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The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking

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THE APA AS A SUPER-STATUTE: DEEP COMPROMISE AND JUDICIAL REVIEW OF NOTICE-AND-COMMENT RULEMAKING

William N. Eskridge Jr. & John Ferejohn***

The Administrative Procedure Act of 1946 (APA) is a “super-statute,” creating a robust, enduring governance structure for the modern regulatory state. An emerging literature on “APA originalism” maintains that some of the judge-created rules of administrative law are inconsistent with the APA’s original public meaning and therefore illegitimate. In the context of notice-and-comment rulemaking, some academics and judges wield APA originalism as a reason to abrogate the presumption of judicial review, hard-look review of agency factual conclusions, and judicial deference to agency interpretations of law. Some of the judges who would apply original public meaning to those issues have asserted an even more aggressive judicial role to limit agency rulemaking that has large-scale social or economic impact.

As an initial matter, this Article responds to the methodological premises of some of the APA originalists. They tend to approach the APA as through a time machine and seek the answers to today’s issues that they say are embedded in the 1946 law. APA originalists also tend to view the APA as a “shallow compromise,” enacted because the exhausted stakeholders wanted closure, and seek to limit administrative law to what they consider the narrow parameters of that compromise. This Article contests these premises. The APA was what political philosophers call a “deep compromise,” where stakeholders’ positions evolved in the course of the long debate and reached a creative resolution of governance issues that has proven to be lasting. Original public meaning for super-statutes such as this one ought to focus on the law’s important concepts, which in this case are rooted in democratic theory.

Even viewed as a shallow compromise through the mechanism of a time machine, the APA presumes the availability of judicial review for agency rules, encourages a

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hard look at fishy agency reasoning, and tolerates or even valorizes a deferential attitude toward agency interpretations under many circumstances. Understood as a deep compromise whereby conservatives accepted the legitimacy of the modern administrative state and liberals accepted procedural guardrails protecting against secret or arbitrary agency rules, the APA supports a presumption of judicial review, hard-look examination of agency reasoning, and deferential consideration of agency reasoning. The doctrine that is most offensive to a serious APA originalism—whether the law is treated as a shallow or a deep compromise—is the Roberts Court’s creation of a “major questions doctrine” that antidefers to agency rulemaking having large social or economic effects, even when the agency action is authorized by the plain meaning of statutes broadly delegating rulemaking authority.

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INTRODUCTION

There is academic consensus that the Administrative Procedure Act of 1946 (APA) is a *super-statute*, “entrenching governmental structures and quasi-constitutional norms.”¹ Like other landmark statutes,

1 Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2054 (2011); accord Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363

the APA is a part of the foundation of the modern American state.² The development of the modern state was resisted at every step and occupied much of the twentieth century.³ The result was the formation of a distinctively American social democracy which combined aspects of a welfare state with regulated capitalism in a diverse and increasingly inclusive political community. Many super-statutes emerged as a result of popular pressure arising from social movements which were sometimes reflected in powerful electoral tides that altered the makeup of federal and state institutions in lasting ways.⁴ New substantive laws and their accompanying agencies were often hard-fought compromises between public and private values, which had to be accepted by subsequent legislatures, administrators, and courts if they were to stick.⁵ These deep, lasting compromises required advocates on all sides to reconsider and sometimes modify deeply held values and beliefs.

Importantly, the compromises that lasted were usually those that preserved and extended democratic values into the new institutional creations and practices, while preserving legal protections for property and liberty interests.⁶ The origin and evolution of the APA seem different from these. Everyone agrees that it was a compromise between or among powerful interests, but it is hard to see the APA as pushed by a social movement, and it has not been seriously revisited by Congress.⁷ Still the 1946 Act can be described as a super-statute in two senses: first,

(opining that the Administrative Procedure Act (APA) is a “superstatute, or subconstitution, in the field of administrative process”); Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J.L. & JURIS. 5, 18 (2009); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 675–76 (2005); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1816 n.151 (2003); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 466 (2015).

² See ADRIAN VERMEULE, LAW’S ABNEGATION 39 (2016).

³ See generally STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982); DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928 (2001); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS (1992).

⁴ See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 3–12, 16–17, 29 (2010).

⁵ See *id.* at 12–22.

⁶ E.g., Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1472–96 (2003) (documenting the accommodations for businesses included in the Civil Rights Act of 1964); Jill S. Quadagno, *Welfare Capitalism and the Social Security Act of 1935*, 49 AM. SOCIO. REV. 632 (1984) (demonstrating that Social Security Act both protected property and accommodated working-class demands).

⁷ Congress has amended the APA no fewer than sixteen times and has considered but not adopted major overhauls or modernizations. See Christopher J. Walker, Essay, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 629, 670 (2017).

it was a deep compromise that marked the partial acceptance of a social democratic welfare state in a capitalist economy; second, it was a “framework” statute that affirmed and extended democratic values and practices into new and old agencies and, in effect, enlisted courts in support of these values.

It was perhaps easy for American public officials and citizens to recognize and endorse democratic *values* if those were framed at a high level of abstraction. After all, in the United States, the necessity for popular legitimation was accepted even by the democracy-skeptical Framers. They accepted that elections would have to be held frequently so that officials of the new federal government could be made to account for their actions before the people.⁸ But building democratic *practices* into the new federal government was a much trickier matter and the Framers themselves resisted such efforts in many ways.⁹ Still, the subsequent history of our country shows the enduring power of the democratic idea—that the people ought to have, must have, an important role in government even if that role may not be direct. Indeed, democratic pressures are often exerted in making the people’s role more explicit and regular (as with the invention of direct primary, the referendum and popular initiative, and other direct democracy ideas).

The genius of the APA is that it managed to advance the democracy and governance projects to a substantial degree while, at the same time, respecting the rule of law. In effect, the APA offered administrative agencies a legitimate way to make rules with the force of law by combining democratic values with due process values (which could be

8 MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 170–75* (2016) (documenting the Framers’ simultaneous commitments to annual elections and their wariness of democracy).

9 In *Federalist No. 63*, for example, Madison defended the creation of the Senate which would preserve liberty and stability against democratic passions:

[T]here are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind? . . . The true distinction between [the ancient republics] and the American governments, lies *in the total exclusion of the people, in their collective capacity, from any share in the latter, and not in the total exclusion of the representatives of the people from the administration of the former.*

THE FEDERALIST NO. 63, at 320–22 (James Madison) (Ian Shapiro ed., 2009).

policed by courts). Agency decisions were to be substantively reasonable, publicly justified, and responsive to public comments. The APA accomplished this by devising procedures that reflected both democratic and due process values—procedures that were appropriate to agencies rather than courts or legislatures. These procedures were not wholly original—pre-APA administrative practices already reflected similar values, to varying extents.¹⁰ But the APA was revolutionary in establishing a substantially uniform and much more inclusive template that Americans could expect to be honored throughout the federal government.¹¹

We argue that this reconciliation of democratic and due process values was accomplished, in part, by modeling the APA as a version of what we might call “folk” democratic theory—a theory of democracy that embodies popular understandings of how a democratic government should work. This “theory” was probably as widely shared among opponents as proponents of the administrative state.¹² The key idea in folk democratic theory is that government power is best exercised directly (by the people) insofar as that is possible.¹³ From the perspective of folk democracy, the right to vote is the fundamental democratic right.¹⁴ The assumption is that We the People—indeed, each person—is competent to make choices among candidates in elections (or to choose among policies where popular referenda are available). The idea is reflected in what is sometimes called the sanctity of the voting booth (with secret ballots and regulations limiting campaigning in the near vicinity), and in the ideological centrality of the jury trial. In ef-

10 See JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE* 61 (2012).

11 See Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 101–13 (2022) (demonstrating that pre-APA agency consultation was less open and inclusive than the notice-and-comment process established by the APA).

12 Folk democratic theory reflects the views of the opponents of the proposed Constitution as well as the views of later populist and progressive reformers. While the Antifederalists failed to get what they wanted at the Philadelphia Convention or in the early Congresses, Gordon Wood argues that within a very few years many antifederalist views, and indeed antifederalist politicians, prevailed. The democratic impulse overwhelmed the federalists everywhere. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 259–71 (1991).

13 John Ferejohn, *Deliberation and Citizen Interests*, in *THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY* 420 (Andre Bächtiger, John S. Dryzek, Jane Mansbridge & Mark Warren eds., 2018); see also CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 1, 9 (2016) (describing the “folk theory” of democracy central to popular thinking about politics). Achen and Bartels provide a sustained critique of the accuracy of the folk democratic conception of politics. For our purposes it suffices to note that this is the conception of democracy is widely held among the American public. ACHEN & BARTELS, *supra*.

14 Ferejohn, *supra* note 13, at 421.

fect, folk democracy assumes that we will get equal *concern* for our interests if only we can fully implement the requirement of equal *respect* for our votes.¹⁵ Folk democracy also insists that where authority must be exercised by elected representatives, these officials must remain politically “close” to the people by exposing themselves and their actions in office to frequent and fairly conducted elections.¹⁶ Elected representatives are expected to act on behalf of their constituents and to explain and justify their plans and actions to their constituents when running for reelection. If the representative wants to be returned to office, he or she must provide a persuasive account of his or her actions to constituents. The reasons offered by an elected representative are primarily directed to her voters (in support of her claim to act on their behalf and in their interests) as part of her appeal to take actions on their behalf.¹⁷ Importantly, for the most part, these justifications were not to be policed by courts but would be regulated politically by voters in constituencies.

Elected representatives cannot do everything in a complex modern state, however. If it is to address the needs of a modern society, Congress must often delegate the authority to make binding rules to specialized administrative agencies. Congress’s power to do that is a great part of what makes it valuable to the people. When agencies must make legally binding rules, in this sense, they should, as far as possible, do so in the same ways that Congress would. Folk democracy requires that, like elected representatives, agencies must give reasons for their actions—but, unlike elected representatives, the occasion for agency justifications is not an election (at least not directly). Rather, explanations might be demanded in a congressional hearing or in a judicial

15 These ideas are drawn from RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), especially in chapter six of that book (“Justice and Rights”), where he argues that equal concern and respect is the best conception of political equality. See *id.* at 179–83. Although Dworkin sees equal concern and respect as, together, characterizing a single value (political equality), *id.* at 182, we think that equal concern and equal respect are two values, not one as Dworkin argues, and that their relationship is contingent. We will not address, here, the gap between the citizen and person that this definition raises.

16 ACHEN & BARTELS, *supra* note 13, at 21–22.

17 The famous speech by Edmund Burke to his electors at Bristol indicates that the appropriate grounds for justification are controversial. Must the elector convince his voters that he has advanced Bristol’s interests or the national or imperial interests? See Edmund Burke, *Speech to the Electors of Bristol* (Nov. 3, 1774), *reprinted in* 1 *THE FOUNDERS’ CONSTITUTION* 391, 392 (Philip B. Kurland & Ralph Lerner eds., 1987). The best modern descriptions of electoral accountability are found in RICHARD F. FENNO, JR., *HOMESTYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (2002), and DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (2d ed. 2004).

proceeding questioning an agency rule or decision. The agency's reasons might be, in this sense, directed either to the legislature (which delegated authority to the agency and provides its funding), or the courts. Ultimately, however, these justifications are owed to the electorate. In this sense agency activity is accountable through democracy (elections) and to law (through judicial review of agency actions).

Agencies must sometimes act like courts in providing some kind of due process to individuals or organizations that may be affected by a decision. This is especially the case where the agency is engaged in adjudication. But agencies are rarely required to provide the same kind or amount of due process when making rules.¹⁸ Indeed, the most important innovation in the APA was the creation or extension of notice-and-comment rulemaking across nearly all of the "administrative state."¹⁹ This avoided cumbersome judicial procedures when legislating new rules but required agencies to act transparently: to receive and consider public comments, with judicial review hovering as an incentive to take comments seriously.²⁰ Agency decisionmakers are much less insulated than federal judges. Judges are expected to give reasons or justifications for their decisions, but these reasons are supposed to be based in law and not on policy considerations. As with courts, agency justifications are supposed to be closely tied to the proceedings leading to the decision.²¹

Folk democracy, so far as we have sketched it, rests on the supposition that ultimate political authority rests with We the People and that governance must therefore be accountable to the people directly or indirectly. If political power is to be exercised other than directly, it must be legally delegated by "We the People" in some sense. And delegated powers must be accompanied by reasons or justifications. Folk democracy makes no claim about how much delegation can be justified; such limits must be found in the Constitution or in political morality. Folk democracy says only that, when authority is delegated to elected or unelected officials, there is an expectation of justification or reason giving in return. In that respect, folk democracy embodies a requirement of explicit accountability in the sense that it demands that exercises of delegated powers be justified to those subject to them, as

18 In chapter two of *The Unwieldy American State*, entitled "A 'Bill of Rights' for the Administrative State," Joanna Grisinger describes the complex debates and compromises in the APA, concerning what kind of due process was required of agencies. GRISINGER, *supra* note 10, at 59–108.

19 George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1650–51 (1996).

20 See GRISINGER, *supra* note 10, at 78, 80–81.

21 See *id.* at 80–81.

well as to elected officials who act on behalf of the people. This demand for reasons is an expression of democratic respect: to be required to give reasons for a decision is to recognize the moral claims of citizens to be respected as autonomous agents. At the same time, folk democracy insists on reserving a vital democratic kernel of authority to the people: the power to remove officials from office (directly or indirectly) without any explanations given or required.

* * *

While there is widespread acceptance that there is something super-statutory about the APA, there is no academic consensus as to the implications this may have for central doctrinal issues of administrative law. Critics of administrative common law, such as Kathryn Kovacs,²² and critics of *Chevron* deference, such as John Duffy,²³ have invoked the APA as a framework statute imposing strict, unchanging rules for the administrative state.²⁴ Conversely, academics supporting administrative common law, such as Gillian Metzger,²⁵ and *Chevron* deference, such as Ron Levin,²⁶ defend these practices as consistent with the APA. These doctrinal debates are part of larger discussion: Have judicial glosses on the APA's broad and often vague text ventured past the line of legitimate dynamic interpretation of an old law and into terrain where the judiciary has overstepped its Article III authority? Is so-called "administrative common law" illegitimate as a matter of democratic theory? Rule-of-law theory?

