmun discerned that “[w]hen an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is ‘final for the purposes of this section’ and therefore ‘subject to judicial review.’”¹¹⁸ Justice

108. Scalia, *supra* note 4, at 363.

109. An irony that did not escape Kenneth Culp Davis in his critique of *Vermont Yankee*. See Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 9 (1980) (“The Supreme Court itself imposed on the agency a procedural requirement in addition to the APA’s procedural requirement.”).

110. *Vermont Yankee*, 435 U.S. at 549.

111. 411 U.S. 138 (1973).

112. 318 U.S. 80 (1943).

113. Kevin Stack has contended that the principle articulated in *Chenery* ultimately rests on constitutional foundations. Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2006).

114. 509 U.S. 137 (1993).

115. *Id.* at 138.

116. 5 U.S.C. § 704 (2012).

117. 5 U.S.C. § 702.

118. *Darby*, 509 U.S. at 146.

Blackmun thus determined that “[w]hile federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review,” the APA “limit[s] the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates.”¹¹⁹ Accordingly, Justice Blackmun concluded that “[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become ‘final.’”¹²⁰

A final example: in 2015, the Court in *Perez v. Mortgage Bankers Ass’n*¹²¹ issued what Cass Sunstein and Adrian Vermeule have dubbed “Vermont Yankee II.”¹²² The D.C. Circuit had since its 1997 decision in *Paralyzed Veterans of America v. D.C. Arena L.P.*¹²³ prohibited agencies from departing from any position reflected in interpretive rules that represented their “definitive position” without proceeding through notice-and-comment.¹²⁴ In *Perez*, the Supreme Court held that the *Paralyzed Veterans* doctrine was incompatible with § 553(b)(A) of the APA, which expressly exempts interpretive rules from notice-and-comment procedures. Writing for the Court, Justice Sonia Sotomayor emphasized this “categorical” textual exemption, invoked the “foundational principles” articulated in *Vermont Yankee*—among them, that the APA “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures”—and rejected attempts to justify the *Paralyzed Veterans* doctrine on “practical and policy grounds.”¹²⁵

II. APA PROTO-ORIGINALISM

Although administrative common law is pervasive, its rise has not gone unchecked. Today, it faces new challenges. Several scholars have argued that certain administrative common law doctrines and agency practices are inconsistent with the APA’s original meaning. A recent proposal to amend the APA represents an effort to return to the APA’s original meaning. Although the judiciary has not yet embraced anything that can reasonably be called APA originalism, several federal appellate judges have expressed doubts about whether certain administrative common law doctrines can be

119. *Id.* at 146.

120. *Id.* at 154.

121. 135 S. Ct. 1199 (2015).

122. See Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 42 (2015).

123. 117 F.3d 579 (D.C. Cir. 1997).

124. See Sunstein & Vermeule, *supra* note 122, at 52.

125. *Perez*, 135 S. Ct. at 1206–07, 1209.

squared with the APA.

A. Scholarship

Contemporary administrative law scholars generally accept that much of administrative law is common law. Yet, as common law proponent Gillian Metzger has acknowledged, administrative law scholarship is a long way from the post-New Deal period in which administrative law scholars like Louis Jaffe and Kenneth Culp Davis “openly celebrated administrative law’s common law character.”¹²⁶ This Section details the efforts of scholars who have engaged in thorough inquiries into the APA’s original meaning that cast doubt upon administrative common law, as well as on longstanding agency practices.

The leading general critique of administrative common law remains John Duffy’s 1998 article, *Administrative Common Law in Judicial Review*.¹²⁷ Duffy contended that the APA was designed to sharply cabin the common law approach to judicial review of agency action that had emerged as judges exercising general federal equity jurisdiction conferred by statute in 1875 applied to administrative officers “the same system of equitable remedies generally applicable against all equitable defendants.”¹²⁸ Although his critique of administrative common law was broad, Duffy did not deny the legitimacy of administrative common law altogether—he offered hard-look review as an example of “statutorily-authorized common law.”¹²⁹ Duffy argued that “in choosing such open-ended language, Congress understood that it was providing the courts with a range of interpretive flexibility,” the text of the original APA allows for some common law doctrinal development.¹³⁰

126. See Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1317 (2012). Metzger’s seminal work describing and defending administrative common law also includes Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2012).

127. Duffy, *supra* note 26.

128. *Id.* at 129.

129. *Id.* at 118.

130. *Id.* at 153. This analysis is consistent with a textualist approach to statutory interpretation advocated by Judge Frank Easterbrook. See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (observing that “[t]he statute books are full of laws . . . that effectively authorize courts to create new lines of common law” and advocating that judges do so if those laws are not unconstitutional). As Saul Levmore has observed, Easterbrook’s favorite example of a statute that authorizes judges to make law is the Sherman Antitrust Act. See Saul Levmore, *Ambiguous Statutes*, 77 U. CHI. L. REV. 1073, 1078

More recently, Kathryn Kovacs in *Superstatute Theory and Administrative Common Law* articulated a comprehensive methodology for interpreting the APA and used that methodology to criticize administrative common law doctrines that departed from the APA's text and history.¹³¹ Although the fact that it is informed by William Eskridge and John Ferejohn's theory of superstatutes¹³²—according to which statutes that share certain characteristics, among them the expression of fundamental, nationally-held principles and extended public deliberation both prior and subsequent to enactment,¹³³ are in fact and ought to be interpreted in a “purposive rather than simple text-bounded or originalist way” and “generate a dynamic common law”¹³⁴—might suggest that Kovacs's methodology incorporates a large role for administrative common law, this is not so. Kovacs contended that the APA suffers from a deficiency that distinguishes it from certain other superstatutes—namely, its implementation is not delegated to a single agency that is “at the center of an interpretive web, with the other branches of government and the public intertwined.”¹³⁵ As a consequence, courts, rather than agencies, are the primary interpreters of the APA, and “courts are not deliberative in the civic-republican sense that superstatute theory demands to legitimize evolutive interpretation.”¹³⁶ In view of this “deliberation deficiency,”¹³⁷ Kovacs argued for a presumption *against* the legitimacy of administrative common law that “ignores or contravenes the APA,”¹³⁸ and urged that judges should “pay[] particular attention to the legislative compromises encoded in the Act and any public deliberation it has encountered since 1946.”¹³⁹

Scholars have also criticized particular administrative common law doctrines as inconsistent with the original meaning of the APA, without addressing the legitimacy of administrative common law as a general enter-

(2010).

131. Kovacs, *supra* note 2.

132. *See generally* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); William N. Eskridge, Jr., *America's Statutory "Constitution,"* 41 U.C. DAVIS L. REV. 1 (2007); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231–46 (2000) (identifying the Civil Rights Act of 1964, the Sherman Antitrust Act of 1890, and the Endangered Species Act of 1973 as super-statutes).

133. Eskridge & Ferejohn, *Super-Statutes*, *supra* note 132, at 1216.

134. *Id.* at 1234.

135. Kovacs, *supra* note 2, at 1210.

136. *Id.*

137. *Id.* at 1209.

138. *Id.* at 1211.

139. *Id.* at 1237.

prise. In *The Origins of Judicial Deference to Executive Interpretation*, Aditya Bamzai charted the landscape in which the APA took shape in the course of pursuing a broader investigation into the history of judicial review of executive interpretations of law.¹⁴⁰ He explored interpretive methodology in the seventeenth, eighteenth, and nineteenth centuries and found that although courts consistently respected contemporaneous executive interpretations of legal provisions, just as they respected contemporaneous interpretations of legal provisions more generally, they did not defer to executive interpretations as such, as they do today under *Chevron*.¹⁴¹ He further documented how, beginning in the early twentieth century, the Supreme Court started drawing upon scholarship that questioned the dichotomy between questions of fact and questions of law, and “blurr[ed] the line between factual determinations and legal questions”—to the point of deferring to agencies concerning what traditionally were regarded as questions of law.¹⁴²

Bamzai argued that the “most natural reading” of APA § 706 is that it “adopt[s] the traditional interpretive methodology that had prevailed from the beginning of the Republic until the 1940s”—that it rejects the then-developing practice of deferring on mixed questions of fact and law in favor of traditional independent review.¹⁴³ Bamzai highlighted the fact that § 706 “prescribed the same standard of review for statutory provisions by requiring that courts ‘interpret constitutional and statutory provisions’ alike,” observing that “[s]ince at least *Marbury*, constitutional provisions had been subject to de novo review.”¹⁴⁴ He further noted that “section 706 established deferential standards of review for issues other than ‘relevant questions of law,’ thereby indicating that Congress knew how to write a deferential standard into a statute when it wanted to do so.”¹⁴⁵ Finally, drawing upon John Dickinson’s analysis, Bamzai emphasized § 706’s omission of a proviso in the proposed minority bill contained in the Attorney General’s Committee Report which would have required that reviewing courts give “due weight” to agency “technical competence” and “specialized knowledge.”¹⁴⁶

Bamzai is not alone in his efforts to explore whether particular administrative common law doctrines are consistent with the original meaning of

140. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 *YALE L.J.* 908 (2016).

141. *Id.* at 916.

142. *Id.* at 917–18.

143. *Id.* at 987.

144. *Id.* at 985 (quoting 5 U.S.C. § 706 (2012)).

145. *Id.*

146. *Id.* at 986. *See also* S. Doc. No. 77-8, at 246–47 (1941).

the APA. Kovacs has criticized a number of common law doctrines as inconsistent with original meaning.¹⁴⁷ Jeffrey Pojanowski has contended that *Auer* deference represents a misunderstanding of its originating case, *Seminole Rock*, which Pojanowski argues rests on an “epistemic and defeasible” form of deference similar to the traditional form identified by Bamzai rather than the “strong, general rule” set forth in *Auer*.¹⁴⁸ That epistemic and defeasible deference—which tracks the context-sensitive framework applied by the Court in *Skidmore*—may have been incorporated into the text of the APA a year later, and *Auer* might contradict that text.¹⁴⁹ Nicholas Bagley has argued that the presumption of judicial review of agency action associated with the Court’s 1967 decision in *Abbott Laboratories v. Gardner*¹⁵⁰ draws no support from the APA’s text or from its legislative history.¹⁵¹ Finally, Aaron Nielson and Kent Barnett have in separate articles criticized the Court’s articulation of a presumption against formal rulemaking in *United States v. Allegheny-Ludlum Steel Corp.*¹⁵² and *United States v. Florida East Coast Railway Co.*,¹⁵³ arguing that the original meaning of the APA does not require Congress to use the magic words “on the record after opportunity for an agency hearing” before the APA’s demanding procedural requirements for formal rulemaking are triggered.¹⁵⁴

147. See, e.g., Kovacs, *supra* note 2, at 1212 (arguing that the judicial practice of accord-
ing particularly strong judicial deference to administrative actions by the military “exceeds
the boundaries” of the APA’s text and “contradicts Congress’s intent,” insofar as the Con-
gress that enacted the APA specifically rejected the War Department’s call to exempt the
military from the APA altogether); Kathryn E. Kovacs, *Scalia’s Bargain*, 77 OHIO ST. L.J.
1155, 1179–83 (2016) (arguing that a 1976 amendment which added to the APA a waiver of
the United States’ sovereign immunity from suits “seeking relief other than money damages”
has been misinterpreted to apply to non-APA claims and to escape the APA’s limitations on
“final agency action” requirement in APA § 704); Kathryn E. Kovacs, *Rules or Rulers? The
Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 532–45 (2018) (arguing that administra-
tive common law doctrines which require agencies to produce administrative records in in-
formal rulemaking, disclose data considered by agencies in formulating proposed rules, dis-
close ex parte contacts during informal rulemaking, and incorporate responses to significant
public comments in their final rules violate the text of § 553).

148. Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J.L. & PUB. POL’Y 1, 96–
97 (2018).

149. *Id.* at 97.

150. 387 U.S. 136 (1967).

151. Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285,
1303–09 (2014).

152. 406 U.S. 742 (1972).

153. 410 U.S. 224 (1973).

154. Kent H. Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH.
L. REV. ARGUENDO 1 (2017); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST.

Scholarly focus on the APA's original meaning has not been limited to whether administrative common law forged *by judges* is consistent with it. William Funk has detailed and criticized agencies' evasion of formal APA adjudication—adjudication “required by statute to be determined on the record after opportunity for an agency hearing”¹⁵⁵—and their use of informal adjudication.¹⁵⁶ Informal adjudication lacks comparable procedural protections for defendants and is presided over by administrative judges (AJs) who are far less insulated from pressure by the policy and prosecutorial branches of the agency that employs them than administrative law judges (ALJs) who preside over formal adjudication.¹⁵⁷ In arguing that “whenever an evidentiary hearing is required by a statute, that hearing should be an APA adjudication,” Funk relied heavily upon the 1947 Attorney General's Manual, which he treated as evidence of original intent and understanding.¹⁵⁸ In the article that prompted Michael Herz—in a favorable review¹⁵⁹—to coin the term “APA originalism,” Kevin Stack drew upon the Attorney General's Manual, as well as upon the APA's drafting history, to argue that regulatory “preambles”¹⁶⁰ should be used by agencies to provide guidance to the public, rather than other kinds of guidance documents, and should be given more weight in judicial review than other guidance documents.¹⁶¹

It is not as though scholars have until recently ignored the APA's text and history. Kenneth Culp Davis and Nathaniel Nathanson criticized *Vermont Yankee* partly because they believed it to be inconsistent with the text and history of the APA.¹⁶² *Chevron's* statutory basis has long been ques-

L.J. 237, 240 (2014). If Barnett and Nielson are right, the Court's presumption against formal rulemaking makes it harder for Congress to authorize formal rulemaking than does the APA's original meaning.