Evan Bernick, Kathryn Kovacs, Jeffrey Pojanowski, and Christopher Walker have advocated "APA originalism"²⁷: they maintain that the Supreme Court should trim back judicial glosses announcing a presumption of judicial review, imposing additional requirements on agency decisionmaking, and/or deferring to those decisions and should hew carefully to the "original understanding" of the APA, its

22 See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209–1211 (2015).

23 See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 190–99 (1998).

24 See *id.* at 130, 193; Kovacs, *supra* note 22, at 1223.

25 See Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1348–52 (2012).

26 See Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 183–90 (2021).

27 See Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. 8, 29–49 (2022) (discussing the APA originalists and critiquing their approach and proposals).

spare text interpreted as Congress and the public would have understood it in 1946.²⁸ Where the “APA prescribes concrete rules of decision,” the APA originalists “favor treating those instructions as fixed, enduring law, not a springboard for common law that contradicts that entrenched understanding.”²⁹

For us, a particularly thoughtful normative framework for APA originalism is that developed by Professor Kovacs. She argues that the APA’s democratic legitimacy is entirely a product of the political debate and settlement accomplished when the law was enacted, virtually without dissent, in 1946.³⁰ Updating should be left to Congress or (failing that) an agency whose officials are accountable to the elected President and Congress.³¹ But the APA is an unusual super-statute: it does not empower a single agency to continue the public deliberation as a basis for entrenching and updating the statutory rules, principles, and norms over time; the updating has been accomplished by federal courts filling in the details common-law style; and Congress has not significantly updated the statute to legitimate the administrative common lawmaking.³² For Kovacs, the judiciary’s administrative common law is largely illegitimate; without active deliberative involvement of legislators, administrators, and other executive branch officials, the new rules lack the public, democratic involvement that has entrenched classic super-statutes such as the Social Security Act of 1935, the Civil Rights Act of 1964, and the Affordable Care Act of 2010 (thus far).³³ As a corrective, she would hew to the APA’s “fierce compromise”³⁴

28 See Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 827–28, 845 (2018); Kovacs, *supra* note 22, at 1250–54; Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 884–86, 890–91 (2020); see also Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 740–45, 751–57 (2021) (exploring the dynamic interpretation of the APA and noting originalist reservations); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 245–46 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (expressing strong reservations about the common-law evolution of the APA).

29 Pojanowski, *supra* note 28, at 899.

30 See Kovacs, *supra* note 22, at 1250.

31 *Id.* at 1219.

32 See Walker, *supra* note 7, at 630–31.

33 See Kovacs, *supra* note 22, at 1254–58.

34 Shepherd, *supra* note 19, at 1557.

fixed into public law in 1946.³⁵ Justice Gorsuch has explicitly adopted this perspective,³⁶ and other Justices lean in that direction.³⁷

Most of these originalists approach the APA through a time machine, what linguists call an “extensional” approach to historical meaning.³⁸ They view the APA as codifying a detailed set of hard-bargained compromises that must be respected by modern interpreters.³⁹ Such APA originalists have not fully explained their approach, but their likely justification would be that the only democratic buy-in for the super-statute came in 1946. Judges ought to follow that consensus today because they lack the popular accountability, and therefore legitimacy, needed to update the original bargain. The theory of folk democracy suggests that these APA originalists have too thin an understanding of both governance and democracy. We also submit that they have an unworkable theory of originalism: once the circumstances of society and government have changed, it is hard and ultimately impossible to enforce an original bargain. As we argue elsewhere, the only workable approach to historical meaning is to explore what linguists call an “intensional” approach to historical meaning: What “concept” or purpose did the stakeholders and legislators settle on in 1946?⁴⁰

Inspired by such a folk theory of democratic governance and a realistic approach to original meaning, Part I of our Article suggests a different understanding of compromise that better fits super-statutes such as the APA, namely, the notion of a “deep compromise.” The

35 See Kovacs, *supra* note 22, at 1208–09, 1243, 1260; see also ESKRIDGE & FEREJOHN, *supra* note 4, at 186–200 (on the Social Security Act); *id.* at 7 (on the Civil Rights Act); Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 515–17 (on the Affordable Care Act).

36 See *Buffington v. McDonough*, 143 S. Ct. 14, 16–17 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

37 See, e.g., *Baldwin v. United States*, 140 S. Ct. 690, 692 (2020) (Thomas, J., dissenting from the denial of certiorari) (arguing from APA originalism that *Chevron* deference ought to be discarded); Jeff Overley, *Chevron Deference's Future in Doubt if Barrett Is Confirmed*, LAW360 (Oct. 23, 2020), <https://www.law360.com/articles/1318381/chevron-deferences-future-in-doubt-if-barrett-is-confirmed> [<https://perma.cc/R9SG-VGCP>] (noting that Justice Barrett may be inclined towards originalism in administrative law).

38 William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1526–27 (2021).

39 Bernick, *supra* note 28, at 857–58 (suggesting though not fully endorsing a justification for APA originalism based its “emerge[nce] from a decades-long public debate between members of all departments of the federal government”); Kovacs, *supra* note 22, at 1237, 1250; Pojanowski, *supra* note 28, at 890, 899.

40 On the distinction between intensional and extensional approaches and an extended argument for preferring the latter in legal interpretation, see Eskridge et al., *supra* note 38, at 1525–34.

APA was the culmination of a great debate over how to reconcile the governance needs of dynamic agency lawmaking with democratic accountability and the rule of law. Before the APA debate, the country was settled on the ideas that agency lawmaking was necessary and that it was impractical to limit it by hard-and-fast statutory rules.⁴¹ Judicial review was considered the better means to limit agency discretion—but how searching should judicial review be?⁴² The New Deal made this question an urgent one: to protect vested property and contract interests against what they considered arbitrary agency regulation, its critics called first for an administrative court and then for direct public participation in the administrative process, followed by judicial review.⁴³ Engaging in their own thorough survey of best practices and accepting the need for reform, the New Dealers agreed to greater public notice and participation, with judicial review focused on jurisdiction, procedure, and substantive arbitrariness.⁴⁴ The critics endorsed large-scale congressional delegation of lawmaking authority and the inevitability of agency discretion, but checked by public participation and outside review.⁴⁵

In the extended debate over administrative procedure reform, roughly 1933–1946, both sides evolved as they debated fundamental issues, and public attitudes changed as well.⁴⁶ For super-statutes, compromises reflect that normative evolution and seek to accommodate the most important values advanced by each side. The APA’s big policy innovation is notice-and-comment rulemaking, which asserted the kind of due process that agencies were to provide, and the deep compromise—the central concept of the law—authorized agencies to engage in large-scale lawmaking, in return for public participation and judicial review.⁴⁷

41 See DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940*, at 5 (2014) (discussing the pre-New Deal consensus favoring flexible agency decision making overseen by judicial review for abuse of process).

42 *Id.* at 4 (“Not surprisingly, the standard of review of findings of fact was the most contested issue of administrative law in the early twentieth century.”).

43 See *infra* Section I.A; Shepherd, *supra* note 19, at 1570–81 (documenting initial support for an administrative court among the New Deal’s critics), 1582–83, 1602 (noting the critics’ turn towards public participation and stricter judicial review)

44 See *infra* Sections I.B., I.C.

45 See *infra* Section I.B.

46 See *infra* Section I.B.

47 See *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN L. REV. 507, 520 (1986) [hereinafter *Present at the Creation*] (transcribing remarks from Walter Gellhorn and K.C. Davis); Shepherd, *supra* note 19, at 1650–51; Peter L. Strauss, Speech, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 750–52 (1996). For the British background for the notice-and-comment review idea, see Rephael Stern, *The British Origins of Informal Rulemaking: A Lost History of Anglo-American Administrative Law* (Apr. 8, 2023) (unpublished manuscript) (on file with authors).

There is no static “original understanding” of the APA for issues the framers did not consider and for which progressives and conservatives did not deliberate. Instead, the original concept was a balance between foundational principles. The deep compromise reflected the practical needs of the citizenry devastated by the Great Depression, changing demography and views within the legal profession, the nation’s transformative experience during World War II, and the entrenchment of a generous delegation doctrine and deferential approach to interpretation by the New Deal Court.⁴⁸ In fact, the compromise was made possible only because the American Bar Association (ABA) reconfigured its leadership to include people sympathetic with the New Deal and who were prepared (on their own terms) to accept the administrative state.⁴⁹ Viewed as a deep normative debate applicable to a changing society, the APA’s evolution could not stop in 1946—and our folk theory of democracy explains how its post-1946 evolution has been legitimate, until very recently, as a regime-changing Supreme Court has challenged a foundational term of the APA’s deep compromise. What has driven this evolution until recent years has not been willful judicial lawmaking, but instead judicial elaboration of notice-and-comment rulemaking and its ascendancy in the modern state. Under our theory, administrative common law has on the whole been a product of institutional interaction and not a diktat from the Supreme Court. Our concern is that the Roberts Court has moved from institutional cooperation to diktat in agency review.

In Part II, we argue that some of the controversial doctrines associated with administrative common law—namely, the presumption of judicial review, the hard-look doctrine for arbitrariness review, and some kind of deference to agency interpretations of law—are defensible on originalist grounds based upon a proper understanding of the APA’s deep compromise. Indeed, even under the more shallow understanding of compromise held by the APA originalists, these doctrines are defensible. The institutional interactions that have driven the APA’s evolution help explain this phenomenon. For example, agencies turned decisively toward notice-and-comment rulemaking to make policy in the 1960s and 1970s (a generation after the APA), and the executive branch largely acquiesced in lower court demands that agencies explain their reasoning and create a public record that could be usefully examined by a court.⁵⁰ It was a short step from that to the Supreme Court’s holding that agencies must explain why they reject

48 See *infra* Section I.B.

49 See Shepherd, *supra* note 19, at 1645–47.

50 Strauss, *supra* note 47, at 755–60.

reasonable alternatives and how their final rules accord with statutory purpose as applied to facts on the ground.⁵¹

In the process, we push back at Professor Kovacs's specific critique of the APA's evolution. She argues that, unlike other super-statutes, the interpretation of the APA has not been controlled by a single agency and that its orphan status has allowed courts to usurp the authority to update the statute.⁵² The diffusion of agency responsibilities for elaborating on the APA, however, does not necessarily undermine the legitimacy of its administrative evolution. There is, in fact, an agency that has pioneered or acquiesced in many of the APA innovations, namely, the Department of Justice (DOJ), which published an influential interpretive manual for the APA in 1947⁵³ and has been the key player in the APA's application to new issues of administrative law. As we see it, what is called "administrative common law" is usually the product of a public dialogue among agencies that aggressively regulate, businesses and their organizations that push back, DOJ lawyers who defend agency authority but also acquiesce in process-based limits, judges who sometimes rein in agencies, and legislators who oversee the agencies and consider proposals to amend their authorizing laws.⁵⁴ Like other super-statutes, the APA's text is often vague, and its structure is spare.⁵⁵ Whatever theory one claims to apply, a great deal of gap filling was inevitable to operationalize the APA's text and structure.

The key issue is to distinguish between democratically legitimate elaboration of the super-statute's deep compromise and illegitimate judicial usurpation. Have courts filled in the details of the statutory scheme in ways needed to carry out its legitimating purpose, or have they imposed their own norms onto the APA? Have courts respected the original balance achieved by the APA, or have they reset the balance? Most administrative common law has secured some democratic pedigree through the challenge-and-response process that involves

51 See *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) (faulting the NHTSA for not addressing an "alternative way of achieving the objectives of the Act" and for ignoring that the statutory purpose that "safety standards [should] not depend on current technology").

52 Kovacs, *supra* note 22, at 1210, 1243.

53 U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947).

54 As the discussion in text makes clear, we do not find nearly as sharp a distinction among "pragmatic," "common law," and "originalist" interpretations of the APA as does the excellent survey in Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963 (2023).

55 See, e.g., Duffy, *supra* note 23, at 118 (noting that the APA is a "broad, vaguely worded statute")

lower courts, agency and DOJ officials, sometimes the White House, sometimes Congress, and the regulated community.

Part III applies both versions of APA originalism—the version that enforces the shallow understanding of compromise and our version that applies the deep understanding of compromise—to the current debate over the nondelegation and major questions doctrines. Professor Kovacs’s critique starts with a shallow understanding of the 1946 compromise and objects to the lack of democratic accountability for judicial lawmaking.⁵⁶ The Roberts Court’s assault on the modern administrative state through its threat to strike down laws delegating lawmaking authority to agencies and through its new super-strong clear statement rule trumping agency rules having a large social or economic impact is judicial lawmaking on steroids.⁵⁷ Any originalist account that does not apply both ways strikes us as more partisan politics than application of neutral rules of law. We argue that the original deal does not support the Roberts Court’s ambitious super-strong clear statement rules, and we consider the Court’s opinion in the OSHA COVID case to be the most significant violation of the APA in recent memory.⁵⁸

The deep compromise of 1946 suggests even stronger objections, as the Court’s aggressive use of substantive canons threatens to unsettle the foundations for the administrative state carefully cemented by the APA. The deliberative process that produced the APA legitimated administrative lawmaking so long as agencies were transparent, sought public comment, justified their rules with a well-reasoned explanation, and were not hiding the ball. Conversely, that process rejected review that substituted a juriscentric vision for the regulatory state for one implemented by agencies faithfully implementing congressional policies.⁵⁹ The roided-up version of the major questions doctrine is triply undemocratic and therefore triply illegitimate: (1) a Supreme Court whose majority is not only unaccountable but was assembled through an irregular process (2) is trumping the democratic deliberation engaged in by accountable agencies addressing a public problem (or in the case of COVID a public emergency), (3) by a rule imposing a clarity

56 Kovacs, *supra* note 22, at 1208, 1254–57. For more on Kovacs’s view of the APA as a shallow compromise, see Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 705 (2010) (“[A]ll parties involved in the APA’s passage understood that the Act was a compromise, and none were fully satisfied.”).

57 See *infra* Section III.A.

58 See *infra* Section III.A.

59 See *infra* Section I.B.

tax on Congress that makes it harder for We the People to enact efficacious legislation.⁶⁰ This is breathtaking judicial activism at its worst.

Overall, the APA's deep compromise also suggests sensible answers to important doctrinal questions. As the APA's text and structure demonstrate, judicial review of final agency rulemaking is presumptively available, with exceptions disfavored.⁶¹ To give efficacy to the APA's requirement that rules not be arbitrary or capricious, the agency must pay attention to the public comments and must respond to the most serious ones with reasoning tied to the statutory purposes and plan. As to interpretations of law, the APA requires that judges assume responsibility—a responsibility we believe is carried out by a sympathetic reading of the statutory text, richly informed by legislative deliberations, an agency's fact-based understanding of how to address the statutory goals, and public as well as private reliance on the agency's rules or interpretations. Basically, we believe the APA is best viewed as consistent with the three leading cases in place when the law was enacted: *Skidmore v. Swift & Co.*,⁶² *Bowles v. Seminole Rock & Sand Co.*,⁶³ and *NLRB v. Hearst Publications, Inc.*⁶⁴ Because nothing in the APA text, structure, or legislative history suggests a whiff of legislative disapproval of any of these leading decisions, you cannot say that the "original" meaning of the APA, whether understood by Congress or by the public, abrogated any and all judicial deference to agency interpretations.