155. 5 U.S.C. § 554 (2012).

156. Funk, *supra* note 11.

157. *Id.* at 148–57.

158. *Id.* at 162.

159. Herz, *supra* note 10.

160. Preambles are the “concise general statement[s] of . . . basis and purpose” that agencies are required to “incorporate in . . . rules adopted.” 5 U.S.C. § 553(c).

161. *See, e.g.*, Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252, 1260 (2016) (arguing that preambles “were conceived as not only identifying the legal and factual basis for . . . rule[s], but also providing guidance on its meaning for the public and the courts”).

162. Davis, *supra* note 26, at 10 (drawing upon text and legislative history to argue that the APA “recognized three kinds of law—constitutional law, statutory law, and common law—and it provided that nothing in the APA cuts back protections provided by any one of the three”); Nathaniel Nathanson, *The Vermont Yankee Nuclear Power Opinion: A Masterpiece*

tioned by scholars.¹⁶³ What *is* new is the extent of scholars' attention to the relevant historical context—including the linguistic, epistemological, institutional, and legal premises from which those who enacted the APA proceeded. Because scholars have yet to formally develop an originalist methodology for interpreting the APA, the above-mentioned articles can—borrowing a term from Lawrence Solum—be characterized as examples of “proto-APA originalism.”¹⁶⁴ But such a methodology can be developed,

of *Statutory Misinterpretation*, 16 SAN DIEGO L. REV. 183, 195 (1979) (arguing that the Court's opinion in *Vermont Yankee* did not represent a “responsible effort to ascertain either the literal meaning or the apparent legislative intent of the APA”).

163. See, e.g., Duffy, *supra* note 26, at 194–95 n.411 (arguing that § 706 “suggests that Congress contemplated courts would always apply independent judgment on questions of law”); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 473 n.85 (1989) (“That section 706 appears to contemplate de novo judicial determination of questions of statutory meaning is generally acknowledged”); Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth-Century Perspective*, 32 CARDOZO L. REV. 2241, 2243 (2011) (stating § 706 “seems to allocate firmly [questions of statutory interpretation] to de novo judicial determination”).

164. See Solum, *Originalism and Constitutional Construction*, *supra* note 16, at 462–63 (coining the term “proto-originalism” in discussing the writings and speeches of Raoul Berger, Judge Robert Bork, Justice William Rehnquist, and Edwin Meese III).

This should not be taken to suggest that no full-fledged theories of APA interpretation are on offer, any more than that it should be taken to suggest that scholars have until recently ignored the APA's text and history. As noted, Kovacs has articulated a comprehensive theory of APA interpretation. It is not, however, an avowedly originalist theory, and Kovacs's concern with respecting and inducing congressional deliberation on an ongoing basis suggests the tensions might emerge between the results that her theory generates and the APA's original meaning. Thus, Kovacs counsels courts to both consider “Congress's treatment of each provision in the original legislative process *and* the quality of deliberation the provision has seen since enactment” and acknowledges that “ongoing deliberation may render administrative common law that once contradicted Congress's intent innocuous”—even if the text is not amended. Kovacs, *supra* note 2, at 1252, 1254 (emphasis added) (offering *Chevron* as a possible example). From the standpoint of originalism, doctrines that contradict the original communicative content of legal texts *cannot* be innocuous unless the text is changed to make way for them—that content is *fixed* until changed through the constitutionally-authorized lawmaking process, and constitutional decisionmakers are constrained to give effect to it. See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) (explaining the centrality of the “fixation thesis” to modern originalism); Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 154 (2012) (“Characteristically, originalists claim that original meaning should have binding or constraining force.”).

As in the context of constitutional interpretation, the question of how often a full-fledged originalist methodology would, if properly applied, generate outcomes that differ from alternative methodologies in the context of APA interpretation is difficult to answer

with the help of premises and tools drawn from constitutional originalism.

B. Legislation

Congressional concerns about overregulation have in recent years inspired numerous legislative proposals, including proposals to amend the APA.¹⁶⁵ Although the APA has been amended several times already, those amendments addressed subjects that were concededly outside the scope of the original APA.¹⁶⁶ Of late, legislators have proposed that the APA be amended in order to *restore* its original meaning.¹⁶⁷ The title of the most sweeping proposal is telling: “The Separation of Powers Restoration Act of 2016” (SOPRA).¹⁶⁸

The text of SOPRA is terse, its goal evident. It would amend APA § 706 to require reviewing courts to “decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies.”¹⁶⁹ It is designed to eliminate *Chevron* deference to agency statutory interpretation and *Auer* deference to agency regulatory interpretation. The report submitted by the House Committee on the Judiciary states that SOPRA will “overturn the so-called *Chevron* and *Auer* doctrines” and that those doctrines “conflict[] flatly with the express terms” of the APA.¹⁷⁰ SOPRA passed the House on July 12, 2016.¹⁷¹ It has since been incorporated into the House version of the proposed Regulatory Ac-

with any precision. This Article focuses on possible conflicts between administrative common law doctrines and APA originalism because it is generally accepted that much of our administrative law is common law. Whether those conflicts would actually be perceived *by judges* who took an originalist approach to the APA and how those judges would respond to those conflicts if they perceived them are separate matters—albeit matters of importance in considering whether APA originalism ought to be adopted by judges.

165. Non-APA related proposals include Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017) (explaining that the Regulations from the Executive in Need of Scrutiny (REINS) Act “will result in more carefully drafted and detailed legislation, an improved regulatory process, and a legislative branch that is truly accountable to the American people for the laws imposed upon them” without reference to the APA).

166. For a general overview of amendments to the APA, see William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 235–37 (1986). For a deep-dive into the 1976 amendments, see Kovacs, *Scalia’s Bargain*, *supra* note 147.

167. *See infra* note 173.

168. Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (2016).

169. *Id.* § 2(3).

170. H.R. REP. NO. 114-622, at 2, 5 (2016).

171. *See* Separation of Powers Restoration Act of 2016, H.R. 4768.

countability Act (RAA).¹⁷²

SOPRA may not become law, whether as a standalone bill or as part of the RAA. The Senate version of the APA targets only *Auer* deference.¹⁷³ Attempts to amend the APA in order to prohibit judicial deference to agencies have failed in the past. For example, in 1980 Senator Dale Bumpers introduced an amendment that would have prohibited any judicial “presumption that any rule or regulation of any agency is valid.”¹⁷⁴ The amendment was ultimately rejected.

Further, as Kristin Hickman and Nicholas Bednar have observed,¹⁷⁵ it is unclear precisely what the post-SOPRA regime would look like. “[D]ecide de novo” seems at first to be clear enough, but Hickman and Bednar point out that the “*Chevron* standard itself contemplates a de novo–like Step One analysis employing traditional tools of statutory construction to evaluate congressional intent and provides for deference under Step Two only when those tools fail to yield a clear answer.”¹⁷⁶ *Auer* too is triggered only when regulatory text proves ambiguous. Perhaps SOPRA would not change much of anything because it would not require courts to do anything that they do not already do when applying the very doctrines that it targets.

Yet, even if SOPRA meets the fate of the Bumpers Amendment or does not change much of anything, its basic premises and its passage in the House evince legislative interest in the degree to which administrative common law has departed from the APA’s original meaning. It expresses a perception on the part of members of Congress that the judiciary has neglected that original meaning, and a desire to return to it.

C. *Judicial Opinions*

Several federal appellate judges have criticized administrative common law in recent years. Justice Brett Kavanaugh, previously of the D.C. Circuit, has argued that the rule set forth in the circuit’s decision in *Portland Cement v. Ruckelhaus*,¹⁷⁷ which requires agencies to disclose technical data and studies on which they relied in formulating proposed rules, “cannot be squared” with APA § 553(a).¹⁷⁸ Judge A. Raymond Randolph¹⁷⁹ and Judge

172. See Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 103 (2017).

173. See Regulatory Accountability Act of 2017, S. 951, 115th Cong. § 4 (2017).

174. 125 CONG. REC. S12,145 (daily ed. Sept. 7, 1979).

175. Kristin E. Hickman & Nicholas R. Bednar, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017).

176. *Id.* at 1457–58.

177. 486 F.2d 375 (D.C. Cir. 1973).

178. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 246 (D.C. Cir. 2008).

179. *Checkosky v. SEC*, 23 F.3d 452, 490–93 (D.C. Cir. 1994) (Randolph, J., concur-

David Sentelle, also of the D.C. Circuit, have argued that the circuit's practice of remanding rules that are found to be arbitrary and capricious to agencies rather than vacating them violates § 702(2)(E), which in their view "command[s]" courts to "hold unlawful and set aside" such actions.¹⁸⁰ Prior to his elevation from the Tenth Circuit to the Supreme Court, now-Justice Neil Gorsuch questioned whether *Chevron* deference was consistent with § 706's command to courts to "'interpret . . . statutory provisions' and overturn agency actions that are found to be inconsistent with those interpretations."¹⁸¹

These opinions do not contain historical analysis that is comparable to the scholarship discussed above, or even a citation to such analysis. Justice Kavanaugh, for instance, averred that the *Portland Cement* rule "is not consistent with the text of the APA or *Vermont Yankee*," but did not inquire into how the text of § 553(a) would have been understood in 1946 or assess whether the Court in *Vermont Yankee* correctly ascertained what the Congress that enacted the APA intended.¹⁸² It would thus be a stretch to describe these opinions as originalist. That being said, Justice Kavanaugh¹⁸³ and Justice Gorsuch have elsewhere engaged in originalist analysis,¹⁸⁴ and could be receptive to arguments against *Portland Cement* and *Chevron* deference, respectively, that are grounded in the APA's original meaning.

III. TOWARDS STATUTORY ORIGINALISM

We are now in a position to consider what a consciously and consistently originalist approach to interpreting the APA might look like and how it could alter administrative law doctrine if embraced by judges. This Part provides an overview of originalism and explains how an originalist methodology might be applied to statutes. It then discusses how the ascendant form of originalism relates to the implementing doctrines¹⁸⁵ that the Court

ring).

180. *See Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (2002) (Sentelle, J., dissenting).

181. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016).

182. *Am. Radio Relay League, Inc.*, 524 F.3d at 246–47.

183. *See Free Enter. Fund v. PCAOB*, 537 F.3d 667, 686–94 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (investigating the original meaning of the Appointments Clause).

184. *See, e.g., Carpenter v. U.S.*, 138 S. Ct. 2206, 2267–72 (2018) (Gorsuch, J., dissenting) (investigating the original meaning of the Fourth Amendment); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223–30 (2018) (Gorsuch, J., concurring) (defending the void-for-vagueness doctrine against originalist criticism by Justice Thomas); *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016) (investigating the original meaning of the Fourth Amendment).

185. *See generally* Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV.

has developed over the years in constitutional settings, as well as how contemporary originalism treats precedent.

A. *Why “Statutory” Originalism?*

Applying the term “originalism” to any methodology for interpreting a statute—even one as important as the APA—might initially seem jarring. Originalism is most familiar as a means of interpreting *constitutional* text. Why would originalist methodology be applicable to the APA at all?

The answer is that constitutional originalism rests upon premises that are applicable to statutes no less than to the Constitution—and, for that matter, to regulations and other legal texts that make up our public law. Among those premises: (1) the meaning of a legal text consists in its communicative content; (2) the communicative content conveyed through particular words, phrases, and sentences in a given legal text is fixed at the time that that text is ratified or enacted.¹⁸⁶ Because the Constitution and the APA are both legal texts, originalism holds that their meaning consists in their communicative content, which content was fixed when they were ratified or enacted.

Indeed, the proposition that the meaning of statutory text is fixed at the point of enactment stirs far less controversy than does the like proposition concerning constitutional text. Although scholars have championed methods of statutory interpretation that *do not* focus on capturing fixed meaning, those methods have not been embraced by judges. For example, while William Eskridge’s “dynamic” approach to statutory interpretation—which entails updating statutes to respond to social and political changes, as well as to other evolutions in the relevant policy environment¹⁸⁷—has proven influential within the academy, Eskridge has acknowledged that judges “treat [it] like the plague.”¹⁸⁸

54, 61–67 (1997); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 37–44 (2001) (describing and defending the Supreme Court’s use of “implementing doctrines” that are not specified in the constitutional text in order to resolve constitutional questions).

186. See Solum, *The Fixation Thesis*, *supra* note 164, at 15.

187. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482–83 (1987) (analogizing judges to diplomats “whose ordering authority is severely limited but who must often update their orders to meet changing circumstances,” and arguing that “the subsequent evolution of [a] statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time” are among the interpretive considerations that judges must weigh).

188. See William N. Eskridge, Jr., *The Dynamic Theorization of Statutory Interpretation*, 16 ISSUES IN LEGAL SCHOLARSHIP 1, 9 (2002). For a notable exception, see *Hively v. Ivy Tech Community College*, 853 F.3d 339, 353–57 (7th Cir. 2017) (Posner, J., concurring) (embracing “judicial interpretive updating” as a means of “avoid[ing] statutory obsolescence and con-

There is still a debate within constitutional originalism concerning whether the Constitution's original communicative content consists in the original communicative intentions of its framers or ratifiers or in the meaning that the public attached to the agreed-upon text at the point of ratification. Further, originalists who agree concerning the ultimate source of communicative content might disagree concerning the best means of ascertaining that content. For instance, intentionalists might disagree about whether to ascertain the ratifiers' intent by (a) directly inquiring into the actual communicative intentions of numerous, geographically dispersed ratifiers; or (b) constructing a hypothetical ordinary member of the 1788 public, seeking to determine how such a person would likely have understood the text, and using that understanding as a proxy for the communicative intentions of the ratifiers, on the assumption that the ratifiers intended the text to be understood as an ordinary member of the public would have understood it. The significance of these intramural controversies will be addressed below.

B. *The Interpretation-Construction Distinction*

Adherents to what is generally referred to as the “New Originalism” generally distinguish between the *interpretation* of constitutional text—the ascertainment of its communicative content—and constitutional *construction*—the activity of giving the text legal effect.¹⁸⁹ New Originalists have also recognized the existence of what Lawrence Solum has termed the “construction zone”—a space in which “the communicative content of the constitutional text underdetermines [its] legal effect.”¹⁹⁰

To appreciate the interpretation-construction distinction, consider a text that is not given legal effect in any respect: the Confederate States Constitution. Few would deny that the Confederate States Constitution is written in English; that its text has meaning; and that the text denotes certain concepts and not others. There are linguistic *facts of the matter* concerning what its text communicates, and those facts are in principle discoverable through empirical inquiry into contemporaneous patterns of word usage and careful study of the context of constitutional communication. Thankfully, those facts do not contribute in any way to the functioning of any existing legal

comitantly . . . avoid[ing] placing the entire burden of updating old statutes on the legislative branch.”).

189. For helpful overviews of the interpretation-construction distinction by two of its earliest and most influential advocates, see Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2011).

190. Solum, *Originalism and Constitutional Construction*, *supra* note 16, at 475.

regime.

Why does the distinction between interpretation and construction matter when one is dealing with texts that *do* contribute to an operating legal regime? First, the interpretation-construction distinction focuses attention on prior normative questions that cannot be ignored—namely, whether the communicative content of the text in question is normatively “good enough” to be fully and consistently implemented today, given the possibility of taking an approach that is not tethered to that content. Second, the interpretation-construction distinction acknowledges a difference between communicative content and legal content that is of pressing importance when inquiry into communicative content does not yield a determinate answer to a particular legal question.

Inquiry into communicative content may fail to yield determinate answers for numerous reasons. Judges are boundedly rational—they have scarce cognitive resources and are limited in their ability to gather and process information—and they are busy.¹⁹¹ They may simply be unable to arrive at a determinate answer to a given question even if they conduct the most diligent inquiry that is reasonable under the circumstances, and even if there is a determinate answer that might be discovered by boundlessly rational judges with limitless information-gathering and computational powers and infinite time.¹⁹² Judges may also wrongly conclude that the text’s communicative content is not “thick” enough to yield a determinate answer. Further, the text under investigation may not determine the outcome in a given case because it is vague or irreducibly ambiguous, whether by accident or by design.¹⁹³ Text is vague if there are borderline cases that are

191. The concept of “bounded rationality” was first developed by Herbert Simon. See generally Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955). For an accessible summary of the concept, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–78 (1998). For an exploration of its implications for judicial decisionmaking, including a valuable discussion of the use of cognitive simplifying strategies (or “heuristics”) by judges to decide complex cases, see generally Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83 (2002).

192. See Whittington, *The New Originalism*, *supra* note 15, at 611–12 (“[E]ven as faithful interpreters we may be limited in our capacity to understand fully what the constitutional commitments of the founders really were and how they might apply to our current concerns.”).

193. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). A legal question has a single determinate answer “if and only if the set of results that can be squared with the legal materials contains one and only one result.” *Id.* at 473. The law is *undeterminate* “if and only if the set of results in the case that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results.”

not clearly encompassed by, nor outside the scope of, a concept indicated by a word—like “tall.”¹⁹⁴ Text is irreducibly ambiguous if it can have two or more distinct meanings even after investigation of communicative context.¹⁹⁵

If constitutional decisionmakers cannot arrive at a determinate answer through interpretation, originalists who accept the interpretation-construction distinction believe that decisionmakers must rely upon rules of decision that are not textually specified. While originalists have not yet developed a consensus concerning how decisionmakers should navigate the construction zone, originalists agree that no activity within the construction zone can *contradict* the communicative content of the constitutional text.¹⁹⁶ Because New Originalists acknowledge the existence of space in which judges must make decisions that are not commanded by original meaning, New Originalists can coherently endorse doctrines that might have been denounced by an earlier generation of originalists as the byproducts of judicial activism.

Neither the interpretation-construction distinction nor the existence of the construction zone are universally accepted by originalists. Some originalists maintain that the interpretation-construction distinction is the fruit of linguistic confusion.¹⁹⁷ Others contend that either the text and structure of the Constitution itself,¹⁹⁸ or interpretive rules that those who

Id.

194. Solum, *Originalism and Constitutional Construction*, *supra* note 16, at 470.

195. *Id.* at 469–70.

196. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 341–42 n.2 (2011) (“Interpretations and constructions may not contradict original meaning, therefore once we know the original meaning of the text, it trumps any other form of argument.”); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 101–02 (2004) (“[A]ny construction must not contradict whatever original meaning has been discerned by interpretation.”). Barnett and I have elsewhere articulated a theory of originalist constitutional construction. *See* Barnett & Bernick, *supra* note 15.

197. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 13–14 (2012) (arguing that the interpretation-construction distinction is a product of “false linguistic association”).

198. *See* Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1233–35 (2012) (arguing that “[i]n the event that there is any uncertainty about what this Constitution means in any specific application” interpreters “should resolve the uncertainty *against* the existence of federal power and *in favor* of the existence of state power” because the federal government needs constitutional authorization to act and states do not); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 881 (2009) (arguing that “the Constitution’s text itself suggests . . . a default rule of . . . popular republican self-government.”).

framed and ratified the Constitution expected to be applied to the Constitution,¹⁹⁹ prescribe decision rules for resolving uncertain cases. But New Originalism has gained considerable ascendancy. Although not all originalists are New Originalists,²⁰⁰ the interpretation-construction distinction and the concept of the construction zone have been highly influential and are thus highly relevant to envisioning APA originalism.

C. *The “Construction Zone” and Constitutional Common Law*

No matter how long one studies the usage of the phrase “the freedom of speech” and the concepts associated with it in the years leading up to the ratification of the First Amendment, one will find nothing about strict scrutiny for content-based speech restrictions,²⁰¹ nothing about regulations of the time, place, and manner of speech,²⁰² and nothing that requires a demonstration of “actual malice” before public officials²⁰³ or public figures²⁰⁴ can be awarded damages in libel actions. All of the latter doctrines have been developed and applied by the Supreme Court on a case-by-case basis, in certain cases without any inquiry into original meaning.

Although the law governing the freedom of speech is a uniquely active area of constitutional common law, it is not the only active area. In a

199. See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752, 772–80 (2009) (arguing that constitutional actors should have recourse to these “original methods” when textual analysis fails to yield a clear answer to a given question rather than to constitutional constructions that are informed by “extraconstitutional considerations”).

200. Prominent New Originalists include Jack Balkin, Randy Barnett, Lawrence Solum, and Keith Whittington.

201. See *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972) (holding that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

202. See *Cox v. New Hampshire*, 312 U.S. 569, 574–76 (1941) (upholding a parade licensing scheme based on time, place, and manner criteria after concluding that it served a municipality’s legitimate interest in regulating traffic, maintaining public order, and ensuring that overlapping parades did not prevent all speakers from being heard).

203. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (holding that libel actions brought by officials against their critics implicate the freedom of speech and articulating a rule pursuant to which officials cannot recover damages for false, defamatory statements unless they can demonstrate that a given statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”).

204. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 134 (1967) (internal quotations omitted) (extending the rule articulated in *Sullivan* to libel actions brought by people who are not public officials, but who are “public figures . . . involved in issues in which the public has a justified and important interest.”).

number of articles²⁰⁵ and an important book,²⁰⁶ David Strauss has chronicled the common law character of much of modern constitutional law. Strauss has identified Establishment Clause doctrine,²⁰⁷ the “one-person, one-vote” principle,²⁰⁸ and the application of equal protection principles to the federal government²⁰⁹ as examples of common law constitutionalism. In the development of these doctrines, Strauss observes, “the specific words of the text play at most a small role.”²¹⁰ While Strauss celebrates constitutional common law, one need not share his high opinion of it to recognize the descriptive power of his account of what the Supreme Court does in many constitutional cases.

It is difficult to generalize about whether the constitutional common law endorsed by Strauss is compatible with originalism. Originalists who embrace the interpretation-construction distinction and acknowledge the inevitability of entrance into the construction zone in some cases insist nonetheless that constitutional decisionmakers should not begin developing doctrines at the first sign of textual vagueness or ambiguity and should *never* develop doctrines that contradict original meaning. For example, if (as John Stinneford has argued),²¹¹ the original meaning of the terms “cruel and unusual” in the Eighth Amendment proscribes cruel innovation, the Court’s prevailing “evolving standards of decency” doctrine²¹²—a common law doctrine—might contradict the text. A punishment might be an instance of cruel innovation and yet, as a consequence of a sudden inflammation of public opinion, be found to reflect an emerging societal consensus and thus upheld as constitutional. In that case, applying the evolving-standards doctrine would lead to an outcome that the original meaning of text forbids.²¹³

205. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973 (2011); David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845 (2007).

206. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

207. Strauss, *Common Law Constitutional Interpretation*, *supra* note 205, at 920.

208. *Id.* at 929.

209. Strauss, *Does the Constitution Mean What It Says?*, *supra* note 205, at 43–45.

210. Strauss, *Common Law Constitutional Interpretation*, *supra* note 205, at 877.

211. See J.F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008).

212. Traceable to *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

213. For his part, Strauss has embraced departures from what he believes to be the original meaning of the text of the First, Fourth, Fifth, and Fourteenth Amendments. See Strauss, *Does the Constitution Mean What It Says?*, *supra* note 205, at 3–4, 30–45.

But the development of doctrine that is not dictated by constitutional text is not inherently incompatible with constitutional originalism. Indeed, New Originalists hold that the development of gap-filling doctrines is *required* when text is vague or ambiguous—even if they balk at the term “construction.” Particular constitutional common law doctrines must be evaluated on a case-by-case basis.

D. Precedent

There is no consensus originalist theory of precedent. Almost all²¹⁴ originalist scholars, however, accept that prior judicial decisions should be accorded some weight by judges, without regard to the correctness of those decisions. No originalist judge appears to have acted in accordance with the principle that precedents that are inconsistent with original meaning must be immediately overruled. To the extent that there is a consensus originalist position concerning what considerations should inform decisions whether to follow nonoriginalist precedents, it is that settled expectations should be given *some* weight.

Some of the very rule of law values, from which originalism draws much of its appeal, counsel in favor of not suddenly disrupting people’s expectations. People conform to what they understand to be applicable legal rules and they plan their affairs around the continued existence of those rules, often at considerable cost. The transition costs associated with rule changes are not limited to particular transactions that may be jeopardized. As Randy Kozel has explained, rule changes may have wide-ranging effects, as legislators and executive officials make different decisions about how to allocate public resources, private citizens reorganize their personal and financial affairs, and all may entertain “more generalized doubts about the stability and constancy of the legal order.”²¹⁵

Of course, bad rules can also be very costly. Every instance of judicial adherence to an unconstitutional rule perpetuates not only the ill effects of the rule, but also the misapprehension on the part of members of the public that the rule is consistent with the law of the land. Further, if the importance of preserving settled expectations were enough to justify the non-enforcement of original meaning in every case, originalism would have little bite²¹⁶ in a jurisprudential landscape shaped in substantial part by non-

214. With the notable exceptions of Gary Lawson and Michael Stokes Paulsen. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23 (1994); Michael Stokes Paulsen, *The Inherently Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

215. See Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1496 (2013).

216. See William Baude & Steven E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2D 103,

originalist precedents. Most originalists thus hold that there are circumstances under which original meaning can and indeed *must* trump precedent, transition costs notwithstanding.²¹⁷

IV. ENVISIONING APA ORIGINALISM

If originalism always requires ascertaining the fixed communicative content of legal text, it does not require that that communicative content always be ascertained through the same means. Ascertaining communicative content requires attention to the context in which a given text took shape, and context necessarily differs from text to text. This Part develops a provisional methodology that practitioners of APA originalism might apply and uses that provisional methodology to evaluate several administrative common law doctrines. It also considers how APA originalism might treat precedent.