I. THE APA AS A DEEP COMPROMISE ELABORATED AND ENTRENCHED BY ONGOING PUBLIC DELIBERATION

A. *Fierce Compromise? Modus Vivendi?*

Justice Gorsuch relies on APA originalism as a central justification for overruling or abrogating the souped-up version of *Chevron*.⁶⁵ Section 706(2) says that courts shall declare the law but does not specify what sources courts must rely on to figure out what the law requires.⁶⁶ Gorsuch opines that the APA codified what he believes to be the Ros-

60 See *infra* Section III.C.

61 See 5 U.S.C. § 702 (2018) (presuming judicial review of agency rules and announcing specific exceptions to review).

62 323 U.S. 134 (1944).

63 325 U.S. 410 (1945).

64 322 U.S. 111 (1944).

65 See *Buffington v. McDonough*, 143 S. Ct. 14, 16–17 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

66 5 U.S.C. § 706(2) (2018).

coe Pound/pre-war ABA view that judicial deference to agency decisions was the road to “administrative absolutism.”⁶⁷ Under his version of APA originalism, the super-statute was a “hard-fought compromise” basically adopting the judicial supremacist vision for reining in the regulatory state that he thinks Roscoe Pound and the ABA had propounded in the 1930s.⁶⁸ That view is wrong on the history.

To begin with, Gorsuch’s account overstates the ABA’s and Dean Pound’s criticisms of the New Deal. Between 1933 and 1940, the ABA’s Special Committee on Administrative Law (chaired by Colonel O.R. McGuire and, for just one year, by former Harvard Dean Roscoe Pound) caustically criticized FDR’s regulation of private property and private enterprise,⁶⁹ culminating in its 1938 report analogizing the New Deal’s “administrative absolutism to liberty-denying dictatorship in the Communist Soviet Union.”⁷⁰ In the same report, however, Dean Pound (the chair of the committee that year) specified that what he considered administrative tyranny consisted mainly of unpredictable, unaccountable, irregular agency actions, especially in adjudications.⁷¹ One remedy suggested by the 1938 report was that agencies should publish general “rules” setting policy that could provide notice to the public and guide administrators.⁷² Even if the committee’s 1938 vision were the template for the 1946 APA, the super-statute would not be evidence that judicial review should ignore agency views about how to interpret substantive laws they were charged with implementing. It was not too much substantive regulation that bugged Dean Pound, but was instead a process that was too often obscure to the public, lacking due process, and arbitrary or at least unjustified.⁷³

In any event, the APA was not the brainchild of Roscoe Pound, and the 1937–38 ABA Committee was not its midwife. ABA-proposed

67 See *McDonough*, 143 S. Ct. at 16–17 (Gorsuch, J., dissenting from the denial of certiorari) (quoting Roscoe Pound, *The Place of the Judiciary in a Democratic Polity*, 27 A.B.A. J. 133, 136–37 (1941)).

68 See *McDonough*, 143 S. Ct. at 16–17 (quoting Shepherd, *supra* note 19, at 1560, 1646–47, 1649–52).

69 See Shepherd, *supra* note 19, at 1569–76, 1582–83, 1590–98, 1645.

70 *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 339–43 (1938); see also Shepherd, *supra* note 19, at 1590–93 (discussing the 1938 report).

71 See *Report of the Special Committee on Administrative Law*, *supra* note 70, at 340 (contrasting “Marxian” administrative absolutism with the “systematic,” “uniform,” nature of the “judicial process” governed by “authoritative grounds”).

72 *Id.* at 362.

73 See Blake Emerson, “Policy” in the Administrative Procedure Act: Implications for Delegation, Deference, and Democracy, 97 CHI-KENT L. REV. 113, 128 (2022) (documenting Dean Pound’s commitment to egalitarian and public-regarding regulatory ideals but dissatisfaction with unpredictable, nontransparent, arbitrary agency decisions).

legislation reflecting Pound and McGuire's critique of the regulatory state had no chance of becoming law so long as FDR was President. Even the Walter-Logan Bill, supported by the ABA, failed in 1940 because supporters lacked the two-thirds margin required to override President Roosevelt's veto.⁷⁴ As discussed below, the ABA in 1941 removed McGuire as chair and assembled a new committee; the new chair, Carl McFarland (a former New Deal official) had a different approach to the legislation and during World War II was willing to work with the Justice Department to create the bill that was finally enacted in 1946.⁷⁵

Scholars writing more accurate accounts of the APA's legislative history have this in common with Justice Gorsuch's account: they view the APA debate between 1933 and 1946 as a political tug-of-war between bitterly competing stakeholders—big business and their ABA lawyers versus New Deal administrators and the White House—whose intense, unyielding goals were fundamentally at odds, but who found it in their interests to make concessions to the other side. The author of the best statutory and legislative background of the APA, George Shepherd dubs the APA a “fierce compromise” that secured unanimous votes in both chambers of Congress, “not because everyone was thrilled with the bill, but because private negotiations had permitted the parties to cobble together an agreement that all could at least tolerate.”⁷⁶ More bluntly, “the APA was the cease-fire agreement of exhausted combatants in the battle for control of administrative agencies.”⁷⁷ Professor Shepherd's excellent history is saturated with resignation, which reflects a widely held view: If all you folks can come up with is this sorry “compromise” borne of exhaustion, well, how disappointing.⁷⁸

Shepherd's approach is the dominant one and reflects the popular understanding of compromise as an unprincipled decision by evenly matched adversaries to split the difference and go home.⁷⁹ Reflecting that sense of disappointment, this is what political scientists call a “shallow compromise,” the result of purely strategic bargaining

74 See Shepherd, *supra* note 19, at 1593–1632 (providing a detailed account of the Walter-Logan Bill, strongly opposed by the agencies and their supporters, and successfully vetoed by FDR).

75 See *id.* at 1645–47.

76 *Id.* at 1557, 1675.

77 *Id.* at 1678.

78 See generally Sandrine Baume & Yannis Papadopoulos, *Against Compromise in Democracy? A Plea for a Fine-Grained Assessment*, 29 CONSTELLATIONS 475 (2022) (systematically analyzing the criticisms of political “compromise” and suggesting responses that salvage something of value, including Richardson's notion of “deep compromise” below).

79 See *supra* note 56 and accompanying text.

that produces an incoherent and often unstable hybrid.⁸⁰ As we shall see below, the APA as a shallow compromise can be the basis for a grounded debate. For example, Justice Gorsuch's view that Dean Pound's approach was hostile to any kind of judicial deference to agencies and that such a view was codified in the APA is not correct under any fact-based account of the statute's enactment.⁸¹

In any event, the APA is something more than a shallow compromise, and that "something more" is related to the consensus that the APA is a super-statute. Thus, there is a disconnect between Shepherd's disappointed, split-the-difference description of the APA's "bitter compromise,"⁸² which left everyone exhausted and angry over the acrimonious process and very unhappy with the half a loaf they were left with in the end, and his afterword that the "APA's impact has been profound and durable and represents the country's decision to permit extensive government, but to avoid dictatorship and central planning. The APA permitted the continued growth of the regulatory state that exists today."⁸³ If the APA was such a disappointment on all sides, why was it an immediate success? How has a widely resented "bitter compromise" been so durable? As John Rawls famously argued, a compromise of this sort—he called it a *modus vivendi*—is intrinsically unstable, as it rests on the contingent balance of political forces.⁸⁴ When the balance of political forces shifts, a *modus vivendi* can collapse and the fighting start all over again.

B. *The APA as a Deep Compromise*

The foregoing instrumentalist understanding, where interest groups and partisan officials did battle and then bargained to a truce dividing the spoils, is not the only way to think about compromise. Political philosopher Henry Richardson approaches compromise from a perspective of democratic deliberation.⁸⁵ On high-visibility issues affecting the common good and the well-being of the democratic polity,

80 See Richard Bellamy, *Democracy, Compromise and the Representation Paradox: Coalition Government and Political Integrity*, 47 *GOV'T & OPPOSITION* 441, 447 (2012) (contrasting "shallow" from "deep" compromise).

81 *Buffington v McDonough*, 142 S. Ct. 14, 16–17 (2022) (Gorsuch, J. dissenting from the denial of certiorari).

82 Shepherd, *supra* note 19, at 1681.

83 *Id.* at 1678. After the statement in text, Shepherd returns to the "bitter compromise" characterization. See *id.* at 1681.

84 JOHN RAWLS, *POLITICAL LIBERALISM* 148 (expanded ed. 2005).

85 See HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 17–20 (2002). For helpful reviews of this work, see Anthony Simon Laden, 32 *SOC. THEORY & PRAC.* 333 (2006) (reviewing RICHARDSON, *supra*), and Victor M.

Richardson posits that groups with different goals and perspectives will want (or ought to want) to reach agreement through a process of deliberation in which the participants debate and seek common ground on either ends or means—and common ground on either will alter each group’s understanding of its own goals, a development that can create new opportunities for common ground.⁸⁶ For the APA debate, there was strong theoretical disagreement as to the balance of ends (New Dealers emphasized egalitarian governance and dealing with the Depression, the ABA private property/freedom of contract and due process) and as to the means to achieve the right balance (internal agency reform versus mild judicial review versus strong judicial review).⁸⁷

Exchanging views and information in a spirit of cooperation toward a common goal, as well as cautious competition, the participants in public deliberation are more likely to produce something that will last. According to Professor Richardson, they might under the right circumstances come to a “deep compromise,” a settlement which “builds a new policy position on an underlying compromise at the level of ends” motivated by “respect for the other either as an individual or as a fellow member of some valued identity or enterprise.”⁸⁸ In a deep compromise, each side comes to accept the agreement from its own viewpoint and values.⁸⁹ In contrast to a shallow compromise that reflects purely instrumental bargaining and likely produces an incoherent hybrid,⁹⁰ a deep compromise reflects learning and evolution among the participants and produces a principled resolution that finds common ground reflecting a coherent policy moving forward.⁹¹

The key to reaching a deep compromise in the APA entailed reconciling competing values of democratic governance and libertarian due process through detailed examination of the administrative process in all its glory (and with all its warts) while that process was correcting the broken market, trying to save millions from destitution, and ultimately fighting the war to end all wars. Over a dozen years, this

Muñiz-Fraticelli, 118 ETHICS 746 (2008) (reviewing RICHARDSON, *supra*). The value of Richardson’s study is that he not only asserts that deep compromise is possible, but also provides a detailed illustration, in the context of administrative rulemaking, of how such an understanding may be reached among parties who strongly disagreed at the start.

86 HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS 82–84 (1994).

87 Shepherd, *supra* note 19, at 1562, 1569–72, 1584 (canvassing motivations); *id.* at 1575, 1582–1586, 1598–1602 (canvassing means).

88 RICHARDSON, *supra* note 85, at 147.

89 See Bellamy, *supra* note 80, at 447.

90 See *id.* (contrasting “shallow” from “deep” compromise).

91 See RICHARDSON, *supra* note 85, at 147–49 (illustrating the phenomenon with the example of state accommodation of gay couples through civil unions instead of marriages—a form of “asymmetrical” deep compromise).

process of facts and actions created what Rawls called an “overlapping consensus” that permits groups harboring different philosophies and values to converge nevertheless on norms that can be embraced by each group for its own reasons.⁹² These consensual norms make up what Rawls called public reason, and he argued that political argument in such a society ought to be conducted in public reason.⁹³ The gentle reader can readily comprehend that Richardson’s account reflects the kind of republican, public-regarding deliberation that the Framers aspired to establish in the Constitution of 1789, and extended (imperfectly) toward a fuller democratic framework since that time.⁹⁴

The Civil Rights Act of 1964⁹⁵ was a deep compromise of this kind. Although diehard segregationists opposed it to the bitter end, the civil rights coalition of minority and religious groups persuaded labor unions, businesses, farmers, and shopkeepers that barring race discrimination was a worthy goal that served symbolic interests as well as those of individual justice and advanced the economic interests of everyone.⁹⁶ To be sure, the 1964 Act is littered with shallow compromises, such as protection of seniority systems against Title VII claims,⁹⁷ but the statute overall was a product of deep and principled compromise, where a variety of interests and groups came together on a general goal that could be implemented at a reasonable cost.⁹⁸ The depth of the compromise—the power of the overlapping consensus that came at the end of the legislative process—is what made this law such a transformative moment in American history. So this is all well and good—but the APA is not the Civil Rights Act. Was its “fierce” and “bitter compromise” more shallow than deep? Not at all.

Shepherd’s and other well-grounded accounts of the legislative history of the APA certainly reveal that the politics of administrative law were contentious, fiercely fought, and characterized by tunnel vision and an us-against-them attitude on both sides. As late as 1940,

92 See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 1–2 (1987).

93 RAWLS, *supra* note 84, at *liii*.

94 See, e.g., THE FEDERALIST NO. 10, *supra* note 9, at 47 (James Madison); THE FEDERALIST NO. 78, *supra* note 9, at 391 (Alexander Hamilton). See generally JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE 40–50 (1986) (describing how the ABA-New Deal debate of the 1930s had similar qualities to the Federalist-Antifederalist debate of the late 1780s).

95 Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000e (2018).

96 See generally CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

97 See 42 U.S.C. § 2000e-2(h) (2018).

98 For an inspiring account of the 1964 Act, which brought Republican conservatives together with Democratic and Republican liberals, see WHALEN & WHALEN, *supra* note 96.

when the Walter-Logan Bill was debated and passed in Congress, the ABA and the New Deal seemed to be at acrimonious loggerheads. Supporters of the Walter-Logan Bill decried the “[a]dministrative absolutism” that “stalks . . . the land” and analogized the administrative state to the “policies and practices of the Soviet Government.”⁹⁹ The ABA’s Special Committee issued broadsides against the New Deal’s “administrative absolutism”¹⁰⁰—which were returned by agencies zealously predicting doomsday for the nation if the procedural requirements such as an in-person public hearing for rulemaking ground agency problem-solving to a halt.¹⁰¹ Walter Gellhorn and Kenneth Culp Davis, the advisers to the Attorney General’s Committee on Administrative Procedure, considered the ABA to be a “pernicious” organization dominated by “hysterical” extremists like Dean Pound.¹⁰²

Of course, so long as these were the attitudes on either side, the conditions for deep compromise did not exist—but neither did conditions for a shallow compromise, as FDR successfully vetoed the Walter-Logan Bill, with this concluding overstatement: “Apart from a disagreement with the general philosophy of legal rigidity manifest in some provisions of the bill, I am convinced that it would produce the utmost chaos and paralysis in the administration of the government at this critical time.”¹⁰³ Trumping the President’s hyperbole with his own, Dean Pound denounced the veto message as yet another example of the “Marxian idea of the disappearance of law” that characterized the New Deal’s administrative state.¹⁰⁴

Notwithstanding the intemperate rhetoric on both sides, the congressional hearings and debates over the Walter-Logan Bill revealed more common ground than most commentators have recognized.¹⁰⁵ The supporters of the Bill accepted the goals of the regulatory state and the necessity of congressional delegation of extensive lawmaking authority to agencies. As Representative Walter’s House Judiciary Committee Report put it:

99 86 CONG. REC. 13,662, 13,672 (1940) (Statement of Sen. King).

100 See *Administrative Law: Hearings on H.R. 4236, H.R. 6198, and H.R. 6324 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 76th Cong. 22–23 (1939) [hereinafter *1939 House Hearings*] (statement of Col. O.R. McGuire, Couns., Gen. Acct. Off.) (testifying on behalf of the ABA Special Committee on Administrative Law).

101 See *id.* at 39–40 (statement of Chester T. Lane, General Couns., Securities and Exchange Commission).

102 *Present at the Creation*, *supra* note 47, at 514, 524.

103 President Roosevelt’s Veto of the Logan-Walter Bill is reprinted in *Logan-Walter Bill Fails*, 23 A.B.A. J., 51 (1941).

104 Pound, *supra* note 67, at 133.

105 A notable exception is Emerson, *supra* note 73, at 122–23 (arguing that New Dealers and ABA leaders shared a broad understanding of “policy” that agencies were empowered to implement).

Very obviously these administrative agencies cannot be abolished Practically all of these agencies, in their administration of the various and sundry statutes, must issue rules, make investigations, conduct hearings, and decide controversies, and there is no practicable and feasible method which could be adopted by which there could be segregated these quasi-legislative and quasi-judicial functions from the purely administrative functions without destroying the usefulness of such agencies.¹⁰⁶

Sections 1 and 2 of Representative Walter's measure dealt with the "quasi-legislative authority of the administrative agencies to fill in the details of statutes, an authority which such agencies must necessarily have and exercise in the complex world of today, and, in fact, an authority which they have had and exercised since the first statutes were enacted in 1789," according to Colonel McGuire, representing the ABA.¹⁰⁷

Senator Logan's Senate Judiciary Committee Report also explicitly accepted the legitimacy of "quasi-legislative" agency rulemaking with the force of law, pursuant to congressional delegation. Logan's measure required agencies to give public notice of proposed rulemaking and to conduct a public hearing if requested, before issuing a final rule that would be subject to judicial review.¹⁰⁸ The Senate Report opined that "there is no reason why these agencies should not follow substantially the procedure of the Congress in the exercise of such legislative power as is delegated to them."¹⁰⁹ Indeed, the Senate Report maintained that the bill's internal procedures would help the agencies do their jobs: public rulemaking would give agency officials the benefit of the "viewpoints and experience of labor, industry, and others who may be affected by the rules" and would put the regulated community, courts, and the agency's own staff a clear "guide for the conduct of their affairs" and (for courts) useful information in cases under the statute.¹¹⁰

In turn, critics of the Walter-Logan Bill endorsed "the need of procedural reform in the field of administrative law," as Representative Celler put it in his Minority Report.¹¹¹ Indeed, Celler cited specific examples of bad lawless agency decisions, for example, some mistakes

106 H.R. REP. NO. 76-1149, pt. 1, at 2 (1939).

107 1939 *House Hearings*, *supra* note 100, at 24 (statement of Col. O.R. McGuire, Couns., Gen. Acct. Off.) (testifying on behalf of the ABA Special Committee on Administrative Law).

108 S. REP. NO. 76-442, at 2 (1939).

109 *Id.* at 12.

110 *See id.*

111 H.R. REP. NO. 76-1149, pt. 2, at 1 (1940).

from the FCC and Department of Labor.¹¹² “I believe the National Labor Relations Board has shown an utter disregard of Congress,” lambasted the New Dealer. “It has on several occasions overridden the plain intent of the basic statute creating it. It has sought to legislate and to replace Congress.”¹¹³ Some remedy is essential, he opined, but the Walter-Logan Bill went too far.¹¹⁴ “Bad cases make bad laws.”¹¹⁵

The Roosevelt Administration likewise agreed that public administration was something of a mess that demanded reform. In 1937, the President’s Committee on Administrative Management acknowledged arbitrariness criticisms of agency adjudications in particular and recommended internal agency checks, such as promulgation of rules that would provide advance notice of and guardrails for administrators’ applications of their statutes to particular facts.¹¹⁶ Seeking to head off the Walter-Logan Bill but also to create a useful fact-based record of the architecture of the administrative state, FDR had in 1939 authorized the Attorney General to appoint a Committee on Administrative Procedure.¹¹⁷ Chaired by Dean Acheson, the Committee included Francis Biddle, Carl McFarland, Arthur Vanderbilt, Henry Hart, Harry Shulman, Lloyd Garrison, Walter Gellhorn, and other blue-ribbon experts.¹¹⁸ The *Final Report* of the Committee, submitted to the Attorney General on January 22, 1941, and transmitted to Congress two days later, revealed that agencies followed a wide variety of procedures to carry out their statutory missions.¹¹⁹ Reflecting then-current and historical practice, the *Final Report* focused on adjudications in agencies following the Interstate Commerce Commission (ICC) or National Labor Relations Board (NLRB) models, but Chapter VII of the *Report* was a thorough examination of agency rulemaking.¹²⁰ It documented the pervasive and often broad delegation of lawmaking authority to agencies, few of which did not have the power to issue rules having the force of law.¹²¹ All of the twenty-seven agencies surveyed by the committee

112 See *id.* at 2.

113 *Id.*

114 See *id.* at 1–2.

115 *Id.* at 2.

116 PRESIDENT’S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 36–37 (1937); see also Noah A. Rosenblum, *The Antifacist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 62–63 (2022).

117 See Shepherd, *supra* note 19, at 1594–98.

118 COMM. ON ADMIN. PROC., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at iv (1941) [hereinafter 1941 ATTORNEY GENERAL REPORT] (showing all twelve members signing the letter submitting their *Final Report*).

119 See *id.* at iii–iv.

120 See *id.* at 15–16 (contrasting the ICC and NLRB); *id.* at 97–121.

121 See *id.* at 98.

staff¹²² were free to issue interpretive rules and guidelines that did not have the force of law, though they often had that effect because federal courts deferred to their guidance.¹²³

The Attorney General's Committee rejected the view that rule-making was closely analogous to legislation and therefore required public hearings: Unlike legislatures, agencies are not representative bodies, are bound by the will of those bodies that do represent the people, and engage in factfinding and investigation to implement statutory schemes.¹²⁴ Agency procedures ought to be adapted to engage in thorough investigation and factfinding and to give "adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses."¹²⁵ The Committee's survey revealed that almost all the agencies considered the views of stakeholders and (less often) the public before they issued rules and regulations. The mechanisms included informal consultation with interested parties, conferences, formal advisory groups, public factfinding hearings, and adversarial hearings.¹²⁶ The Committee, dominated by New Dealers¹²⁷ but well-informed of the ABA's perspective by McFarland and Vanderbilt,¹²⁸ opined: "Participation by these groups in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests."¹²⁹

The period 1939–1941 was a turning point, where the conditions for a deep compromise became apparent: experts working together in the Attorney General's Committee, with legislators and the ABA discreetly adjusting their views (sometimes choosing different people to represent them), were finding more common ground than had been the case before 1939.¹³⁰ Bipartisan congressional support¹³¹ for the Walter-Logan Bill revealed widespread demand for an administrative process that was more regular, more uniform across agencies, more

122 See *id.* at vii (listing all twenty-seven agencies studied by the Committee in the table of contents for chapter six).

123 *Id.* at 98–100.

124 See *id.* at 101–02.

125 *Id.* at 102.

126 See *id.* at 103–14; see also Bremer, *supra* note 11, at 101–13.

127 See Shepherd, *supra* note 19, at 1595.

128 See *supra* text accompanying notes 118–20, 125.

129 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 103.

130 See, e.g., Shepherd, *supra* note 19, at 1636–40 (showing the shuffling in sponsors between the Walter-Logan and 1941 bills; the moderation of the ABA and changes in its committee members; and the points of compromise reached by the administration, ABA, and business groups).

131 See *id.* at 1601, 1619, 1625.

open, and more participatory than FDR was willing to sign onto quite yet.¹³² The Committee's *Report* opened the eyes of the White House and its partisans to the fact that agencies were already operating with the involvement of stakeholder consultation, and the experts believed that public participation helped the agency to find facts, to create workable regulatory regimes, and to promulgate rules considered relatively legitimate by the relevant public.¹³³ When Francis Biddle became Attorney General (1941–1945), he brought with him a buy-in of the Committee's recommendations, including that of public participation.¹³⁴

The same year, his friend Carl McFarland became chair of the ABA's reconstituted Committee on Administrative Procedure (Colonel McGuire and three other diehards were rotated off the Committee).¹³⁵ An Assistant Attorney General for the Lands Division during FDR's second term, McFarland had partnered with former Attorney General Homer Cummings to practice law in Washington, D.C.¹³⁶ McFarland represented a new generation of ABA lawyers, many of whom now made their living as advisers, litigators, or lobbyists representing clients affected by New Deal regulations.¹³⁷ Unlike Dean Pound, they found it hard to work up outrage against quasi-socialist "administrative absolutism" and easier to accept the modern regulatory state as the new normal. That FDR had won an unprecedented third term by a comfortable margin¹³⁸ was evidence that the public continued to support the New Deal and, presumably, its aggressive regulatory initiatives. On the other hand, the New Dealers would lose their working majority in Congress after the 1942 off-year election, but FDR was elected to a fourth term in 1944.¹³⁹

McFarland not only brought a cooperative attitude and support for the goals of the New Deal, but also fresh ideas. His main idea had

132 See *Logan-Walter Bill Fails*, *supra* note 103, at 52–53 (reproducing FDR's veto message objecting to the uniform formalization of the administrative process); Shepherd, *supra* note 19, at 1624.

133 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 104–08.

134 See *id.* at 1647.

135 See *id.* at 1640.

136 See *Carl McFarland*, U.S. DEPT. OF JUST., <https://www.justice.gov/enrd/carl-mcfarland> [<https://perma.cc/D4Q2-TQU2>].

137 See generally CHARLES A. HORSKY, *THE WASHINGTON LAWYER* (1952); Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 *YALE L.J.* 266, 379–81 (2013).

138 See LEWIS L. GOULD, *THE REPUBLICANS* 206 (2014).

139 See *id.* at 210.

been incorporated in proposed legislation that a minority of the Attorney General's Committee had included in its *Report*.¹⁴⁰ The draft legislation proposed by the Committee's majority had only required that agencies make public their rulemaking procedures and provide notice of final rules to the public.¹⁴¹ McFarland's draft bill for the committee minority (including former ABA President Arthur Vanderbilt)¹⁴² required agencies to publish public notice of a proposed rulemaking, so that affected parties could submit comments and information.¹⁴³ The agency could hold a public hearing, but the draft bill allowed the agency to receive either written or oral comments, at its discretion.¹⁴⁴ Also going beyond the majority's bill, the minority bill required agencies to publish all rules and regulations in the Federal Register.¹⁴⁵ The McFarland draft legislation was introduced in the Seventy-Seventh Congress as S. 674; the majority's draft legislation was S. 675, and a third more agency-restrictive bill was S. 918.¹⁴⁶ At Senate subcommittee hearings, the McFarland bill emerged as the focal point for a possible compromise.¹⁴⁷ The ABA endorsed S. 674, the McFarland bill, and shunned S. 918, which reflected intransigent hostility to agency lawmaking.¹⁴⁸ Agency representatives mostly supported S. 675 and strongly opposed S. 918, while expressing some openness to S. 674.¹⁴⁹

The Seventy-Seventh Congress never debated any of the reform proposals, however, because the nation went to war in December 1941.¹⁵⁰ The United States's entry into World War II strained everything in American life, as people were exposed to fast-moving and unpredictable events, both at home and abroad. There was an urgent

140 The minority's proposed legislation is found at 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 217-47.

141 *Id.* at 195.

142 See David F. Maxwell, *Hon. Arthur T. Vanderbilt*, 1 AM. J. LEGAL HIST. 270, 271 (1957).

143 See 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 228.

144 See *id.* at 228-29 (reproducing the minority bill's provisions for published notice and opportunity for public comment). In 1937, the ABA had first proposed that agencies could only issue final rules after publishing notice of them and receiving evidence in public hearings. *Report of the Special Committee on Administrative Law*, 62 ANN. REP. A.B.A. 789, 846-47 (1937). The 1941 minority draft legislation was the first time the idea of notice-and-comment rulemaking, without required public hearings, was officially floated.

145 See 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 226-27.

146 See Shepherd, *supra* note 19, at 1638.

147 See *Administrative Procedure: Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. of the S. Comm. on the Judiciary*, 77th Cong. (1941); see also Shepherd, *supra* note 19, at 1638-41.

148 Shepherd, *supra* note 19, at 1640; *Proceedings of the House of Delegates*, 66 A.B.A. ANN. REP. 397, 401-03 (1941).

149 Shepherd, *supra* note 19, at 1638-41.

150 *Id.* at 1641.

need for agile administrative agencies capable of managing complex supply chains, eliminating production and transportation bottlenecks, building fast-depleting stocks of armaments, and developing new weapons, while responding to inflationary pressures and other domestic disruptions. As Tino Cuellar has demonstrated, America's massive war mobilization refrained from direct governmental operation of private businesses but, instead, generated an administrative structure (including new agencies like the Office of Price Administration (OPA)) that "facilitated industrial coordination, price regulation and consumer rationing, and mass taxation on an unprecedented scale."¹⁵¹ The operation of this vast administrative apparatus exposed the public to "powerful, adaptive federal agencies," with broad lawmaking and enforcement authority; on the other hand, "lawyers witnessed further entrenchment of procedural constraints meant to shape agencies' weighing of the consequences of official decisions."¹⁵² While the wartime administrative creations left enduring precedents for the administrative state, they also raised red flags, as there was a great deal of public dissatisfaction with hasty and arbitrary actions by the agencies in charge of the economy.¹⁵³

During the war, Carl McFarland, still representing the ABA, drafted an administrative procedure bill (introduced in both chambers of Congress in 1944) that built on his draft bill for a minority of the Attorney General's Committee.¹⁵⁴ As the ABA had urged for years, the McCarran-Sumners Bill drafted by McFarland would have established a unified code of internal procedure and judicial review applicable to almost all agencies, but (as the New Dealers had insisted) it accommodated the agencies with relaxed procedural requirements. For example, the bill required publication of a notice of proposed rulemaking, with an invitation for public comments; imposed public hearings only where the statute specifically required them (formal rulemaking); and required publication of final rules in the Federal Register.¹⁵⁵ Informal as well as formal rules and formal adjudications were subject to immediate judicial review, to determine whether the agency action was "arbitrary or capricious, . . . unsupported by competent, material, and substantial evidence, upon the whole record as reviewed by the court."¹⁵⁶

151 Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1346–47 (2014).