A. *The Object of Interpretation*

It has been said that the debate between originalists who seek the “original intentions” of the Constitution’s framers or ratifiers and those who seek the “original public meaning” of the constitutional text is over, and that the public meaning originalists have won.²¹⁸ This is an exaggeration. While public meaning originalism is dominant today,²¹⁹ there remains a live debate between intentionalists and public meaning originalists. Both sides can claim distinguished scholars among their ranks.²²⁰ The question thus arises whether APA originalists would pursue the original intentions of the legislators who enacted the APA or the meaning that ordinary members of the

108 (2016) (listing a number of landmark decisions that most originalists would agree must go at some point).

217. *See id.* (“We see these individual cases largely irrelevant to the battle over interpretive theory.”).

218. *See* Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2049 (2006) (asserting that it is “a caricature of originalism” to portray it as “a version of crude intentionalism that focuses on the specific subjective intentions or expectations of individuals as to how a provision might be applied”).

219. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 123 (2013) (describing public meaning originalism as the “predominant” originalist theory).

220. Prominent intentionalist originalists include Larry Alexander, Richard Kay, and Saikrishna Prakash. *See* Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009).

public would have attached to it.

Drawing upon ideas elaborated by linguist Paul Grice, Lawrence Solum has detailed how people routinely distinguish between “speaker’s meaning” and “sentence meaning”—between the concepts that particular speakers *intend* to communicate to others by choosing particular words and phrases and the conventional meaning of those words and phrases in a given linguistic community.²²¹ Listeners will often not have access to information about a speaker’s specific communicative intentions and must rely instead upon the conventional meaning of the speaker’s words and whatever relevant contextual information is available.²²²

The distinction between speaker’s meaning and sentence meaning is potentially of great practical importance for originalists. An originalist who seeks speaker’s meaning may be far more interested in intentions that could not be accessed on the basis of even diligent study of contemporary linguistic practice and other features of the publicly available context of communication. She might be more ready than an originalist who seeks sentence meaning to investigate the private writings of the author or authors of a text in order to figure out what meaning was intended.

But there will not likely be much distance between speaker’s meaning and sentence meaning in the context of the APA. Like the amended Constitution, the APA was written to communicate concepts to a broad audience—to government officials and to private citizens. Speaking with reference to constitutional originalism, Solum explains:

[W]hat is sometimes called “public meaning originalism” is actually consistent with and a consequence of what is called “original intentions originalism”—except in the rare case where the author is crazy or for some other reason is radically mistaken about the linguistic beliefs and competences of the intended audience. This becomes apparent once we see that the relevant intentions are communicative intentions directed to the public. The Framers’ meaning of the constitutional text is the meaning the Framers intended the public to grasp on the basis of the public’s recognition of the Framers’ communicative intentions: That meaning is necessarily public meaning. For this reason, the structure of communicative intentions (the object of original intentions originalism) necessarily focuses on public meaning (the object of public meaning originalism) as the means by which communication occurs.²²³

The public to which statutes are addressed has little information concerning the specific communicative intentions of legislators. The legislators

221. Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 491 (2013).

222. *Id.* at 492–94.

223. Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1136 (2015).

who enacted the APA could not assume that the public would know or could learn what they personally intended the words and phrases they chose to mean. What they *could* assume is that the public would be familiar with contemporary English and would be aware of certain features of the institutional and legal context that the APA was designed to shape. By drawing upon their own understanding of the conventional meanings of the words and phrases in the APA, as well as upon publicly available contextual information, members of the public could grasp the APA's communicative content.

APA originalism could thus be expected to proceed by seeking to ascertain the original public meaning of the APA's text. Pursuit of that public meaning could entail an effort to reconstruct the actual understanding of the text that was held in 1946 by those to whom it was initially addressed. Alternatively, public meaning could be operationalized by the construction of a hypothetical ordinary member of the 1946 public who knows something of the subject matter addressed by the APA, as well as some of the legal and political background summarized above.²²⁴ Because it would be extraordinarily difficult to identify an actual, coherent subjective understanding held by *all* members of the public, some such proxy for public meaning would likely be required.

B. Evidentiary Sources

If ascertaining communicative content is the goal, and original public meaning is the means, what kinds of evidence would APA originalists look to in order to capture the public meaning of the statute's text?

First, there is the evidence that is contained in the text and built into the structure of the APA itself. The APA contains a definitional section and alerts readers that the stipulated definitions apply throughout "this Act."²²⁵ Second, there is contemporaneous evidence of word usage and patterns and regularities in grammar and syntax that can be used to establish the semantic meaning of the words and phrases in the APA, as well as help us understand how those words and phrases combine together into sentences.²²⁶ Together, the semantic meaning of those words and phrases, syntax, and grammar yield *semantic content*²²⁷—both in the case of terms that are designed to denote the concepts that are typically associated with them in or-

224. See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006) (advocating this approach).

225. See 5 U.S.C. § 551 (2012).

226. *Id.*

227. For a discussion of terms of art, see Solum, *Originalism and Constitutional Construction*, *supra* note 16, at 503–04.

dinary speech and in the case of “terms of art” that carry specialized meanings with which only linguistic subcommunities would be familiar.²²⁸ Third, there is evidence that can establish other features of the context of communication, which features in turn can be used to pragmatically enrich the content of the APA’s text. Thus, study of the development of judicial review of agency action in the years preceding the APA’s enactment reveals how § 706(2)’s instruction to courts to “review the whole record” both generally incorporates and subtly alters the law governing judicial deference to agency fact-finding.²²⁹

Constitutional originalists have gradually coalesced around a hierarchy of evidentiary sources. In a 1994 article, “The President’s Power to Execute the Laws,” Saikrishna Prakash and Steven Calabresi presented a hierarchy that has largely stood the test of time:

(1) Consider the plain meaning of the words of the Constitution, remembering to construe them holistically in light of the entire document.

(2) If the original meaning of the words remains ambiguous after one consults a dictionary and a grammar book, consider next any widely read explanatory statements made about them in public contemporaneously with their ratification.

These might shed light on the original meaning that the text had to those who had the recognized political authority to ratify it into law.

(3) If ambiguity persists, consider any privately made statements about the meaning of the text that were uttered or written prior to or contemporaneously with ratification into law. These statements might be relevant if and only if they reveal something about the original public meaning that the text had to those who had the recognized political authority to ratify it into law.

(4) If ambiguity still persists, consider lastly any postenactment history or practice that might shed light on the original meaning the constitutional text had to those who wrote it into law. Such history is the least reliable source for recovering the original meaning of the law, but may in some instances help us recover the original understanding of an otherwise unfathomable and obscure text.²³⁰

This hierarchy is based on both the legal status of the relevant sources and the perceived reliability of those sources. Because only the words of “this Constitution” are “the supreme Law of the Land,”²³¹ interpreters should only consult pre- or post-enactment commentary if “it is needed to understand what the law meant objectively at the time it was enacted,” specifically, “by shedding light on which of several possible textual meanings

228. Solum, *supra* note 221, at 506.

229. 5 U.S.C. § 706(2).

230. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 553 (1994).

231. U.S. CONST., art. VI, cl. 2.

was in fact the one that was intended.”²³² Pre-enactment history is consulted before post-enactment history “because there can be no guarantee that a later lawmaker’s understanding in fact bears on the intent animating an earlier enactment.”²³³

Similar considerations counsel in favor of using a similar hierarchy of evidentiary sources to interpret the APA. Only the text of the APA is (part of) the “supreme Law of the Land.”²³⁴ There are contextual reasons to be particularly wary of drawing upon the APA’s pre- and post-enactment history—there was a concerted post-enactment effort to obscure the APA’s transformative character and legislators on both sides of a long-running and heated partisan debate sought to create a record favorable to their side. Shepherd has documented how “each party to the negotiations over the bill attempted . . . to create a record that would cause future reviewing courts to interpret the new statute in a manner that would favor the party.”²³⁵ On Shepherd’s account, legislators did so precisely because the text was in important respects ambiguous, which ambiguity was in turn attributable to the fact that insistence upon clear provisions might have killed any deal.²³⁶

Post-enactment scholarly commentary concerning the APA should also be approached with caution. For example, the post-enactment commentaries of Kenneth Culp Davis and Louis Jaffe—both of whom were “present at the creation” of the APA²³⁷—consistently favor an understanding of the APA’s provisions that would allow for administrative flexibility that they thought normatively desirable.²³⁸ By contrast, John Dickinson’s post-enactment commentary on the APA’s judicial review standards ran contrary to his own preferences. As a normative matter, Dickinson thought the traditional distinction between questions of law and fact to be untenable, and applauded what he saw as an erosion of the distinction in a handful of Supreme Court decisions prior to the APA’s enactment.²³⁹ His nuanced explanations of how the APA repudiated a trend that he believed salutary

232. See Calabresi, *supra* note 230, at 554 (quotation omitted).

233. *Id.*

234. *Cf. supra* notes 231–232 and accompanying text (just as the text itself of the U.S. Constitution should be the primary consideration when interpreting the Constitution, so too should the text itself of the APA be the primary consideration when interpreting the APA).

235. Shepherd, *supra* note 22, at 1662–63.

236. *Id.*

237. Davis was a researcher for Gellhorn, who directed the Committee on Administrative Procedure; Jaffe was a Special Attorney for the Department of Justice during the final stages of the drafting of the APA. Kenneth C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511 (1986).

238. Duffy, *supra* note 26, at 134–38.

239. Bamzai, *supra* note 140, at 971–76.

should thus receive more weight than Davis and Jaffe's explanations of how the APA merely restates existing law.

A word about dictionaries, which Calabresi and Prakash prioritize. Judicial recourse to dictionaries to determine the meaning of words has been subjected to harsh criticism.²⁴⁰ Since the publication of Calabresi and Prakash's article, originalist scholars²⁴¹ and judges have begun to turn away from dictionaries and towards corpora—searchable databases containing millions of words, drawn from different genres of text, spanning particular time periods.²⁴² Corpora hold the potential to provide snapshots of language use that better illumines communicative content than dictionary definitions or mere judicial intuitions concerning language use.²⁴³

240. See, e.g., Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 401 (2003); Jeffrey L. Kirchmeier, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 262 (2010); Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915 (2010); Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027 (2005).

241. See, e.g., Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Jennifer L. Mascott, *Who Are 'Officers of the United States'?*, 70 STAN. L. REV. 443 (2018); James C. Philips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English, 1760-1799*, 59 S. TEX. L. REV. 181, 182–84 (2017); Joel William Hood, *The Plain and Ordinary Second Amendment: Heller and Heuristics*, (Apr. 17, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425366.

242. See, e.g., *State v. Rasabout*, 356 P.3d. 1258, 1271 (Utah 2015) (Lee, J., concurring in the judgment); *State v. Canton*, 308 P.3d. 517 (Utah 2013) (Lee, J., for the majority); *Baby E.Z. v. T.I.Z.*, 266 P.3d. 702, 724–26 (Utah 2011) (Lee, J., concurring in part and concurring in the judgment) (advocating the use of corpus linguistic data in support of his interpretation of “custodial proceeding” under the federal Parental Kidnapping Protection Act, 28 U.S.C. § 1738A (2006)); see also *People v. Harris*, 885 N.W.2d 832, 838–39 n.29 (Mich. 2016) (opinion of the court per Zahra, J.) (citing Utah Supreme Court opinions in support of the methodology of corpus linguistics); *id.* at 850 n.14 (Markman, J., dissenting) (citing Utah Supreme Court opinions and also relying on corpus linguistic data, but drawing a different inference from the data).

243. For arguments in favor of the use of corpora by originalists, see, e.g., James C Philips, Daniel M. Ortner, & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. FORUM 20 (2016); Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181 (2017).

C. Precedent

It is difficult to imagine APA originalism without a role for precedent for the same reason that it is difficult to imagine constitutional originalism without it—there are compelling rule of law-related reasons to assign some weight to prior judicial decisions. The disruption of settled expectations would thus likely be a consideration at play for APA originalists in determining whether non-originalist precedent should be discarded or preserved, or extended or limited.

It might be thought that disruptions of settled expectations associated with the APA would generally be less severe than would disruptions of settled expectations associated with the Constitution. But this generalization should be resisted. Consider that all federal agencies are constrained by the APA and by the body of administrative common law associated with it, and that the overwhelming majority of the rules that constrain members of the American public are produced by federal agencies. Overruling or even limiting administrative common law doctrines may be highly disruptive.