152 *Id.* at 1347, 1350.

153 See Shepherd, *supra* note 19, at 1641–49.

154 S. 2030, 78th Cong. (1944); H.R. 5081, 78th Cong. (1944); see Shepherd, *supra* note 19, at 1649 (discussing the bills).

155 S. 2030 § 3.

156 *Id.* § 9(f).

A deep compromise was close at hand, and it remained for McFarland (for the ABA) and Attorneys General Biddle (for the Roosevelt Administration) and Tom Clark (for the Truman Administration) to work toward a measure that would prove acceptable to all.¹⁵⁷ As Justice Cuellar argues, the wartime explosion of agency authority normalized the administrative state, which provided careers for lawyers outside as well as inside the government. Roscoe Pound continued to denounce the “administrative absolutism” of the Roosevelt Administration, but alumni of the New Deal like Homer Cummings, Carl McFarland, Thurman Arnold, Abe Fortas, Frank Shea, Warner Gardner, and Lloyd Cutler founded influential Washington, D.C. law firms and better reflected the future of the legal profession as one engaged with, and not at war with, the modern administrative state.¹⁵⁸ Within the Roosevelt Administration, the war effort produced greater appreciation for the legitimizing and goal-based values of openness (notice) and participation (stakeholder input).¹⁵⁹ Populated with New Deal alumni and allies, federal courts allowed a great deal of latitude for agencies to regulate broadly but closely examined and sometimes reversed their decisions.¹⁶⁰

A revised McCarran-Sumners Bill (S. 7) was introduced in the Seventy-Ninth Congress (1945).¹⁶¹ Reflecting ongoing discussions between the ABA Committee and the Attorney General’s Office, S. 7 retained the earlier structure but moderated the agency restrictions.¹⁶² Additional accommodations and exemptions were worked out in negotiations among the ABA, congressional committee staff, and the agencies.¹⁶³ After the relevant committees solicited detailed input from the New Deal agencies as well as the DOJ and the ABA, a further-revised McCarran-Sumners Bill was promulgated in May 1945, a month after FDR’s death.¹⁶⁴ Having made his political reputation from celebrated hearings investigating waste in military spending, President

157 See Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 230 (1986).

158 See U.S. DEP’T OF JUST., *Carl McFarland (1937-39)*, <https://www.justice.gov/enrd/carl-mcfarland> [<https://perma.cc/7XCJ-XJHC>]; LAURA KALMAN, A BIOGRAPHY 124–26 (1990); *Obituaries: Warner W. Gardner*, WASH. POST, Jan. 4, 2003, at B07; *Francis Shea, D.C. Lawyer, Dies at 84*, WASH. POST, Aug. 10, 1989, at D07; Douglas Jehl, *Lloyd Cutler Is Picked as Clinton’s Interim Counsel*, N.Y. TIMES, Mar. 8, 1994, at D21.

159 Shepherd, *supra* note 19, at 1642, 1647.

160 STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 22 (3d ed. 1992).

161 Shepherd, *supra* note 19, at 1654.

162 See *id.* at 1654–55.

163 See *id.* at 1655–56.

164 See *id.* at 1656–57.

Truman agreed with the ABA's notion that some judicial monitoring of agencies could improve and not obstruct the operation of the regulatory state.¹⁶⁵ Behind the scenes, private enterprise continued to lobby for greater restrictions on agencies.¹⁶⁶ With more negotiations and a number of minor adjustments, the APA was passed by virtually unanimous votes in Congress and was signed into law on June 11, 1946.¹⁶⁷

C. *The Terms of the APA's Deep Compromise*

The APA was a compromise that did not completely satisfy all the New Dealers or all the conservatives—but the primary reason it was an immediate success and proved durable was that it was a principled compromise that deftly adapted the regulatory state to the folk democracy norms described in our introduction. The bitter opponents of 1933–38 had evolved and found common ground by 1943–1946. The common ground was not possible without each side's altering its goals and the practical means for securing its goals. In our view, there were three levels at which the APA's deep compromise operated.

First, as a matter of constitutional law, agency lawmaking pervasively affecting the economy and society, under broad congressional delegations, was legitimate and necessary for the operation of governance of our modern state. The administrative state was here to stay, and the federal government could not operate without strong agencies issuing regulations with the force of law. Congress, acting with the President under Article I, Section 7, was responsible for setting and correcting national policy—but Congress could not do its job without massive delegation of lawmaking authority to agencies. Whatever dulled teeth the “nondelegation” doctrine had before World War II and the APA, it was after 1946 a “delegation” doctrine allowing broad congressional authorization for agencies to make national policy. As Dean Landis put it in 1938, even “broad and vague” grants of power to regulate are constitutional so long as Congress “specif[ies] not only the subject matter of regulation but also the end which regulation seeks to attain.”¹⁶⁸

165 See *id.* at 1658–59; *Special Committee to Investigate the National Defense Program*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/investigations/truman.htm> [<https://perma.cc/ZE7X-H26A>] (last visited Mar. 22, 2023).

166 See Shepherd, *supra* note 19, at 1659–60.

167 See *id.* at 1661–75.

168 JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 51, 66 (1938); *cf. id.* at 50 (quoting ELIHU ROOT, *ADDRESSES ON GOVERNMENT AND CITIZENSHIP* 535 (1916), for the idea that the nondelegation doctrine had “retired from the field” by the early twentieth century); see also ROOT, *supra*, at 534–35.

Consistent with the folk theory of democracy set forth in our introduction, those agencies were indirectly accountable to We the People: the nationally elected President appointed their chief officers, the Senate confirmed those officers, and the House with the Senate regulated agencies by oversight and control of their budgets. The APA added two additional quasi-democratic checks on agencies: one through the structure of informal rulemaking¹⁶⁹ and the other through judicial review to enforce the standards and purpose adopted by Congress.¹⁷⁰

Second, as a matter of administration, agency rulemaking required the participation of stakeholders. The biggest innovation of the APA was one whose importance expanded over time: the notice-and-comment process for informal rulemaking.¹⁷¹ Raphael Stern demonstrates that the notice-and-comment idea originated in a 1932 British report supporting administrative reforms: according to its British and ABA proponents, the policy would accommodate stakeholders by assuring their participation, would not bog agencies down as much as a public hearing requirement would, and We the People might feel a more immediate connection with administrators.¹⁷² The aspiration was that agency lawmaking that gave notice to everyone, solicited and responded to public comments, and was accountable to deferential examination by judges would not only be more legitimate, but would also be better informed and more effective much of the time.

Third, as a matter of jurisprudence, serious but not de novo judicial review was available for almost all notice-and-comment rules. Administrative law scholars had, before the APA, engaged in a jurisprudential debate about how agency discretion should be regulated. As Dan Ernst has documented, here was broad recognition of the “agency” problem, but experts had different views about how to constrain agencies without losing their effectiveness.¹⁷³ Following the Rechtsstaat tradition, Ernst Freund maintained that delegated lawmaking had to be confined by

169 5 U.S.C. § 553 (2018).

170 *Id.* § 706.

171 Nonetheless, pre-APA experts recognized that almost all then-existing federal agencies engaged in rulemaking. See 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 98–100; JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 198–270 (1927). Dean Landis, among others, argued that rulemaking ought to be the primary mechanism for agency implementation. LANDIS, *supra* note 168, at 88.

172 See Stern, *supra* note 47, at 44–45 (acknowledging McFarland as the proponent of notice-and-comment rulemaking originally developed in Great Britain).

173 See ERNST, *supra* note 41, at 9–15.

specific rules set forth by legislation.¹⁷⁴ That view was unrealistic: Congress could not anticipate the many vectors of public policy, and agencies needed discretion to adapt statutes to new circumstances. Modifying A.V. Dicey's theory that post hoc judicial review was a better way to monitor agencies, Felix Frankfurter and Charles Evans Hughes maintained that judicial review should closely monitor constitutional and jurisdictional issues but should deferentially monitor factual and legal issues decided by agencies operating under fair, open, and fact-based processes.¹⁷⁵

The Frankfurter-Hughes jurisprudence became the consensus view because it reconciled practical governance and folk democracy with the rule of law and private rights in a workable manner, unlike Freund's *Rechtsstaat*. As the Attorney General's Committee put it in 1941: Judicial review would be "the final word on interpretation of law," consistent with *Marbury* and our constitutional traditions.¹⁷⁶ "This is not to say that the courts must always substitute their own interpretations for those of the administrative agencies," however.¹⁷⁷ "Their review may, in some instances at least, be limited to the inquiry whether the administrative construction is a permissible one."¹⁷⁸ Consistent with the Hughes Court jurisprudence, courts stood ready to halt arbitrary or lawless agency action, including grabbing turf beyond their delegated authority; but, consistent with the realities of the modern administrative state, courts should not micromanage the evolution of statutory schemes.

II. THE IMPLEMENTATION OF THE APA'S DEEP COMPROMISE: INSTITUTIONAL INTERACTION AND FOLK DEMOCRACY

A. *The APA as a Super-Statute: Implementation*

Under our theory, a super-statute "alter[s] substantially the then-existing regulatory baselines with a new principle or policy," a "new normative or institutional framework."¹⁷⁹ Super-statutes such as the Sherman Act, the Civil Rights Act, etc., respond to a growing social or

174 See Ernst Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 405, 410 (1894); ERNST, *supra* note 41, at 11–15 (discussing Freund's *The Law of the Administration in America*).

175 See ERNST, *supra* note 41, at 36, 39–40. See generally *id.* at 17–77 (providing an extended analysis of Frankfurter's vision in FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (1930) and of the Hughes Court's exercise of restrained review of agency actions).

176 See 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 78.

177 *Id.*

178 *Id.*

179 William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216, 1230 (2001); see also ESKRIDGE & FEREJOHN, *supra* note 4, at 26.

economic need to address an important public problem and are adopted after a “lengthy period of public discussion and official deliberation.”¹⁸⁰ Adopted after a lengthy period of public and official deliberation, the APA standardized and altered then-existing regulatory baselines with new policies and an important new principle (democratic participation in administrative rulemaking). The process and the product were related: because the different players responded to one another and to the changing needs of the country, their deliberative attitude enabled a deep compromise.

A successful super-statute is one whose new principle “‘sticks’ in the public culture in a deep way, becoming foundational or axiomatic to our thinking” and proving to be robust over time.¹⁸¹ This idea is similar to Rawls’s notion of public reason in *Political Liberalism*. In that book, Rawls argues that a society may (and hopefully should and will) be able to agree on the constitutional essentials required for civic life acceptable to all, supported by shared public values as part of an overlapping consensus among people adhering to diverse views of the good (Rawls calls these “comprehensive doctrines”).¹⁸² Convergence of this kind amounts to what we call a deep compromise. This convergence is distinguished from a (mere) *modus vivendi* which amounts to a kind of truce based on the balance of powers among those holding alternative comprehensive views. We argue that the early fights over administrative procedures that culminated in the defeat of the Walter-Logan Bill in 1940 were efforts to find alternative *modi vivendi* which might be acceptable to the opposed parties.

In the classic super-statutes, the supporters and administrators implement the new law in a practical way that makes progress toward the statute’s popular goal and avoids the disasters prophesied by its opponents.¹⁸³ If the putative super-statute gains traction in the polity, its great principle will be “debated, honed, and strengthened through an ongoing give-and-take among the legislative, executive, and judicial branches.”¹⁸⁴ Through this public, deliberative process, the statute

180 Eskridge & Ferejohn, *supra* note 179, at 1231, 1273; see ESKRIDGE & FERREJOHN, *supra* note 4, at 26.

181 Eskridge & Ferejohn, *supra* note 179, at 1216, 1231; see ESKRIDGE & FERREJOHN, *supra* note 4, at 26.

182 RAWLS, *supra* note 84, at 12.

183 ESKRIDGE & FERREJOHN, *supra* note 4, at 17; see also *id.* at 26, 33, 186, 214, 266 (laying out the theory of “administrative constitutionalism” as a mode for entrenchment); cf. Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013) (describing a similar theory).

184 Eskridge & Ferejohn, *supra* note 179, at 1237; see ESKRIDGE & FERREJOHN, *supra* note 4, at 7, 19, 78, 454.

“wins over skeptics,” and the new principle becomes “entrenched . . . into American public life.”¹⁸⁵

Unlike many of the super-statutes we have reviewed, the APA was not a prominent and decisive campaign issue in a presidential election, because its precepts were accepted by the nominees of both major parties.¹⁸⁶ Nor was the APA the product of a great social movement. Rather it was a negotiated settlement among political leaders, administrators, economic groups, and lawyers who sought ways to entrench values important to their positions. One side wanted to establish that an executive branch empowered by popular mandates could change the way civic life was ordered; the other insisted that existing liberty and property rights needed institutional protections. The deep compromise was accepted by all sides, was pretty enthusiastically followed by the chief players, and was swiftly entrenched in the federal government. New Deal lawyers who ran or advised the agencies participated in implementation and elaboration of the APA, as they worked closely with legislators to craft enabling laws and to hew to the compromises embedded in those laws.¹⁸⁷ Many of the New Deal lawyers formed law firms that represented corporations subject to these regulatory regimes; under their guidance, private enterprise and property owners readily pressed their interests within the new framework.¹⁸⁸ While fully supportive of the APA settlement, the Supreme Court, Congress, and the President did not immediately develop its details, which were left to the federal agencies, lower court judges, and DOJ lawyers.

Over time, agencies made the biggest move, by shifting their lawmaking away from adjudication toward notice-and-comment (informal) rulemaking.¹⁸⁹ The DOJ defended and judges went along with that shift, but lower courts fleshed out § 553 (the codification of the APA’s notice-and-comment provision) by requiring agencies to provide not only notice of proposed and final rules, but also to create a factual record available to the public and reviewing judges, to revise proposed rules in response to significant comments, and to provide an

185 ESKRIDGE & FERREJOHN, *supra* note 4, at 111; Eskridge & Ferejohn, *supra* note 179, at 1237.

186 President Truman signed the APA into law and won a surprise election for a full term in 1948. Both major-party candidates in all the presidential elections between 1952 and 1976 supported the APA settlement of broad delegations of lawmaking authority to agencies, checked by judicial review.

187 See Parrillo, *supra* note 137, at 333–42 (showing how “the agencies and DOJ divisions constantly communicated and negotiated with Congress on how to administer (and whether to amend) the statutes in their charge” in the 1940s).

188 See sources cited *supra* notes 136, 158.

189 See Walker, *supra* note 28, at 740–41.

explanation for not following them.¹⁹⁰ As Christopher Walker (skeptical of administrative common law) has observed, these elaborations have motivated agencies to create “online databases to facilitate public access to the proposed rulemaking” and to justify final rules with detailed responses to objections posed by commenters.¹⁹¹

Given the small “c” constitutional legislative deliberation preceding the enactment of a super-statute and the administrative deliberation as it is implemented and tweaked, we argued that super-statutes will not only enjoy legitimacy and importance, but will have a “broad effect on the law—including an effect beyond the four corners of the statute.”¹⁹² A super-statute “will have colonizing effects on other statutes” and may have “a gravitational pull on constitutional law itself.”¹⁹³ One way a super-statute has a colonizing effect on other statutes is to establish a decision-making framework and policymaking procedures applicable to all agencies or a variety of agencies. The APA, by design, has had pervasive effects across federal agencies.

We agree with Kovacs and other scholars who consider the APA to be a “framework” statute that sets out structural guidelines for governance and procedural guideposts for how legitimate rules and adjudications must happen.¹⁹⁴ That the APA broadly cuts across the federal government does not render it a particularly unusual super-statute, however. Titles VI and VII of the Civil Rights Act¹⁹⁵ apply to all federal departments and agencies, as do Title IX¹⁹⁶ and other sex discrimination laws, and the Americans with Disabilities Act.¹⁹⁷ Likewise, the National Environmental Policy Act of 1969,¹⁹⁸ the Federal Advisory Committee Act,¹⁹⁹ and the Endangered Species Act²⁰⁰ apply to all federal agencies. Many other super-statutes, from the Occupational Safety and

190 See *infra* Section II.B.

191 Walker & MacGuidwin, *supra* note 54, at 1969 (quoting Walker, *supra* note 28, at 743).

192 Eskridge & Ferejohn, *supra* note 179, at 1216.

193 *Id.* at 1235–36; see also ESKRIDGE & FEREJOHN, *supra* note 4, at 214–16.

194 See *supra* notes 22–23 and accompanying text.

195 Civil Rights Act of 1964 42 U.S.C. §§ 2000d, 2000e (2018).

196 Education Amendments of 1972, 20 U.S.C. §§ 1681 (2018).

197 Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2018).

198 National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2018).

199 Federal Advisory Committee Act, 5 U.S.C. app § 1–16 (2018).

200 Endangered Species Act of 1973, 16 U.S.C. § 1531 (2018).

Health Act²⁰¹ and ERISA²⁰² to the Affordable Care Act²⁰³ create structures and procedures applicable to several different federal agencies. All of these and others are framework statutes like the APA.

That a statute creates a framework and operates primarily through structuring procedures is consistent with our primary criterion for super-statutes, that they are normative and establish principles that go beyond the common law and significantly change the status quo. Focusing just on informal rulemaking, one can readily see the normative significance of the APA. It was a landmark event in the history of the rule of law. Before the APA, agency rulemaking procedures were ad hoc and often closed to public view and participation.²⁰⁴ Emily Bremer maintains that informal rulemaking was often nothing more than prefatory to more formal adjudication.²⁰⁵ To the extent that was the case, the APA created a structure that was even more of a rule-of-law revolution than previously understood. Not only did it impose uniformity, transparency, responsiveness, and publicity/notice requirements on administrative lawmaking, but it also created a process that was separate from formal adjudication and that could create a regime of general rules. Section 553 certainly facilitated and may have inspired the explosion of agency rulemaking in the 1960s and 1970s.

The APA's rule-of-law norm was complemented by a quasi-democratic public deliberation norm. In fact, agency rulemaking must satisfy more demanding tests than full Article I, Section 7 requirements. And resulting rules must be knowable, capable of guiding behavior, and neutral in their application. Most important, the APA's requirement of notice to the public, comment from anyone interested, and response by the agency creates a dialogue holding out the potential for productive engagement by We the People and deliberation among agency officials, experts and technocrats, and the stakeholders potentially affected by the proposed rules.

B. APA Originalism and Shallow Compromise: Rulemaking Process and the Presumption of Judicial Review

Where an agency has been delegated rulemaking authority and is not required to develop the rules from formal hearings, § 553 requires

201 Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2018).

202 Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2018).

203 Patient Protection and Affordable Care Act, 42 U.S.C. 201 (2018).

204 Bremer, *supra* note 11, at 90.

205 See Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 380 (2021).

that the agency must give adequate and effective notice of the proposed rule,²⁰⁶ must give interested persons an opportunity to participate in the rulemaking “through submission of written data, views, or arguments with or without opportunity for oral presentation,”²⁰⁷ and must incorporate in the rules adopted a “concise general statement” of the basis and purpose for the rule.²⁰⁸

Unless exempted by statute or committed to agency discretion, a final rule can be immediately reviewed in a court, which “shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions.”²⁰⁹ Section 706(2) says that judges should set aside agency rules that are “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law.”²¹⁰ Section 706 concludes: “In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party.”²¹¹

This statutory structure did not answer most of the questions of detail and application that arose after the creation of new standards-creating agencies such as the EPA and the geometric rise of rulemaking by older agencies such as the FTC, the FDA, the SEC, and other agencies.²¹² The first wave of big changes in APA rulemaking processes followed the election of 1964; legislative mandates and renewed agency missions reflected the ambitious regulatory agenda of the Great Society and Earth Day, and new agencies such as the EPA and older ones such as the FDA turned to informal rulemaking to set national policy.²¹³ With the stakes much higher, regulated parties as well as public interest groups brought ambitious challenges to agency rulemaking, and courts were required to fill in the details of § 553’s spare scheme.²¹⁴ A second, smaller wave followed the election of 1980; the

206 5 U.S.C. § 553(b) (2018).

207 *Id.* § 553(c).

208 *Id.*

209 *Id.* § 706.

210 *Id.* § 706(2).

211 *Id.* § 706.

212 See Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145–48 (2001).

213 See Sidney M. Milkis, *Remaking Government Institutions in the 1970s: Participatory Democracy and the Triumph of Administrative Politics*, 10 J. POL’Y HIST. 51, 59-60 (1998) (noting the “ambitious new undertakings” after 1964 “to address issues such as employment discrimination against minorities and women, environmentalism, consumer protection, and health and safety,” issues typical of the Great Society).

214 See Schiller, *supra* note 212, at 1155–66.

White House and conservative agency heads lowered the level of enforcement and adopted deregulatory rules and policies.²¹⁵ Section 553 did not address issues of deregulation, and so its regime required further elaboration. In Part III, we shall identify a third wave, where an unusual sequence of events connected with Supreme Court appointments has enabled an open assault on the regulatory state. We shall suggest that this new development represents a partial nullification, and not just an elaboration, of the APA's deep compromise.

Responding to the first two waves, DOJ and the federal judiciary had to apply the APA to issues not squarely addressed and had to fill in details. In our view, the process by which this occurred can just as well be called "APA originalism" as "administrative common law." Individual agencies and lower courts answered these questions in a variety of ways, and Congress largely remained on the sidelines. The evolution of accepted doctrine governing administrative rulemaking and judicial review was driven mainly by the Solicitor General's Office within DOJ, in dialogue with the agencies the office represents and the Supreme Court, for whom the Solicitor General is a Tenth Justice.²¹⁶ As to rulemaking, we are impressed with how well institutional interaction hewed to the text, structure, and legislative history of the APA, supplemented by pre-1946 caselaw that addressed some of the details. Chief architects of the resulting administrative common law were agency officials such as Erwin Griswold, Peter Strauss, Rex Lee, and Paul Bator—all presidential appointees implementing their understanding of the APA originalism in the context of Great Society regulation (Griswold, Strauss) or Reagan-era deregulation (Lee, Bator) occasioned by norm-shifting elections.²¹⁷

Regulated industries pushed back hard against ever-expanding agency rulemaking in the 1960s and 1970s.²¹⁸ In environmental cases, the EPA would often be attacked by both polluters opposing regulation and environmentalists demanding more regulation.²¹⁹ The litigation groups and their supportive lower court judges, in particular, advanced new requirements for agency rulemaking—most of which were successfully opposed by the Solicitor General based upon the APA's structure and legislative history. For example, Solicitor General Erwin Griswold (1967–1973) persuaded the Supreme Court to narrowly interpret

215 Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DAEDALUS 33, 37–40 (2021).

216 See *infra* notes 220–44, 267 and accompanying text; LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

217 See *infra* notes 220–44, 267 and accompanying text.

218 See RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 239–42, 250 (1999).

219 See *id.*

§ 556's requirement of formal rulemaking (with in-person hearings on the record) in *United States v. Florida East Coast Railway*,²²⁰ and to reject demands for the Department of Transportation to make detailed findings for informal decisions in *Citizens to Preserve Overton Park v. Volpe*.²²¹ In the latter case, Griswold recommended that if the Court felt there was not a sufficient record for judicial review purposes, it should remand to the trial court, which would be given the Secretary's administrative record;²²² that is precisely what the Supreme Court did in that case.²²³ Going beyond the Solicitor General's advice, the Court suggested that the district court should subject that record to "thorough, probing, in-depth review."²²⁴

In *Vermont Yankee Nuclear Power Plant v. NRDC*,²²⁵ Peter Strauss's brief for the Atomic Energy Commission made a rigorous case from the APA and its legislative history to reject the D.C. Circuit's effort to impose "hybrid rulemaking" (§ 553 procedures plus some extras) on his agency as well as others.²²⁶ A unanimous Supreme Court agreed with Strauss and rebuked the lower court: judges were not authorized to add new rulemaking regimes to those established by §§ 553 and 556–57.²²⁷ The D.C. Circuit had to color within the lines, not draw new ones. (Prompted once again by the Solicitor General, at the behest of the agencies, the Supreme Court would repeat this rebuke to the D.C. Circuit in *Perez v. Mortgage Bankers*.)²²⁸ In all of these instances, the executive branch's lawyers applied the APA with careful attention to its text, structure, and legislative history—and in the foregoing examples, the Supreme Court went along with little or no dissent.

The same process of institutional interaction also addressed the thorny question of what "record" ought to be available for judges to review rulemaking under § 706(2). Applying *Overton Park* to informal rulemaking, the Second and D.C. Circuits required agencies to assem-

220 See 410 U.S. 224, 224, 234–35 (1973). Two Justices dissented partly because they saw the issue in *Florida East Coast* as adjudicative, which required formal hearing. *Id.* at 247 (Douglas, J., dissenting, joined by Stewart, J.).

221 See 401 U.S. 402, 403, 417–19 (1971).

222 See Brief for the Sec'y of Transp. at 30–35, *Overton Park*, 401 U.S. 402 (No. 70-1066).

223 *Overton Park*, 401 U.S. at 417–21.

224 *Id.* at 415.

225 435 U.S. 519 (1978).

226 See Brief for the Fed. Respondents at 38–46, *Vermont Yankee*, 435 U.S. 519 (Nos. 76-419 & 76-528). The primary author of the brief, Peter Strauss, was General Counsel of the Atomic Energy Commission.

227 See *Vermont Yankee*, 435 U.S. at 548.

228 See 575 U.S. 92, 95 (2015) (rejecting D.C. Circuit requirement that an agency go through notice and comment when it alters its interpretation of an ambiguous regulation).

ble a record that provided reasoned and factually supported justifications for the policy choices made in final rules and explanations for why objections were not persuasive.²²⁹ As before, regulated entities and lower courts were addressing issues not specifically answered in the APA—but they were doing so in a manner consistent with the APA’s text, structure, and legislative history. Section 706 explicitly requires attention to a “record,”²³⁰ and § 553 requires the agency to provide a “concise general statement” justifying the final rule.²³¹ Consistent with longstanding (pre-1946) administrative law norms, lower court judges ruled that post hoc rationalizations for agency rules were hard to review and, applying those norms and *Overton Park* to the explosion of informal rulemaking, demanded, as a practical matter, that agencies provide a detailed record.²³² How could there be effective judicial review without a factual record and a reasoned elaboration from the agency?

Such a move would neither have surprised nor bothered the 1946 Congress that enacted the APA. In the leading case on this issue handed down before 1946, *SEC v. Chenery Corp.*, the Supreme Court had said this: “[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.”²³³ Were the judicial decisions requiring a factual record “administrative common law,” or were they APA “textualism” or “originalism”? Or APA “pragmatism”? That the decisions interpreted the APA’s text in light of its purpose and the leading pre-APA Supreme Court decision suggests consistency with the premises of APA originalism.

In the 1970s, agencies complied with these requirements without public pushback, and Peter Strauss’s agency brief in *Vermont Yankee* explicitly told the Court that the Atomic Energy Commission had no objection to federal judges demanding a more complete record. “Even the presence of highly technical and specialized material in the record does not relieve the reviewing court of its obligation to adjudicate a challenge to the adequacy of the record.”²³⁴ In *Motor Vehicles Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*,²³⁵ Solicitor

229 *E.g.*, *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 249–53 (2d Cir. 1977); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34–36 (D.C. Cir. 1976).

230 5 U.S.C. § 706 (2018).

231 *Id.* § 553(c).

232 Richard J. Pierce, *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 192 (1996); Schiller, *supra* note 212, at 1154–66.

233 318 U.S. 80, 94 (1943).

234 Brief for the Fed. Respondents, *supra* note 226, at 36 n.34 (citing *Ethyl Corp.*, 541 F.2d at 35).

235 463 U.S. 29 (1983).

General Rex Lee (1981–85) vigorously argued that agencies ought to be given broad discretion to rescind regulations,²³⁶ but did not object to a requirement that the agency provide public notice for its rescission and a record supporting it.

A final target of some APA originalists is the presumption of reviewability,²³⁷ but here, too, doctrine does not stray from the APA's text, structure, and legislative history. In *Abbott Laboratories v. Gardner*, the Supreme Court ruled that the aggrieved company could enjoy pre-enforcement judicial review of an FDA rule, even though Congress had carefully permitted pre-enforcement review of other actions but had said nothing for the matter in suit.²³⁸ The Solicitor General ignored the APA and focused only on the Federal Food, Drug & Cosmetic Act of 1938, which (the government argued) implicitly precluded pre-enforcement review.²³⁹ The Court set a baseline that defeated the Solicitor General's claim: "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."²⁴⁰ In effect, the Court recognized a presumption of prompt judicial review of rulemaking and other agency actions.