D. Three Clause Studies

Although it is beyond the scope of this Article to use the provisional methodology articulated above to investigate questions about the APA's meaning at the level of depth that those questions merit, it is important to get some sense of APA originalism's implications for existing doctrine. This Section applies that methodology to several administrative common law doctrines.

1. “Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law”: Hard-Look Review

The default standard of judicial review for agency action under § 706(2)(a) of the APA was developed by the D.C. Circuit and ultimately embraced by the Supreme Court in *State Farm*.²⁴⁴ Today, hard look review has both procedural and substantive components. Agencies must weigh relevant factors prior to making their decisions,²⁴⁵ and those decisions must be calculated to achieve contextually legitimate ends derived from authoritative public law.²⁴⁶ Courts will look at the administrative record to determine whether agency action is both procedurally and substantively reason-

244. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42 (1983).

245. *Id.*

246. *Judulang v. Holder*, 132 S. Ct. 476, 490 (2011) (holding a rule arbitrary because it was “unmoored from the purposes and concerns of the immigration laws”).

able,²⁴⁷ and agencies may not justify their decisions with reference to factors, evidence, or stated ends that did not play a role in those decisions.²⁴⁸

The terms “arbitrary [and] capricious” appear to have been drawn from Supreme Court decisions involving the Due Process of Law Clauses of the Fifth and Fourteenth Amendments in the years prior to the APA’s enactment.²⁴⁹ It was under these clauses that the Court determined whether governmental actions were calculated to achieve constitutionally proper ends when those actions deprived people of “life, liberty, or property.”²⁵⁰ The applicable standard of review was eventually dubbed the “rational-basis test.”²⁵¹

Pre-1946 rational basis review was deferential to both legislatures and administrative agencies. Challengers ultimately bore the risk of judicial uncertainty concerning constitutionality. Yet, the presumption of constitutionality thus created was rebuttable. Although the Court’s canonical 1938 decision in *United States v. Carolene Products*²⁵² is sometimes upheld as the decision in which rational basis review became a rubber-stamp, the Court in *Carolene Products* emphasized that it would “deny due process [to] preclude[] the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.”²⁵³ Nor did the rational basis test allow for the rationalization of government actions after the fact. As Justice Louis Brandeis noted in a dissent in *New State Ice Co. v. Liebmann*,²⁵⁴ “[a] decision that the legislature’s belief of evils was arbitrary and unreasonable [could] not be made without

247. *State Farm*, 463 U.S. at 52.

248. *Id.* at 44.

249. *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 320 (1938) (due process violated by “arbitrary, capricious or confiscatory action”); *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 180 (1935) (government actions invalid if “arbitrary, capricious, and not reasonably necessary for the accomplishment of any legitimate purpose of the police power”); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 285 (1932) (Brandeis, J., dissenting) (government actions invalid if “clearly arbitrary, capricious or unreasonable”).

250. *See infra* notes 252–253 and accompanying text (discussing *Carolene Products* and the development of this standard).

251. For explorations of rational basis review during this time period, see Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of Lee Optical*, 19 *GEO. MASON L. REV.* 845 (2012); Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 *U. RICH. L. REV.* 491 (2011).

252. 304 U.S. 144 (1938).

253. *Id.* at 152.

254. 285 U.S. 262 (1932).

enquiry into the facts with reference to which it acted.”²⁵⁵

Beyond the above features, the precise contours of pre-1946 rational basis review appear vague. The Court never did establish criteria for determining what governmental ends were constitutionally proper²⁵⁶ or specify the precise strength of the presumption of constitutionality—whether, say, challengers needed to demonstrate the unconstitutionality of the government’s actions by a preponderance of the evidence, by clear and convincing evidence, or by evidence that left no reasonable doubt.

Hard look review appears to fall within those vague contours. Although it establishes a presumption of agency “regularity,”²⁵⁷ that presumption can be rebutted by challengers. Agencies do not necessarily need to produce evidence in direct support of their actions—in *State Farm*, the Court acknowledged that “the available data [might] not settle a regulatory issue” and stated that the lack of “evidence in direct support of the agency’s conclusion” was not fatal—but judges will not turn a blind eye to evidence in the record.²⁵⁸ As with early rational basis review, the actual reasons for governmental decisionmaking matter under hard look review. Thus, although the courts have never spoken in these terms, hard look review can be defended as a *construction* of the APA that is consistent with—although not required by—the *communicative content* of § 706(2)(a).

2. “The Reviewing Court Shall Decide All Relevant Questions of Law”: Chevron and Auer Deference

Chevron deference is centrally important to modern administrative law. Empirical studies suggest that congressional staffers involved in legislative drafting are not only familiar with *Chevron* itself, but share assumptions that have undergirded the Court’s subsequent decisions defining *Chevron*’s domain. In a survey of 137 staffers conducted by Lisa Bressman and Abbe Gluck, 88% of the staffers stated that the authorization of notice-and-comment rulemaking is always or often relevant to whether drafters intend for an agency to resolve statutory ambiguities—an assumption that the Court made in *Mead*.²⁵⁹ Although scholars have questioned whether *Chevron*

255. *Id.* at 285.

256. See Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1632 (2016) (observing that the Supreme Court “has never comprehensively described, much less defended, the conception of rationality it applies when conducting rationality review”).

257. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

258. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 52 (1983).

259. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 65 STAN. L. REV. 901,

has much of an impact on agency outcomes at the Supreme Court, an empirical study by Kent Barnett and Christopher Walker found a nearly 25% difference in agency-win rates when the circuit courts applied *Chevron* deference as compared to when they did not.²⁶⁰ *Chevron* matters.

APA § 706 provides that “reviewing court[s] shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”²⁶¹ At first blush, this text seems to have little to say about *how* reviewing courts must interpret statutes, in particular, whether judges are required or forbidden to defer to agency interpretations.

As discussed above, however, Aditya Bamzai has shown that this language most likely requires independent review of questions of law.²⁶² Section 706’s text concerning questions of law does not include the language of deference contained in the minority report of the Attorney General’s Committee, which might have been understood as a departure from independent review.²⁶³ No pre- or post-enactment commentary expressed the view that review of questions of law under § 706 was to be anything other than independent. As previously noted, John Dickinson viewed it as a reaffirmation of independent review and a repudiation of some recent decisions in which the Court deferred to agencies in the context of “mixed” questions of law.²⁶⁴

Can *Chevron* be squared with a mandate to perform independent review? One argument that it can entails understanding statutes that agencies administer as authorizing agencies rather than courts to resolve ambiguities. In essence, judges, exercising their independent judgment, might determine that *the law* tells them to defer to agencies’ decisions when text is ambiguous.²⁶⁵

As Duffy has pointed out, however, APA § 559 states that statutes “may not be held to supersede or modify the requirements of the APA except to

994 (2013).

260. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).

261. 5 U.S.C. § 706(2)(E) (2012).

262. See *supra* notes 140–146 and accompanying text.

263. See *supra* notes 41–42 (discussing the adoption and rejection of various provisions from the minority report).

264. See Dickinson, *supra* note 36 and accompanying text.

265. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 207–08 (2006) (describing this view as “plausible” without endorsing it); Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 942 (2018) (arguing that “[a]n interpretation that determines that a statute delegates power to the executive is still an interpretation”).

the extent that [they] do so expressly.”²⁶⁶ A doctrine which holds that ambiguous statutory language, without more, amounts to implicit delegation to agencies to decide questions that courts would ordinarily decide under § 706 without deference would arguably allow Congress to supersede § 706 without expressly saying that it is doing so.

But *would* courts ordinarily decide questions concerning ambiguous statutory language under § 706 without deference? *Chevron* deference arguably only comes into play when independent review has already been performed and has come up short. The command to “decide all relevant questions of law”²⁶⁷ independently of the views of the other branches can be fulfilled through a determination that the law is vague or irreducibly ambiguous and that entrance into the construction zone is therefore necessary.²⁶⁸ There may be normative grounds for a construction which requires judicial deference to reasonable agency decisions when interpretation runs out, whether rooted in agency expertise, political accountability, or some other value.²⁶⁹

Assume that *Chevron* is incompatible with the original APA. A majority of the Court that so concluded would not necessarily vote to overrule it immediately. The costs associated with upsetting settled expectations surrounding *Chevron* might be perceived as being simply too high for a majority to seriously contemplate overruling it in the foreseeable future. The Court might embrace an intermediate solution. It might expressly instruct lower court judges to only defer to agencies in cases involving ambiguities that cannot be resolved through independent judicial review; it might simply “beef up” Step One by deferring only when all of the traditional tools of

266. Duffy, *supra* note 26, at 198 n.427.

267. 5 U.S.C. § 706 (2012).

268. For an argument along these lines, see Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015).

269. Whether this reconciliation is consistent with *Chevron* as it has subsequently developed is debatable. As Evan Criddle has observed, courts have understood *Chevron* to require them to “defer to an agency’s reasonable efforts to clarify the statute’s linguistic meaning based, in part, on its expertise in the relevant field,” which may mean something less than independent judicial review. Evan J. Criddle, *The Constitution of Agency Statutory Interpretation*, 69 VAND. L. REV. EN BANC 325, 339 (2016). A reconciliation may also be possible if the deference in question is predicated upon agencies’ perceived comparative epistemic advantage in interpretation. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1278 (1997) (distinguishing between *legal* deference, which “gives weight to the views of another actor simply because of that actor’s status,” and *epistemological* deference, which “gives weight to the views of another actor because there are reasons to believe that that actor’s views are good evidence of the right answer”).

statutory interpretation have failed to clearly resolve questions at hand and hoping that lower courts get the message. Either approach would enable judges to comply with § 706 at *Chevron* Step One while allowing agencies space to draw upon their expertise to make decisions when the text does not yield a determinate answer (subject, of course, to arbitrariness review).

Critics of *Auer* have contended that *Auer* is problematic even if *Chevron* is not. They have charged that *Auer* is unsupported by even a fiction of congressional delegation;²⁷⁰ that it gives a perverse incentive to agencies to draft ambiguous regulations at time *A* in order to ensure regulatory flexibility at time *B*;²⁷¹ and that it raises aggravated separation of powers concerns because it enables the same agency decisionmakers to promulgate, interpret, and enforce regulations that operate in much the same way as statutes *and* to claim binding deference to their own understanding of their work product.²⁷² From the standpoint of the original meaning of § 706, however, the potential problem with *Auer* is essentially the same as that with *Chevron*: § 706 mandates independent review, and deference may violate that mandate.

If *Auer* can be understood as containing its own “Step One”²⁷³ that allows judges to use all of their interpretive powers to ascertain the meaning of regulatory text and only defer once linguistic meaning gives out, *Auer* might not contradict § 706.²⁷⁴ But whereas the Court in *Chevron* expressly con-

270. See *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 619 (2013) (Scalia, J., concurring) (arguing that “[w]hile the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations”).

271. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (describing the “risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit”). But see Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference’s Effect on Agency Rules*, 119 COLUM. L. REV. (forthcoming 2018) (analyzing an original and extensive dataset of federal rules issued between 1982 and 2016 and finding that regulatory vagueness did not increase in the wake of *Auer*).

272. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) (arguing that “[g]iven the reality that agencies engage in ‘lawmaking’ when they exercise rulemaking authority, *Seminole Rock* contradicts the constitutional premise that lawmaking and law-exposition must be distinct.”). For a rebuttal of anti-*Auer* arguments, see Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017).

273. See Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 70–71 (2000) (describing the determination of ambiguity required by *Auer* as an “implicit first step” which “parallels *Chevron* in form and substance”).

274. I intend to develop this argument in a future work.

templated that judges would seek to resolve statutory ambiguity by using the “traditional tools of statutory interpretation,”²⁷⁵ the Court in *Auer* did not say much of anything about what tools judges ought to use when interpreting regulations.²⁷⁶ It is not clear what the relevant tools would even be; there is no comparable tradition of interpreting regulations that have only become a major component of lawmaking in the past half century. But some courts have used canons that are familiar in statutory interpretation to resolve ambiguities in regulations,²⁷⁷ and regulatory interpretive theory has emerged as a promising field of academic inquiry²⁷⁸ that is already influencing judicial decisionmaking.²⁷⁹

It is difficult to predict how unsettling it would be for the Court to overrule *Auer* or how reluctant a majority convinced that *Auer* was wrongly decided would be to discard it. *Auer*’s domain has already been narrowed in recent years, resulting in decreases in lower court grants of deference and agency win rates.²⁸⁰ But there is good reason to believe that replacing *Auer* with, say, *Skidmore* deference—pursuant to which agency’s interpretations are assigned epistemic weight on the basis of “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it

275. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

276. *See generally* *Auer v. Robbins*, 519 U.S. 452 (1997).