The Supreme Court grounded its presumption in the APA's text, structure, and legislative history. Section 702 creates the baseline: *anyone* aggrieved by an agency action "is entitled to judicial review thereof."²⁴¹ Section 701(a) provides that *an aggrieved person* is entitled to judicial review, "except to the extent that . . . statutes preclude judicial review."²⁴² This structure established judicial review as the default rule, which even the critics of *Abbott Labs* concede is at least a "weak presumption."²⁴³ Reinforcing the point is the APA's legislative history. Representative Walter's report for the House Judiciary Committee opined that a statute "must upon its face give clear and convincing evidence of an intent to withhold" judicial review before the § 702 default would be overridden.²⁴⁴

236 See Brief for the Fed. Parties at 22–28, *State Farm*, 463 U.S. 29 (Nos. 82-354, 82-355 & 82-398).

237 See, e.g., Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014).

238 387 U.S. 136, 139–48 (1967).

239 See Brief for the Respondents at 9–30, *Abbott Lab's*, 387 U.S. 136 (No. 39).

240 *Abbott Lab's*, 387 U.S. at 140. For more recent invocations of the presumption, see, for example, *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667 (1986).

241 5 U.S.C. § 702 (2018).

242 *Id.* § 701(a)(1).

243 See Bagley, *supra* note 237, at 1305, 1303–09.

244 H.R. REP. No. 79-1980, at 41 (1946).

All of the foregoing administrative law doctrines are defensible under the premises of APA originalism, namely, that the APA was a shallow compromise that should be strictly enforced. That the APA was, in fact, a deep compromise provides a stronger justification for the Supreme Court's presumption of reviewability, its disapproval of judicially created "hybrid" procedures for rulemaking, and its requirement that agencies provide a reasoned explanation, based upon factual materials disclosed to the public. All three doctrines are supported by the APA's crown jewel, the notice-and-comment process for informal rulemaking. The deep compromise left agencies free to devise their own additional procedures, but the expectation of judicial review of the agency's actual means-ends reasoning motivates agencies to pay attention to statutory purpose and to public comments.

C. APA Originalism and Deep Compromise: Hard Look Review and Judicial Deference

There are other important issues relating to agency rulemaking and judicial review where neither the Solicitor General nor the Supreme Court persuasively justified doctrine by reference to APA originalism. These are the hard-look doctrines for arbitrariness review and deference to agency interpretations of law. For these doctrines, the originalist critiques have potential bite.²⁴⁵ But history is more ambiguous than some originalists have supposed, and on both issues the Court has taken care to act in accord with democratically accountable signals and directives from Congress. In short, even viewed as a shallow compromise, we do not find the APA to be inconsistent with either of these doctrines.²⁴⁶ Viewed as a deep compromise, the APA requires something more than rational basis review of an agency's explanation of its final rule and would support deference to agency interpretations of law under a variety of circumstances.

In *State Farm*, the Court unanimously ruled that the Secretary of Transportation was required to explain why (when she rescinded the agency's airbag rule) she only considered complete deregulation and did not consider a requirement of both airbags and detachable automatic seat belts.²⁴⁷ That holding was relatively uncontroversial and seems consistent with *Chenery* and with § 553's requirement of an

245 See *supra* note 28 and accompanying text.

246 Cf. Bernick, *supra* note 28, at 849 (concluding that hard-look review is not inconsistent with § 706 but is not required by § 706 either).

247 See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–51 (1983).

agency “explanation” based on the “record.”²⁴⁸ But a 5-4 Court majority also took a “hard look” at the agency’s substantive conclusion that detachable automatic seatbelts did nothing to advance traffic safety.²⁴⁹

Solicitor General Rex Lee’s brief for the government argued that the APA’s legislative history supported the view that § 706(2)(C)’s authorization for courts to invalidate agency rules that are “arbitrary and capricious” was meant to parallel the Supreme Court’s lenient rational basis review for social and economic legislation.²⁵⁰ But the Solicitor General’s brief was highly selective, and a more thorough examination of the legislative record demonstrates that the APA’s use of the term “arbitrary and capricious” reflected a broader standard of review than the rational basis test which the Court has adopted for economic legislation.²⁵¹ Indeed, Justice White’s opinion for the Court respected the APA’s language but also supported hard-look review in *State Farm* with Congress’s directives in the National Traffic and Motor Vehicle Safety Act of 1966 that the agency must compile a record in such cases and that courts should review the agency rules to require “substantial evidence” for such rules.²⁵²

State Farm’s hard-look review strikes us as democratically justified in the context of the authorizing statute, even under the shallow compromise approach to the APA, as applied in light of the Motor Vehicle Safety Act. While John Duffy and Evan Bernick, two leading APA originalists, believe that hard-look review is “statutorily-authorized common law,”²⁵³ Kathryn Kovacs finds it inconsistent with the APA’s shallow compromise.²⁵⁴ When viewed as a deep compromise, APA originalism more strongly supports hard-look review. For the notice-and-comment process to be taken seriously by foot-dragging as well as more responsible agencies, the nonarbitrariness requirement must have bite. That does not mean that courts should apply anything like strict scrutiny to agency rules, but agencies ought to be held accountable to justify their new rules by reference to on-the-ground facts and

248 See *supra* notes 231–34 and accompanying text.

249 See *State Farm*, 463 U.S. at 51–57; *cf. id.* at 58–62 (Rehnquist, J., concurring in part and dissenting in part).

250 See Brief for the Fed. Respondents, *supra* note 226, at 26–27.

251 See Alexander Mechanick, *The Interpretive Foundations of Arbitrary or Capricious Review*, 111 Ky. L.J. 477, 522–23 (2022–2023).

252 See *State Farm*, 463 U.S. at 43–44 (quoting S. REP. NO. 89-1301, at 8 (1966); H.R. REP. NO. 89-1776, at 21 (1966)); *cf.* 5 U.S.C. § 706(2)(E) (2018) (requiring for formal adjudication and rulemaking, that agency action be supported by “substantial evidence” in the record).

253 Duffy, *supra* note 23, at 118; Bernick, *supra* note 28, at 825, 847–49 (quoting Duffy, *supra* note 23, at 118).

254 See Kovacs, *supra* note 22, 1208–09.

statutory purposes, which is exactly what Justice White required in *State Farm*.

The Roberts Court has revealed another dimension to hard-look review. In the *Census Question Case*, Chief Justice Roberts ruled for a 5–4 Court that the Secretary of Commerce did not act arbitrarily in adding a question about a respondent’s citizenship to the 2020 Census.²⁵⁵ The Chief gave the Secretary’s action a mildly hard look, which it survived (unlike the agency action in *State Farm*). But writing for a different 5–4 majority, the Chief Justice invalidated the Secretary’s action because his apparently reasonable explanation was in fact “pretextual”: hard evidence had surfaced that the Secretary lied about why he added that question, and so the trial court was correct to vacate the decision and remand it back to the Secretary for a new, untainted decision.²⁵⁶

Although four Justices strongly objected to that holding²⁵⁷ and the Chief Justice did not justify this exception to normal review by reference to the APA, he offered a justification based on the highly unusual circumstances of the case, where the Secretary had presented an evasive and perhaps perjured account on the record:

The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.²⁵⁸

As before, we do not believe this reasoning would have shocked or dismayed the APA Congress. Indeed, we are pretty sure that a bipartisan majority would have applauded the Chief Justice. Hence, even under the view that the APA was a shallow compromise, the Chief’s opinion strikes us as defensible—and we think it required under our view that the APA was a deep compromise. By 1946, there was an overlapping consensus (shared by the ABA, President Truman, and most of the New Dealers) that the administrative state requires good faith on the

255 See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2569–71 (2019) (Roberts, C.J.) (finding support for the Secretary’s reasoning and ample precedent for such questions in most prior censuses).

256 See *id.* at 2573–76.

257 “To put the point bluntly, the Federal Judiciary has no authority to stick its nose into the question whether . . . the reasons given by Secretary Ross for that decision were his only reasons or his real reasons.” *Id.* at 2577 (Alito, J., concurring in part and dissenting in part); *accord, id.* at 2576 (Thomas, J., concurring in part and dissenting in part).

258 *Id.* at 2575–76 (Roberts, C.J.) (majority opinion).

part of agencies.²⁵⁹ And there was no dissent from the *Chenery* stance that post hoc rationalizations were not acceptable reasons for agency rules. That the APA's legislative history reveals no example where an agency head had perjured himself, does nothing to diminish the originalist cogency of the Roberts opinion—indeed, the APA, if it is to be taken seriously, requires that such a remarkable agency record be rejected, as the Court did.

A clearer example, and a big one, of doctrine that may lie beyond the original understanding of the APA is *Chevron* deference.²⁶⁰ Agency interpretations of statutes they were charged with enforcing usually prevailed, both before and after the APA. Three leading cases won by New Deal agencies and known to the APA Congress were *Skidmore v. Swift & Co.*, opining that judges ought to consider agency expertise and analysis when interpreting statutes;²⁶¹ *Bowles v. Seminole Rock & Sand Co.*, holding that the OPA's public interpretation of its own regulation resolved any ambiguity and justified application of the regulation, as broadly interpreted, to the offending company;²⁶² and *NLRB v. Hearst Publications, Inc.*, rebuking a lower court for rejecting the agency's interpretation of an undefined statutory term.²⁶³ “[Q]uestions of statutory interpretation,” the *Hearst* Court ruled, “are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute.”²⁶⁴ And “where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially,” the agency's view “is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law.”²⁶⁵ Notice how closely this language parallels the deference language in the *Final Report* of the Attorney General's Committee.²⁶⁶

259 See *supra* notes 157–67 and accompanying text.

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

261 *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

262 *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417–18 (1945).

263 *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130–31 (1944).

264 *Id.*

265 *Id.* at 131.

266 See 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 90 (“[T]he court might approach it, somewhat as a question of fact, to ascertain, not the ‘right interpretation,’ but only whether the administrative interpretation has substantial support.”); *id.* at 92 (“[T]he court should review the proceeding sufficiently to be satisfied that the administrative determination is not arbitrary and is within permissible bounds of administrative discretion.”); see also *infra* notes 302–03 and accompanying text.

In *Chevron*, Deputy Solicitor General Paul Bator,²⁶⁷ representing the Reagan Administration’s philosophy, defended the EPA’s rescission of a Carter Administration emissions rule and adoption of the famous (and easier on industry) “bubble concept” as within the agency’s delegated authority.²⁶⁸ Specifically, he maintained that the vague language of the Clean Air Act, as amended in 1977, was essentially a delegation of authority and discretion for the EPA to fill in the statutory details and to change its rules based on new information or a different balance of the statute’s dual policies of clean air for the people and reasonable cost to the industry.²⁶⁹ Bator did not tie his analysis to § 706 (the codified version of the APA’s chief judicial review provision), nor did the Supreme Court in its unanimous decision agreeing with his approach. Specifically, Justice Stevens’s opinion for the Court in *Chevron* ruled that when Congress does not “directly address[]” an interpretive issue in the statute, judges should defer to “reasonable” interpretations by the agency acting under delegated rulemaking authority.²⁷⁰ Stevens added a normative kicker to Bator’s argument: when there is no clear statutory answer, and the interpretation will involve a policy judgment, unaccountable judges should defer to the policy judgments of administrators appointed by the President, confirmed by the Senate, and relatively more accountable to the democratic process.²⁷¹

As Tom Merrill has demonstrated, *Chevron* was not, on its face or as read in 1984, a message to lower courts that they must defer to any or all “reasonable” agency rules.²⁷² The DOJ, the D.C. Circuit, and academics transformed *Chevron* into a broad mechanism for lower courts to go along with more agency interpretations than they otherwise might have.²⁷³ The Solicitor General’s Office has blown hot and cold over *Chevron*,²⁷⁴ and has worked with the Supreme Court to create

267 Alfonso A. Narvaez, *Paul Michael Bator Is Dead at 59; Lawyer-Teacher Also Served U.S.*, N.Y. TIMES, Feb. 25, 1989, at 12.

268 See Brief for the Administrator of the Environmental Protection Agency at 16–20, *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (Nos. 82-1005, 82-1247 & 82-1591).

269 See *id.* at 21–22, 33–34, 43–49.

270 See *Chevron*, 467 U.S. at 843–44.

271 See *id.* at 864–66.

272 See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275–76 (2014).

273 See Thomas W. Merrill, *The Story of Chevron USA Inc. v. Natural Resources Defense Council, Inc.: Sometimes Great Cases Are Made Not Born*, in STATUTORY INTERPRETATION STORIES 164, 187–88 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2011); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 12, 43 (2017).

274 See Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply Chevron When It Should?*, INT’L REV. L. & ECON., March 2019, at 81, 85 (demonstrating that the Solicitor General requests *Chevron* deference inconsistently).

a complicated continuum of deference that the Court has applied with the predictability of a prairie tornado.²⁷⁵ John Duffy, Stephen Breyer, and others maintain that the souped-up version of *Chevron* is inconsistent with the *Marbury*-inflected role for courts, which under § 706 “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.”²⁷⁶ Ron Levin, John Manning, and others maintain that *Chevron* may be a novel way of approaching the deference issue but is well within the parameters of judicial review contemplated by the APA.²⁷⁷

We start with a simple point. Based on the APA’s text, structure, and legislative history, there is remarkably little that can be advanced to criticize *Chevron* as it was written. Step one is the central *Chevron* inquiry, and the reviewing court asks whether Congress has “directly addressed” the issue in the statute, a judicial inquiry which the *Chevron* Court in footnote nine said should be answered using all the judge’s traditional tools of statutory interpretation.²⁷⁸ Consistent with footnote nine, Justice Stevens’s opinion for the Court examined the text, the structure, the purpose, and the legislative history of the Clean Air Act, as amended in 1977.²⁷⁹ This is classically independent judicial review, applying the traditional tools of statutory interpretation, as understood in 1946 (the APA) or 1984 (*Chevron*). Most *Chevron* cases are resolved at step one, and the agency wins most of them because the reviewing court concludes that Congress directly addressed the issue and answered it in the way the agency did.²⁸⁰ In *Kisor v. Wilkie*, the Supreme Court reaffirmed *Seminole Rock*’s deference to an agency interpretation

275 William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1182 (2008).

276 5 U.S.C. § 706 (2018) (emphasis added); see Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986) (invoking § 706 as decisive evidence against *Chevron*); Duffy, *supra* note 23; see also Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 976–95 (2017); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (book review).