277. *See, e.g.*, *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668–69 (2007) (invoking the canon against surplusage); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (invoking the canon that the specific governs the general); *Fabi Constr. Co. v. Sec’y of Labor*, 508 F.3d 1077, 1087 (D.C. Cir. 2007) (invoking *noscitur a sociis*, according to which words are known by those around them); *Sec’y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 260–61 (D.C. Cir. 2005) (invoking the anti-absurdity canon).

278. *See, e.g.*, Lars Noah, *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules*, 51 HASTINGS L.J. 255, 290–306 (2000) (advocating an intentionalist approach to regulatory interpretation and urging that judges “at least [give] some attention to . . . regulatory history before accepting the agency’s current reading” in *Auer* cases); Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 105–42 (2015) (advocating that judges seek the public meaning of regulatory text but allow “agencies to pursue more intentionalist or purposivist interpretations through *Seminole Rock*’s rule of judicial deference when the regulatory text is otherwise ambiguous.”); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 380 (2012).

279. *See* *Halo v. Yale Health Plan, Dir. of Benefits*, 819 F.3d 42, 52 (2d Cir. 2016) (citing Stack, *supra* note 278).

280. *See generally* Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813, 814–15, 821–26 (2015) (collecting cases).

power to persuade”²⁸¹—would change *some* outcomes. Specifically, agencies would prevail at a lower rate when defending their positions and agencies and litigants would not depend on those positions prevailing as often as they do now.²⁸² There would certainly be transition costs associated with the move to the new regime. Concerns that agencies would respond by proceeding through adjudication rather than rulemaking—arguably a worse outcome from a rule of law standpoint—might also inspire hesitation before overruling *Auer*.²⁸³ As with *Chevron*, if overruling *Auer* is perceived as being too unsettling, the Court might expressly instruct judges to only defer to agencies in cases involving regulatory ambiguities that judges cannot resolve through independent review, or merely model hard-nosed regulatory interpretation at Step One in its own cases.

3. “Either the Terms or the Substance of the Proposed Rule”: The Logical Outgrowth Doctrine

Vermont Yankee did not nullify all administrative common law procedural innovations. Among the most significant to survive is the “logical outgrowth” rule, which requires that the final rules that agencies adopt not “differ[] so radically from the [rules] proposed” that those affected by them have “no meaningful forewarning of [their] substance.”²⁸⁴

In *Long Island Care at Home, Ltd. v. Coke*,²⁸⁵ the Supreme Court described the logical outgrowth rule as an interpretation of § 553(b)(3)’s requirement that agencies publish in notices of proposed rulemaking “either the terms or the substance of the proposed rule or a description of the subjects and issues involved.”²⁸⁶ However, as the D.C. Circuit noted in a 1954 decision, the text of § 553(b)(3) does not suggest that final rules may not differ in important ways from proposed rules.²⁸⁷ Nor does any of the APA’s pre- or post-enactment history suggest that § 553(b)(3) was so understood in 1946.

281. *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944).

282. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1271 (2007) (finding that 18.9% of courts of appeals applying *Skidmore* use an “independent judgment model” and uphold agency regulatory interpretations only if they are deemed the best interpretations).

283. See Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 947–48 (2017) (warning that overruling *Auer* might “harm the very people” that its critics seek to help).

284. *S. Terminal Corp. v. EPA*, 504 F.2d 646, 656 (1st Cir. 1974). For an overview of the development and content of the doctrine, see generally Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213 (1996).

285. 551 U.S. 158 (2007).

286. *Id.* at 174 (citing 5 U.S.C. § 553(b)(3) (2012)) (internal quotations omitted).

287. *Logansport Broad. Corp. v. United States*, 210 F.2d 24, 28 (D.C. Cir. 1954).

The text and structure of the APA's requirements concerning judicial review offer compelling evidence that judges may not add to the APA's strictures when its text is clear. The APA defines the scope of judicial review and delineates the standards that judges are to apply in performing judicial review.²⁸⁸ It specifically enumerates contexts in which judges must "hold unlawful and set aside agency action, findings, and conclusions," implying that judges are not to hold unlawful and set aside agency "action, findings, and conclusions" in other contexts.²⁸⁹ Pre-enactment history indicates that the APA's judicial review requirements were designed to serve as "a comprehensive statement of the right, mechanics, and scope of judicial review."²⁹⁰ Agencies were left to impose additional procedural requirements on themselves as they saw fit, in the service of their unique missions.²⁹¹

The logical outgrowth rule's incompatibility with the original APA would have an obvious implication for other administrative common law doctrines that impose procedural requirements on agencies that are clearly not textually required. Such rules would have to be considered illegitimate, even if they serve useful purposes and even if prudence might dictate that they not be immediately overruled. When the APA's procedural requirements are vague or ambiguous, however, courts could, consistently with APA originalism, legitimately formulate rules of decision in a common law fashion in order to give effect to the APA's text. Determining whether particular administrative common law doctrines are within the construction zone requires in each instance an inquiry into the original meaning of the text that the rules are supposedly implementing.

V. EVALUATING APA ORIGINALISM

If originalism is not at present *the* theory of constitutional interpretation to beat on the federal bench, it is at least among the contenders. Even judges who reject originalism do not dismiss those arguments as irrelevant—they respond to them and engage in originalist inquiries of their own.²⁹² The possibility of APA originalism catching on must be taken seriously.

288. See 5 U.S.C. § 706.

289. *Id.* § 706(2).

290. 92 CONG. REC. 5654 (1946) (statement of Rep. Walter), reprinted in SENATE JUDICIARY COMM., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 368 (1946).

291. See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law Before and After the APA*, in ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 163–87 (Nicholas R. Parrillo ed., 2017).

292. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 636–39 (2008) (Stevens, J., dissenting).

This Part sketches some of the normative arguments that might be made in support of or against the judicial implementation of APA originalism, as well as the prospects of that implementation taking place.

A. Arguments for APA Originalism

1. The Original APA is the Law

The most basic argument in favor of the judicial implementation of APA originalism is that the original APA is the law. All public officials take an oath to “support this Constitution,”²⁹³ and “this Constitution” in turn makes “the Laws of the United States . . . made in pursuance” of the Constitution the Supreme Law of the Land.²⁹⁴ The APA became part of the Supreme Law of the Land in 1946. Those who draw power from the Constitution must implement the APA’s original communicative content if their official duties require them to do so, to the extent that that content is constitutional.

Even if the strongest possible version of this argument is rejected—specifically, that judges may *only* look at the original meaning of the APA—a more modest one is possible. Originalism might be—as William Baude has put it in the context of discussing constitutional originalism—“the ultimate criterion” for interpretation of the APA.²⁹⁵ APA originalism could be what Baude has termed “inclusive originalism,” which allows judges to look to “precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them.”²⁹⁶ This would allow for decisionmaking tools that are not part of the APA’s text to be used to resolve cases, if the original meaning of the APA permits those tools. It would be surprising, for instance, if the APA forbade reliance upon precedent, if Bamzai is correct that the APA largely incorporated a centuries-old approach to judicial review.²⁹⁷

Finally, it could be argued that the APA’s original communicative con-

293. U.S. CONST. art. VI, § 3.

294. *Id.* § 2.

295. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015).

296. *Id.* at 2354–55.

297. Certain devices might be among what John McGinnis and Michael Rappaport have termed the “original methods” that those who enacted the APA expected subsequent interpreters to apply to it. See McGinnis & Rappaport, *supra* note 199, at 751–52, 758–68 (arguing that both intentionalists and public meaning originalists ought to adopt the view that the Constitution should be interpreted in accordance with enactors’ original methods, and that constitutional text and early interpretive practice further support the use of original methods).

tent should at the very least be expressly embraced as *one* of the factors that judges consider when interpreting the APA, and that some form of APA originalism should be developed for the limited purpose of equipping judges to get better at considering that factor. In a highly influential book, Phillip Bobbitt argued that constitutional practice includes six modalities, or methods of constitutional argumentation, that are generally recognized as legitimate.²⁹⁸ Originalism could be *one* of the recognized methods of argument that is advanced when interpreting the APA, just as it is one of the arguments advanced when interpreting the Constitution. Most originalists would reject this minimal role for their methodology—as Solum has written, originalists “typically believe that original meaning should *constrain* constitutional practice” in the sense of being “lexically prior to other modalities of constitutional interpretation and construction.”²⁹⁹ But some originalists might consider that even a sixth of a loaf is better than nothing.

2. *Fidelity to the APA Will Legitimize the Administrative State*

Even if originalists are correct that the APA’s communicative content was fixed in 1946, they cannot escape the normative question of whether to give that content legal effect. That the original APA is constitutionally valid and judges draw power from the Constitution only upon taking an oath to give effect to constitutionally valid laws is not necessarily enough to justify implementing the original APA. Perhaps the Constitution authorizes legislative choices that are sufficiently evil that judges ought to do what they can to oppose them or mitigate their ill effects. Perhaps the APA embodies a number of such choices.

Although a thorough assessment of whether the original APA is normatively good enough to be implemented as written is beyond the scope of this Article, the manner in which the APA took shape supports a presumption that it is indeed good enough. The APA emerged from a decades-long public debate between members of all departments of the federal govern-

298. These modalities include:

[1] the historical (relying on the intentions of the framers and ratifiers of the Constitution); [2] textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary “man on the street”); [3] structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); [4] doctrinal (applying rules generated by precedent); [5] ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and [6] prudential (seeking to balance the costs and benefits of a particular rule).

PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991).

299. Solum, *The Fixation Thesis*, *supra* note 164, at 8 (emphasis added).

ment. Both sides drew upon normative values that can be traced back to the Founding Era, even if they weighed those values differently than did the Constitution's framers and ratifiers.³⁰⁰ Values like energy in government, accountability in government, public participation in governmental decisionmaking, nonarbitrary governmental decisionmaking, and the security of individual rights, have endured to this day. This is not to say that the APA cannot possibly have serious normative deficiencies, but the statute as a whole deserves the benefit of the doubt concerning its basic normative legitimacy, if not its optimality.

If the original APA, taken as a whole, is normatively good enough to be implemented as written, APA originalism could reinforce the perceived legitimacy of the administrative state. Perhaps the most enduring argument against the administrative state is that it is somehow lawless. The argument that *all* administrative agencies are in fact constrained by the text of a presumptively legitimate statute and that their compliance with it is judicially monitored and enforced as consistently as resources allow could go a long way towards countering that charge, were that argument advanced convincingly. At present, no such argument can be convincingly made—the original meaning of the APA has long been neglected.

3. *APA Originalism Will Promote the Rule of Law*

Administrative law, as Justice Scalia once put it, “is not for sissies.”³⁰¹ It is exceedingly complex, and doctrinal developments within administrative law are difficult to anticipate. Granted, the subject matter of administrative law is complex, and doctrine in every area of law necessarily develops over time, often in surprising ways. But there is an obvious tension between such traditional rule of law values as clarity and stability in the law³⁰² and

300. See JOHN A. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* 40–50 (1986) (drawing parallels between Founding-era arguments between Federalists and Anti-Federalists and debates over the administrative state during the 1930s and 1940s).

301. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *DUKE L.J.* 511, 511 (1989).

302. See LON L. FULLER, *THE MORALITY OF LAW* 45, 63 (1964) (identifying clarity and stability as rule-of-law values); see also Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 *HARV. L. REV.* 1924, 1929, 1978 (2018) (arguing that most of “[Fuller’s] principles, and certainly their animating spirit, have a foundational character in administrative law,” but cautioning against reflexive judicial recourse to them, both because “the domain of law’s morality is intrinsically limited” and because “agencies may reasonably choose, in a broad range of situations, to compromise Fuller’s principles even where they apply.”).

an administrative jurisprudence that oscillates unpredictability between common law doctrines that seem disconnected from the APA's text, on the one hand, and insistence upon fidelity to that text, on the other.

APA originalism may promote the rule of law by taking certain doctrinal options that produce unnecessary complexity off the table. Thus, if the original meaning of § 706 requires independent judicial review of questions of law, *Chevron* as we know it may have to go³⁰³—perhaps not right away, but eventually. With it would go a body of law that is difficult for even scholars of administrative law to understand. If a certain amount of doctrinal development will necessarily take place under APA originalism, it may be more disciplined, and at least in certain contexts, complex rules may be replaced with simpler ones.

Originalist adjudication can also be complex. But the complexity of adjudication may at least be marginally reduced if the focus of judicial inquiries and the kinds of evidence relevant to those inquiries are better known in advance. Further, since the history relevant to APA originalism is more accessible than that relevant to constitutional originalism—not only because there is more documentation but because the context in which the APA took shape more closely resembles today's—the possibility of truly surprising finds and outcomes may be more remote.

4. *Administrative Common Law is Democratically Illegitimate*

Even if the original APA is suboptimal in certain respects, there are powerful reasons to think that *judges* should not try to improve upon it. The judicial displacement of perfectly constitutional and popular legislative decisions on the ground that they violate judge-made doctrines that judges deem net-beneficial, seems democratically illegitimate.

One potential justification for such displacement might run as follows: (1) had it anticipated subsequent developments, the Congress that enacted the APA would have made different choices to establish the originally-intended balance of competing values; (2) owing to partisan gridlock, it is not likely that Congress will at present or in the foreseeable future take those developments into account and restore that balance; (3) therefore, judges should do so.

The obvious problem with this justification is that one person's partisan gridlock is another's properly-functioning legislative process. It is an often irksome, but nonetheless ineluctable truth about the legislative process, that its fruits may not deliver as intended, promised, or wished for. Even if

303. The qualification is important. *Chevron* without *Mead* and the major-questions doctrine, for example, would be considerably less complex than *Chevron* at present.

judges are generally competent to correct what they perceive to be political market failures, arriving at the conclusion that in doing so they are acting consistently with the democratic will of Congresses past or present—to say nothing of remaining within the bounds of their own constitutional authority—requires considerable imagination.

A related justification is that agencies simply cannot be counted upon to take into account the views of certain politically underrepresented interests when making regulatory decisions, if left to their own devices, and that courts can “democratize” agency decisionmaking by forcing agencies to pay attention to those views.³⁰⁴ The trouble with this justification is that it is grounded in single-institutional analysis³⁰⁵ of the limitations of the administrative process—it is blind to problems of differential interest-group access that afflict courts as well. For instance, industry interests that stand to reap concentrated benefits from deregulation have a strong incentive to hire skilled lawyers who can present information favorable to their position to courts; consumer and environmental interests that stand to suffer nontrivial but diffuse costs from deregulation have a weaker incentive to do so.³⁰⁶ Judicial supplementation of the APA to protect politically underrepresented interests may only produce deadweight loss—it may increase the costs of regulatory activity without producing any compensating democratic benefits.

B. Arguments Against APA Originalism

1. APA Originalism Will Rarely Yield Clear Answers

A number of scholars—drawing sometimes from language theory,³⁰⁷ sometimes from public choice theory,³⁰⁸ sometimes from both³⁰⁹—have

304. Merrill, *supra* note 49, at 1064 (arguing that courts during the late 1960s and early 1970s were “expanding the availability of judicial review, and were imposing new rights of intervention and hearing requirements, precisely in order to make agency processes more representative”).

305. On the perils of single-institutional analysis, see generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES; CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

306. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 77–79 (1991) (rebutting arguments that the “adversarial structure” of litigation can “offset an interest group’s ability to exercise any disproportionate influence it has”).

307. See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 *COLUM. L. REV.* 609, 613, 625–26 (1990).

308. See Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*,

urged that there are serious epistemic difficulties involved in discovering the original communicative intentions of multimember decisionmaking bodies. Seeking original public understanding is fraught with difficulty as well because different members of the public may understand legal texts differently. Constructing a hypothetical ordinary understander of the relevant language may not resolve the above difficulties—there may be no single understanding that could reasonably be attributed to such a person. Such a construction might have to be informed by normative judgments—for example, that intratextual coherence and consistency should be prioritized over incoherence and inconsistency.³¹⁰ But then one is arguably no longer pursuing fixed meaning—one is creating meaning, and one should at least acknowledge it.

Judges can expect to encounter some of these difficulties in seeking the original meaning of the APA. Recall that the APA was a compromise, and that the price of compromise was underdeterminacy that allowed both sides to claim victory. Even if it is possible, for the purposes of interpreting certain terms and phrases, for judges to construct a reasonable member of the public who understands the APA's text in a way that does not reflect controversial normative judgments—to take an obvious example, interpreting the term “30 days”³¹¹—it may not be possible to do so in most litigated cases. In such cases, originalism's aspiration to discover meaning may lead judges—whether intentionally or accidentally—to create meaning without realizing that they are doing so. If most litigated cases involving the APA center around text that is vague or ambiguous, APA originalism may either give us more of the same administrative common law or—perhaps worse—administrative common law presented by judges as the command of clear text.

2. *The Original APA is Normatively Bad*

The original APA could still be attacked on a number of normative grounds that counsel in favor of maintaining components of the status quo that are inconsistent with it. Among them: (1) the original APA failed to anticipate important developments in administrative practice; (2) it was based upon incorrect assessments of institutional competence; and (3) it legitimized an administrative state that is fundamentally illegitimate because

12 INT'L REV. L. & ECON. 239, 249–54 (1992).

309. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1984).

310. See Robert Bennett, *Originalism and the Living American Constitution*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 105 (2011).

311. See 5 U.S.C. § 553(d) (2012) (providing that the publication of a rule “shall be made not less than 30 days before its effective date”).

its central features violate the original meaning of the Constitution.

The original APA envisions agencies that act essentially like courts in part because agencies generally *did* operate like courts in 1946. Agencies prior to the 1960s acted primarily through adjudication—the few agencies that did issue substantive rules did not do so often.³¹² The surprise is that the APA required agencies to give notice of, and allow members of the public to comment on, the content of rules *at all*.

With the benefit of hindsight, the omission is glaring. Decisions that those who enacted the APA likely expected to be made in an adjudicatory context and subject to the APA's rigorous procedural safeguards and judicial review standards are now made through informal rulemaking or highly informal nonlegislative guidances and policy statements.³¹³ Ironically, returning to the original meaning of the APA might move us even further away from the balance between energy, expertise, accountability, and rights-protection that the APA was designed to establish.

The judicial review provisions of the APA largely track the settlement between administrative power and independent judicial review that the Supreme Court developed in preceding years. That settlement provided for judicial deference to agency fact-finding but reserved questions of law for the courts, primarily on grounds of comparative institutional advantage. While, as Chief Justice Hughes put it in *Crowell v. Benson*,³¹⁴ ordinary questions of fact were thought to be “more effectively and expeditiously handled in the first instance by a special and expert tribunal,”³¹⁵ judges were regarded as experts in law. Thus, independent judicial determinations of both questions of law and certain questions involving “constitutional” and “jurisdictional” facts were thought to be necessary to prevent the establishment of “a government of a bureaucratic character alien to our system.”³¹⁶

The settlement described in *Crowell* has long since become undone. Adrian Vermeule has persuasively argued that judges broadly defer to agencies on questions of both fact and law today because they have come to believe that agencies have institutional advantages in answering both kinds of questions.³¹⁷ If such deference violates § 706, the very institutionalist premises on which the APA rested may counsel against enforcement of the APA's original meaning.

312. GRISINGER, *supra* note 28, at 76; Schiller, *supra* note 53, at 1144–46.

313. For an overview of nonlegislative rules, see generally William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321 (2001).

314. 285 U.S. 22 (1932).

315. *Id.* at 88 (Brandeis, J., dissenting).

316. *Id.* at 57.

317. VERMEULE, *supra* note 3, at 23–36.

Lastly, constitutional originalists may consider the original APA to be unworthy of restoration. The APA arguably offers a separation of legislative, executive, and judicial *functions* within agencies in place of a constitutionally-required separation of legislative, executive, and judicial *powers* across governmental branches; a day in *commission* in place of a constitutionally-required day in *court*. Some originalists may be prepared to accept the original APA on the theory that it represents the best available option in a second-best constitutional world³¹⁸ in which rigorous enforcement of the original Constitution is not practically possible. Others may consider that restoring the original APA may lull Americans into a false sense of security and diminish their incentive to restore the original Constitution.

3. *Administrative Common Law Has Improved Upon the Original APA*

Vermont Yankee has few critics today. But a number of administrative common law doctrines have long been accepted by the Supreme Court—arguably for the good. Even if originalism in theory allows room for the construction of net-beneficial doctrines that do not contradict the APA’s text, it does not follow that those doctrines will survive. And net-beneficial doctrines that *do* contradict the APA’s text will certainly be placed in jeopardy.

Consider hard look review. Although this Article has suggested that it is a permissible construction of vague text, there is a plausible contrary argument. The argument would run that pre-1946 rational-basis review was not nearly as demanding as hard-look review. APA originalism might lead a judge to conclude that the § 706(2)(A) is not so vague as to accommodate the doctrine delineated in *State Farm*. Although the question of whether hard-look review is worth its considerable costs is hotly contested,³¹⁹ there

318. See R.G. Lipsey & R. K. Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 12 (1956) (setting forth what is now a well-known technical proposition in welfare economics—that if one of the Paretian optimum conditions required for a given transaction to be efficient cannot be satisfied, satisfying the other conditions may not improve overall welfare). That technical proposition spawned literature both within and without economics that focuses on how to maximize welfare under suboptimal conditions. For a review of the literature, see generally Robert Ashford, *The General Theory of Second Best—An Overview*, 49 AKRON L. REV. 433 (2016).

319. For some leading defenses of hard-look review, see, e.g., Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 514, 521 (1997); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 527–29; Patricia M. Wald, *Judicial Review of Complex Administrative Agency Decisions*, 462 ANNALS AM. ACAD. POL. &

are forceful arguments that it does capture net benefits by safeguarding citizens against agency carelessness³²⁰ and opportunism.³²¹ Were it to be replaced with a more deferential standard on originalist grounds, the result might be net-detrimental.

Similarly, even if the logical outgrowth rule is incompatible with the APA's original meaning, it may still be a net-beneficial means of promoting fair notice. As the Fourth Circuit put it in the 1985 case of *Chocolate Manufacturers Ass'n of the United States v. Block*,³²² the logical outgrowth doctrine prevents agencies from using the comment period as a "carte blanche to establish a rule contrary to its original proposal."³²³ If the doctrine is incompatible with the APA's original meaning, it may be a genuine improvement upon it because it is well-adapted to conditions that the APA did not anticipate.

The *Vermont Yankee* saga does not prove that it is a bad thing for courts to depart from the APA's original meaning. On balance, administrative common law may be doing more good than harm. The fact that it is not clear which of its products will ultimately stand or fall should encourage caution before urging the adoption of a disruptive methodology.

4. *APA Originalism Will Not Yield Net Benefits in a Largely Nonoriginalist World*

Assuming that they do not believe that constitutional decisionmakers are duty-bound to implement the original APA, though the heavens may fall, those who would introduce APA originalism into institutional practice need to consider whether the benefits of implementing the original APA in a substantially nonoriginalist world would outweigh the costs.

This is a familiar, if undertheorized, problem for constitutional original-

SOC. SCI. 72, 77 (1982). For some leading critiques, see, e.g., Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243 (1999); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 629 (1997).

320. See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002) (defending hard look review on the grounds that it can improve the quality of decisionmaking by counteracting the psychological biases of agency officials).

321. See Merrick Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 521 (1985) (defending hard-look review as a means of "ensur[ing] that agencies remain faithful to congressional intent").

322. 755 F.2d 1098 (4th Cir. 1985).

323. *Id.* at 1104.

ists. Although welfarist arguments in favor of originalism are a relatively recent development,³²⁴ originalism has long been defended on consequentialist grounds as a “lesser evil”—as better than any reasonably available alternative, as measured with reference to evaluative criteria that are tied in some respect to outcomes.³²⁵ Thus, even if the original meaning of the amended Constitution is normatively good for welfarist or other consequentialist reasons, constitutional originalists must consider whether departures from original meaning might sometimes yield better overall outcomes in what they consider to be a second-best constitutional world—one shaped in substantial part by nonoriginalist precedents and practices.³²⁶

Think of the legislative veto—a device held unconstitutional by the Supreme Court in *INS v. Chadha*.³²⁷ Legislative vetoes, which were³²⁸ incorporated into statutes that delegated rulemaking authority to agencies, provided that one or both Houses of Congress could nullify those rules without the President’s signature. In a strongly originalist opinion, the Court in *Chadha* concluded that this amounted to an unconstitutional end-around the bicameralism and presentment requirements of Article I.³²⁹

324. See generally MCGINNIS & RAPPAPORT, *supra* note 219 (defending originalism on welfarist grounds). For an argument that the latter defense, which relies upon the unique capacity of supermajoritarian decision rules to generate net-beneficial outcomes, is unsuccessful, see Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-Originalists*, 101 Nw. U. L. Rev. 1905 (2007).

325. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (arguing that originalism will generate outcomes that are “more compatible with the nature and purpose of a Constitution in a democratic system” than those generated by living constitutionalism because originalism can “prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable”).

326. Just as the introduction of a Pareto imperfection into a market may increase social welfare by counteracting the effects of an existing imperfection. See Peter J. Hammer, *Anti-trust beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 862 (2000) (explaining how “one market failure can sometimes counteract the effects of another market failure” and offering an example: a monopoly resulting from a merger between two companies that raises the price and lowers the output of a good but reduces the negative externalities associated with the good’s consumption, for a net social welfare gain).

327. 462 U.S. 919 (1983).

328. And sometimes still are, *Chadha* notwithstanding. See MICHAEL J. BERRY, *THE MODERN LEGISLATIVE VETO: MACROPOLITICAL CONFLICT AND THE LEGACY OF CHADHA* 82–83 (2016) (finding that the number of veto statutes continued to increase each year after *Chadha*, but noting that “since the ruling Congress has, with few exceptions, completely abandoned its use of legislative vetoes authorizing just one chamber to block executive actions”).

329. *Chadha*, 462 U.S. at 959.

Despite the majority's originalist analysis, *Chadha* may not have been a victory for originalism. As Martin Shapiro has written, the veto was a "direct assault on . . . proregulatory forces' project for turning the agencies into an independent fourth branch because it brought agency rulemaking under greater congressional control."³³⁰ Absent that device, what Justice Byron White in his *Chadha* dissent described as the "delegation of vast authority" by Congress to agencies continues, but the exercise of that authority may be less constrained than it would otherwise be.³³¹ By enforcing the original meaning of Article I's bicameralism and presentment requirements, the Court may have left Americans more vulnerable to abuses of executive power made possible by delegations of legislative power that arguably violate Article I's Vesting Clause.³³² It is not clear that *Chadha* resulted in a net gain, either in respect of governmental compliance with the original Constitution or in respect of aggregate social welfare more generally.³³³

Of course, *Chadha* is only one case. But if in fact judges who consistently applied originalism did more harm than good under pervasively non-originalist conditions—second-best constitutional conditions by their lights—it would *not* necessarily be best for judges to consistently apply originalism. APA originalists, too, will have to consider whether their methodology will outperform alternatives under second-best conditions. Perhaps the best of possible worlds would be one in which original APA has since 1946 been consistently enforced, but that is not our world. It is,

330. Martin Shapiro, *A Golden Anniversary? The Administrative Procedure Act of 1946*, 19 REGULATION, NO. 3, at 40, 45 (1996).

331. *Chadha*, 462 U.S. at 989 (White, J., dissenting).

332. Compare Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) (arguing that "[t]he nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory"), with Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332 (2002) (arguing that the vesting of "all legislative powers herein granted" in Congress precludes the subdelegation of legislative power to other governmental institutions).

333. Compare Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 4 (1994) (arguing that "where Congress has unconstitutionally delegated legislative power to an agency, the delegation plus a legislative veto is closer to the constitutional baseline than the unconstitutional delegation would be standing alone" and that "the legislative veto should, under certain circumstances, be allowed"), with Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 696 (1991) (arguing that "[b]y strictly enforcing Article I, the Court in *Chadha* impede[d] Congress's efforts to lower the decision costs of government, making it easier for special interests to control the political process" and that *Chadha* "ultimately will produce more political accountability, not less").

therefore, not necessarily the case that efforts by judges today to consistently enforce the original APA would improve upon the status quo. Perhaps judges should instead make compensating adjustments to restore the balance of values that the APA was designed to establish but which are not consistent with the original meaning of the APA's text.

Or perhaps not. Vermeule notes that time-pressed generalist judges may be "ill-suited to identify valid compensating adjustments, so that the mistakes they make would have even more harmful consequences than would failure to adjust the constitutional rules to take account of the systematic interaction between the originalist and nonoriginalist components of those rules."³³⁴ But perhaps implementing original meaning *without* compensating adjustments and inconsistently implementing original meaning *with* compensating adjustments would *both* produce worse overall outcomes than doing what judges have generally done since the rise of informal rulemaking—and thus the status quo should be maintained. The point is that we do not really know whether the benefits of APA originalism of any variety will outweigh the costs (and there will always be costs).

C. Prospects of Implementation

Those who recommend that judges adopt any interpretive methodology must account for the possibility that judges will decline to do so because doing so would undermine values that judges seek to capture.³³⁵ Even if a judge is convinced that a particular interpretive methodology is generally best suited to capturing sought-after values, she may decline to apply that methodology in a given case if it appears to her that doing so will poorly serve her values. But judges *do* adopt interpretive methodologies—the ascendancy of constitutional originalism on the federal bench is an instructive case in point.

To the extent that judges value leisure—and empirical evidence suggests that they do³³⁶—APA originalism may compare favorably to constitutional originalism. APA originalism may not require the same amount of scarce judicial time or cognitive effort. The ideas and principles that undergird the APA are not so alien and obscure that judges must, in the words of Suzanna Sherry and Daniel Farber, "immerse [them]selves in a lost tradition"

334. ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 158 (2011).

335. See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1763 (2013) (explaining that any "advice from the external standpoint will have to be refracted through the motivations of actors within the system").

336. See generally Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011).

in order to identify them.³³⁷ The language of the APA, while concededly vague at points, is far less abstract than, say, that contained in the Bill of Rights or Section 1 of the Fourteenth Amendment, and key terms are defined in the statute itself.

Empirical evidence also suggests that judges care about their reputations,³³⁸ and APA originalist judges may not suffer reputational costs on par with those incurred by constitutional originalist judges. Constitutional originalism still draws fire from politicians, pundits, and legal scholars on the ground that consistent adherence to it would have normatively unacceptable consequences.³³⁹ A return to the original meaning of the APA would not cast doubt upon the legitimacy of institutions that have become critical to modern governance. Indeed, enforcing the original APA may *reinforce* the perceived legitimacy of those institutions by assuring the public that the bureaucracy is bound by law.

Finally, APA originalism may hold a similar appeal to that of constitutional originalism amongst judges who value the rule of law. Despite being arguably the most effort-costly interpretive methodology on the market³⁴⁰ and despite the reputational costs associated with it, originalism has risen within the academy and on the federal bench in substantial part because of its purported capacity to equip judges to maintain the rule of law rather than imposing their own will. Originalism's purported rule of law benefits have served as an important component of normative arguments for originalism at least since then-Attorney General Edwin Meese III's famous

337. DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 20 (2004).

338. *See generally* LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

339. A considerable amount of critical commentary followed the nomination of now-Justice Gorsuch. *See, e.g.*, Erwin Chemerinsky, *Neil Gorsuch's Originalism Problem*, NY DAILY NEWS (Mar. 21, 2017), <http://www.nydailynews.com/opinion/neil-gorsuch-originalism-problem-article-1.3004164>; Marjorie Cohn, *Gorsuch Would Use 'Originalism' To Affirm Right-Wing Agenda*, HUFFINGTON POST (Mar. 23, 2017, 01:23 PM), https://www.huffingtonpost.com/entry/Gorsuch-would-use-originalism-to-affirm-rightwing_us_58d4036ae4b099c777b9dfd2; Jill Filipovic, *9 Reasons Constitutional Originalism Is Bullsh*t*, COSMOPOLITAN (Mar. 21, 2017), <https://www.cosmopolitan.com/politics/a9162680/neil-gorsuch-constitutional-originalism-supreme-court/>; Ken Levy, *The Problems With Originalism*, N.Y. TIMES (Mar. 22, 2017), <https://www.nytimes.com/2017/03/22/opinion/the-problems-with-originalism.html>.

340. *See* Eric A. Posner & Adrian Vermeule, *Originalism and Emergencies: A Reply to Lawson*, 87 B.U. L. REV. 313, 319 (2007) (observing that “[i]nstead of relying upon moral intuitions, or low-cost analogies to precedents . . . originalist judges do massive amounts of historical and archival research”).

call for a “jurisprudence of original intention”³⁴¹ in 1985 and were central to Justice Antonin Scalia’s influential advocacy of originalism.³⁴² A methodology that is perceived to have such constraining capacity may be attractive to judges generally, insofar as they seek judicial office in the first place in part because they desire to give effect to principles that are distinguishable from their own will. Ronald Cass has nicely distilled why such judges might self-select for office on the basis of this understanding of the judicial role:

In accepting appointment to the bench . . . , the judge knowingly steps into the role of constrained [decisionmaker]. She accepts the framework of judicial decisionmaking that casts the judge as arbiter of disputes about applications of preexisting rules. Viewed broadly then, the dominant aspect of the judge’s sense of right is a belief that the right way to decide a case is to put personal preferences aside and apply “the law.”³⁴³

Nonoriginalists would, of course, deny that originalism has any unique capacity to maintain the rule of law. This Article does not argue that it does. The point is only that APA originalism may be perceived as offering similarly unique rule of law benefits to judges and may be similarly attractive to them.

All of this being said, applying APA originalism will be expensive. There are considerable epistemic difficulties inherent in any originalist enterprise, and resolving those difficulties takes scarce judicial time and effort. Indeed, APA originalism may require more judicial time and effort than common law oriented approaches that take certain precedents as settled and do not entail any substantial historical research, although reading those precedents is also time-consuming and effortful.³⁴⁴ Further, the reputational costs to judges of being identified as APA originalists may not be trivial. An administrative jurisprudence in which judges do not generally defer to agencies upon concluding that statutory or regulatory language is ambiguous would be quite different from the one we have now, and APA originalism could produce those changes. Defenders of the status quo would be sure to warn

341. See Attorney Gen. Edwin Meese III, Address before the American Bar Association (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 9 (1986).

342. See Scalia, *supra* note 325, at 863–64 (averring that “the main danger in judicial interpretation of the Constitution . . . that the judges will mistake their own predilections for the law” and arguing that originalism alone “establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself”).

343. Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 978–79 (1995).

344. See VEREMULE, *supra* note 265, at 259–60.

of these possibilities and attack those who might bring them about.

The judges who may find APA originalism most attractive may be unlikely bedfellows. Constitutional originalist judges who are skeptical of modern administrative governance may consider that enforcing the original APA will do more to safeguard Americans against unconstitutional administrative power than a combination of an underenforced original Constitution and administrative common law. Pragmatic judicial proponents of administrative governance may find enforcement of the original APA appealing because it offers an opportunity to *enhance* agency discretion. The original APA does little to address informal rulemaking, and it leaves agencies plenty of space to fashion their own procedures. Pragmatists who believe that agencies should have more space than they do at present may be worried about the fate of deferential doctrines like *Chevron*, but may bet on originalist attachment to precedent counseling against discarding these doctrines. If these pragmatists are really lucky, the public perception that the original APA is being enforced might reinforce the administrative state's perceived legitimacy while *also* giving agencies more flexibility.

CONCLUSION

The APA never brought about the transformation of administrative practice and legal doctrine that it was designed to achieve. If one wants to understand either administrative practice or legal doctrine today, reading its text or studying its history will not help very much—what changes have taken place in administrative law and practice since it was enacted often have little to do with its text or history.³⁴⁵ The changes that a return to the APA's original meaning might bring about could be profound.

No one can predict with any confidence whether APA originalism would yield net benefits if it is adopted.³⁴⁶ There are, however, grounds for confidence concerning the form that APA originalism would take. The interpretive goal of APA originalism would likely be the same as that of the domi-

345. Martin Shapiro has related an amusing anecdote that captures the disconnect between administrative law doctrine and the APA's text:

Some years ago I was reading a final exam in an administrative law class, and a student who had been busily stroking the cases for a half dozen pages or so suddenly interrupted his writing and provided this parenthesis: "(My God, I just actually read part of the APA. Please ignore all I've written so far.)" I've never been sure that reading the APA really did help the poor soul. It often doesn't help me very much.

Martin Shapiro, *APA: Past, Present Future*, 72 VA. L. REV. 447, 447 (1986).

346. For a detailed discussion of the epistemic difficulties associated with predicting the impact of interpretive choices, see Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000).

nant form of constitutional originalism—ascertaining the original public meaning of the law’s text. The hierarchy of contemporaneous ordinary meaning, pre-enactment history, and post-enactment history would likely be carried over from constitutional originalism. To the extent that it tracks the ascendant New Originalism, APA originalism would leave room for the development of doctrines that are consistent with, if not required by, the original APA, and thus would not doom all administrative common law doctrines—though it would cast serious doubt on those that contradict the original APA. APA originalism could also be expected to incorporate a role for precedent that is sensitive to the settled expectations of agency officials and members of the regulated public.

Although this Article has largely focused on the implications of APA originalism for adjudication, there is good reason for confidence that APA originalism as a *scholarly* endeavor would yield valuable information about a landmark statute. Penetrating inquiries into the APA’s text and history have already yielded such information. Even if the original APA is sufficiently deficient that the American people are better off with an administrative jurisprudence that only occasionally invokes it, the construction and application of a full-fledged APA originalist methodology by scholars could generate insight into how and why the APA is deficient. That insight might aid not only judges but legislators and Executive Branch officials in dealing with similar questions concerning the appropriate balance between flexibility and fairness, expertise and accountability, responsiveness to a rapidly changing policy environment and respect for individual rights, that must be answered today and tomorrow. It may inform ongoing efforts to amend the APA. More speculatively, insights derived from APA originalism may inspire efforts to replace the APA with a written administrative constitution that is better suited to today’s administrative state.

A tremendous amount of scholarly energy has been spent exploring the drafting and ratification of the Constitution and investigating its original meaning. Although the drafting, ratification, and original meaning of the APA has not yet received comparable scholarly attention, that is changing fast. Any effort to introduce APA originalism into institutional practice on a broad scale must confront normative questions that may prove more difficult to resolve than any historical or linguistic ones. But if all that APA originalism does is lead us to appreciate why we are not missing much, it will have made a positive contribution by enabling us to appreciate what we have and equipping us to resist efforts to return to a lost world that never quite was.