277 See Levin, *supra* note 26, at 188–90; John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 635–37 (1996).

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

279 See *id.* at 848–56.

280 Cf. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (“One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.”).

of ambiguities in its own regulations,²⁸¹ but only after emphasizing the duty of the reviewing court to determine, using footnote nine’s traditional tools of interpretation, whether there was any genuine ambiguity.²⁸²

If the traditional tools judges apply to determine statutory meaning do not resolve the issue, *Chevron* step two requires judges to defer to the agency’s view so long as it is “reasonable,” presumably another judicial inquiry.²⁸³ In 1946, there were three ways for judges to resolve legal uncertainty once they were unable to determine statutory meaning by applying the traditional tools and canons of statutory interpretation (those listed above, plus relevant statutory precedents). One way was to develop a judicial common law for the statutory term or provision; another was to apply a clear statement rule; a third was to go along with the agency’s interpretation. In 1944, the Supreme Court had rejected the first way in *Hearst*, which was a labor case but whose rejection of the common-law approach in agency cases was more broadly applicable.²⁸⁴ The second approach was in 1946 largely confined to criminal and free speech cases, where the rule of lenity required that the government lose when the statute was not clear.²⁸⁵ The third way was that adopted in *Hearst*, *Seminole Rock*, and other pre-APA Supreme Court decisions.²⁸⁶

The legislative background of the APA (1933–1946) reveals a number of statements by supporters of the various administrative reform bills endorsing judicial review that considered or deferred to agency interpretations where the traditional tools of statutory interpretation suggested administrative discretion or did not yield a clear answer.²⁸⁷ We did not find a single statement supporting judicial review that applied judicial common law or substantive canons to resolve cases where the traditional tools of statutory interpretation failed. Indeed, the discussion of deference in the Final Report of the Attorney General’s Committee (in some cases, “limited to the inquiry whether the

281 *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–15 (2019) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

282 *See id.* (citing *Chevron*, 467 U.S. at 843 n.9); *see also id.* at 2448 (Kavanaugh, J., concurring).

283 *See Chevron*, 467 U.S. at 843–44.

284 *See NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 121–22 (1944).

285 *See McBoyle v. United States*, 283 U.S. 25, 27 (1931); *Morissette v. United States*, 342 U.S. 246, 263 (1952). During the 1930s, however, the Supreme Court relaxed its notice requirements, and the rule of lenity went into decline. *See Mila Sohoni, Notice and the New Deal*, 62 DUKE L.J. 1169, 1203–06 (2013).

286 *See Hearst*, 322 U.S. at 130; *Seminole Rock*, 325 U.S. at 413–14; Levin, *supra* note 26, at 168, 169–70.

287 *See, e.g.*, 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 90–91; *id.* at 246–47 (transcribing the draft legislation by the committee minority).

administrative construction is a permissible one”)²⁸⁸ might support a liberal reading of *Chevron’s* circumstances for deference

Aditya Bamzai offers a different view of pre-APA deference.²⁸⁹ He claims that established canons, from the early republic until the 1940s, only supported deference to contemporaneous, longstanding interpretations by officials.²⁹⁰ Yet the leading case, *United States v. Moore*,²⁹¹ stated the canon more broadly in 1878:

The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.²⁹²

Professor Bamzai concedes that the Supreme Court in *Bates & Guild Co. v. Payne* explicitly deferred to an agency interpretation that abandoned the agency’s contemporaneous and longstanding interpretation to the contrary.²⁹³ While he assumes that the Court’s 1904 decision in *Bates* was *sui generis*, it is not: a fair number of Supreme Court decisions between 1904 and 1946 explicitly deferred to agency interpretations that were neither contemporaneous nor longstanding.²⁹⁴

288 *Id.* at 78.

289 *See* Bamzai, *supra* note 276, at 976–95.

290 *See id.* at 987–90.

291 95 U.S. 760 (1878).

292 *Id.* at 763 (first citing *Edwards v. Darby*, 25 U.S. (12 Wheat.) 206 (1827); then citing *United States v. State Bank of N.C.*, 31 U.S. (6 Pet.) 29 (1832); and then citing *United States v. MacDaniel*, 32 U.S. (7 Pet.) 1 (1833)). Bamzai interprets *Moore* as limited to situations where there was a contemporaneous, longstanding executive branch interpretation, Bamzai, *supra* note 276, at 998 n.383, but the Court’s own statement of the rule of law was broader and was the basis for an equally broad statement of deference doctrine, under the rubric of “practical construction,” in the leading treatise. J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 309, at 892, 893 & n.4 (1891). For other cases supporting the broader statement of the canon, see, for example, *Bates & Guild Co. v. Payne*, 194 U.S. 106, 108–09 (1904); *United States v. Gilmore*, 75 U.S. (8 Wall.) 330, 333 (1869).

293 *See* Bamzai, *supra* note 276, at 966–67; *see also* *Bates & Guild Co. v. Payne*, 194 U.S. 106, 108–09 (1904). Professor Bamzai also does not discuss or cite Dan Ernst’s earlier book on Tocqueville’s Nightmare, ERNST, *supra* note 41, which thoroughly analyzes the moderately deferential approach taken to agency interpretations by the Hughes Court (1930–41). *See* ERNST, *supra* note 41, at 51–77.

294 *See, e.g.*, *Great N. Ry. Co. v. United States*, 315 U.S. 262, 275–76 (1942) (according interpretive weight to circulars issued thirteen years after the statutory enactment); *Dobson v. Comm’r*, 320 U.S. 489, 500–03 (1943); *United States v. Reynolds*, 250 U.S. 104, 109 (1919); *Houston v. St. Louis Indep. Packing Co.*, 249 U.S. 479, 479–80, 484–86 (1919) (relying on *Bates* to defer to an agency interpretation rendered seven years after the statute was enacted); *Boston & Maine R.R. v. Hooker*, 233 U.S. 97, 118 (1914).

Professor Bamzai claims that § 706 of the APA swept away all these cases,²⁹⁵ a proposition that neutral examinations of the shallow compromise have found lacking in evidence.²⁹⁶ Nowhere in the lengthy record of debate on the final versions of the APA during the 1940s have we found a single critical reference to the leading deference cases, namely, *Skidmore*, *Hearst*, or *Seminole Rock*. Michael Rappaport defends a narrow understanding of the APA on the ground that the Supreme Court might have deferred to agency interpretations that mixed issues of law and fact but did not defer on pure issues of law.²⁹⁷ Like Bamzai, Rappaport does not address the precise *Chevron* situation, where the court applies all of its tools of statutory interpretation and cannot produce a persuasive interpretation of law. It is under those circumstances that *Chevron* deference kicks in, and our view is that APA originalism would not support either a common law or a substantive canons approach when the standard sources of law run out.

Hearst—the leading case on the eve of the APA—might be characterized as starting with a pure issue of law, namely, whether the common law’s limited understanding of “employee” applied to the Wagner Act.²⁹⁸ Once the Court had determined that issue, with due consideration of the agency views, it then decided the application of law to facts, where the Court was highly deferential. Delivered two years before the APA, the opinion for the Court opined that “questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute.”²⁹⁹ Reflecting *Skidmore*, that was the standard for pure issues of law. “But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the

295 See Bamzai, *supra* note 276, at 985–87.

296 See, e.g., Levin, *supra* note 26 at 170–74 (offering a detailed examination of the case law, including relevant cases not cited by Bamzai); Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1650–52 (2019) (rejecting his own as well as Bamzai’s view that the APA sought to abrogate deference doctrine by the Supreme Court).

297 Michael B. Rappaport, *Chevron and Originalism: Why Chevron Deference Cannot Be Grounded in the Original Meaning of the Administrative Procedure Act*, 57 WAKE FOREST L. REV. 1283 (2023).

298 “It is not necessary in this case to make a completely definitive limitation around the term ‘employee.’ That task has been assigned primarily to the agency created by Congress to administer the Act.” *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 130 (1944); *id.* at 135 (Reed, J., concurring in the result). “The question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question.” *Id.* at 136 (Roberts, J., dissenting).

299 *Id.* at 130–31 (majority opinion). Justice Roberts disagreed with this holding. *Id.* at 136 (Roberts, J., dissenting).

statute must determine it initially, the reviewing court's function is limited."³⁰⁰ This reads like a very liberal interpretation of *Chevron*.

Indeed, even *Chevron* might be understood as involving issues of both law and fact. As in *Hearst*, the initial issue was whether the Court should impose a judicial gloss on an undefined statutory term ("major stationary source") or whether it should consider the agency's input. The Bator brief for the government relied on the statutory balance of the clean air purpose and the reasonable cost purpose of the statute to claim grounds for deference to the EPA.³⁰¹ As *State Farm* and other hard-look review cases suggest, most agency rulemaking is going to present reviewing courts with issues of law that might turn on or are intertwined with issues of fact.

Consider this last point raised by Professor Bamzai. The *Final Report* of the Attorney General's Committee reflected progress toward regulatory reform and a narrowing of differences in 1941: representing the New Dealers, the majority included a provision for deferential judicial review in its draft bill, in terms directly anticipating a broad reading of *Chevron*;³⁰² representing the ABA, the minority (McFarland and Vanderbilt) included a provision for judicial review in their draft code that accorded "due weight" to agency "technical competence" and "specialized knowledge," language similar to that in *Skidmore*.³⁰³ Professor Bamzai argues that § 706's omission of the deference language proves that the APA abrogated post-1940 Supreme Court cases that reflected the minority's language,³⁰⁴ but that's not the way "compromise" works. Whether deep or shallow, compromise means that there was a resolution somewhere in the middle of contending views. The New Deal majority on the committee endorsed highly deferential

300 *Id.* at 131 (majority opinion).

301 See the Administrator of the Environmental Protection Agency at 21-22, 33-34, 43-49, *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (Nos. 82-1005, 82-1247 & 82-1591).

302 See 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 90-91. "[W]here the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body. Again, the administrative interpretation is to be given weight—not merely as the opinion of some men or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it." *Id.*

303 *Id.* at 246-47 (transcribing the minority's draft legislation).

304 See Bamzai, *supra* note 276, at 985-90. This passage argues that the APA adopted the "traditional" approach to agency interpretations, which Bamzai insists is the approach before 1941, and rejected the approach followed after 1941. That would be very odd indeed—and without any evidence that Congress meant to override the Supreme Court decisions of the 1940s, the presumption must lie with congressional acquiescence in the decisions of the 1940s. Note, too, that we (like Professor Ernst) do not find as striking a break between the 1940s and earlier decades.

review; the ABA was willing to concede somewhat deferential review; the “middle” view was somewhere in the vicinity of *Hearst*. The “compromise” was certainly not to silently override *Hearst*, or *Seminole Rock* or the other deferential decisions of the 1940s.

As Justice Scalia appreciated, under *Chevron*’s two-step process, the court “shall decide all relevant questions of law.”³⁰⁵ Section 706 does not dictate to courts precisely what materials they must consider when they decide questions of law. Just as courts can consider dictionaries and legislative materials when they decide questions of law, so they may consider agency materials, as *Moore*, *Seminole Rock*, *Hearst*, and other pre-1946 cases explicitly held.³⁰⁶ Notice that our analysis does not insist upon a broad reading of *Chevron*; we only maintain that *Chevron*, as Justice Stevens wrote the opinion, is not inconsistent with the original public meaning of the APA.³⁰⁷ Moreover, we think APA originalism strongly supports *Skidmore* deference, where the Court considers agency views based upon their expertise, experience, and factual evidence.³⁰⁸ Indeed, our reading of the APA and the cases suggests that *Chevron* can be understood as a doctrinal refinement of *Skidmore* to reflect rule-like steps rather than standards-like balancing.

Our analysis does, however, support an original public meaning critique of Justice Scalia’s opinion in *City of Arlington v. FCC*, where the Court applied *Chevron* and deferred to the FCC on the issue of the agency’s own jurisdiction.³⁰⁹ During the public debate on administrative reform, Chief Justice Charles Evans Hughes (1930–1941) led the Court to defer to agency factfinding and statutory interpretations, but not on matters of constitutional and statutory jurisdiction.³¹⁰ The

305 See Scalia, *supra* note 280 at 516 (noting that “question[s] of law” are “properly to be resolved by the courts,” but that when *Chevron* deference applies “the only question of law presented to the courts is whether the agency has acted within the scope of its discretion—i.e., whether its resolution of the ambiguity is reasonable”); 5 U.S.C. § 70 (2018).

306 See, e.g., *United States v. Moore*, 95 U.S. 760 (1878); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944).

307 Cf. Rappaport, *supra* note 297, at 1325–26 (rejecting a broad reading of *Chevron* that defers to any reasonable agency reading of a statute but remaining open to a more narrow reading of *Chevron*, which, we repeat, is not a precedent that is written in the revolutionary way some judges and commentators have read it).

308 See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

309 *City of Arlington v. FCC*, 569 U.S. 260 (2013). Conversely, we agree with the Chief Justice’s dissenting views. *Id.* at 296–97 (Roberts, C.J., dissenting) (arguing, in line with the APA backdrop established by the Hughes Court, that courts should not defer to an agency’s interpretation of a provision limiting its own authority).

310 See ERNST, *supra* note 41, at 52–54 & n.12.

Hughes Court regime is an important backdrop to the APA, which explicitly requires courts to be sure that agencies have jurisdiction for the rules they issue.³¹¹

If one considers the APA a deep and not just a shallow compromise, the case for *Chevron* is stronger, partly for the reason announced in Justice Stevens's opinion for the Court.³¹² Once the traditional legal materials run out, considerations of policy will determine the answer. Before *Chevron*, the traditional justifications for deferring to agencies when the law ran out were that Congress had vested agencies, and not courts, with authority to develop the statutory scheme and, relatedly, that agencies had experience and expertise that made their policy judgments more reliable.³¹³ *Chevron* added a powerful third reason to prefer policy judgments reflected in agency rulemaking over those reflected in judge-made common law or substantive canons: agencies are much more democratically accountable, because (1) agency heads are appointed and confirmed by the electorally accountable President and Senate and can be removed by the President; (2) agencies are responsive to Congress, which sets their budgets and monitors/oversees their operation; and (3) informal rulemaking must take public comments seriously.³¹⁴ Notice how this third reason powerfully meshes with the APA's foundation in folk democracy and with the APA's specific innovation of notice-and-comment rulemaking.

The case for APA tolerance of or even support for *Chevron* might also be strengthened by the record of congressional deliberation both before and after the landmark decision. Between 1975 and 1985 Senator Dale Bumpers (D-Arkansas) proposed a series of amendments aimed at correcting what he considered too much judicial deference to agency views about what the law required.³¹⁵ For example, the

311 See 5 U.S.C. § 558(b) (2018) (underlining the need for judicial review to determine an agency's exercise of jurisdiction).

312 See *supra* notes 270–77 and accompanying text.

313 Scalia, *supra* note 280, at 514, 516 (noting that pre-*Chevron* cases “often refer to the ‘expertise’ of the agencies in question” as well as “the conferral of discretion upon the agency” by Congress); *Pitston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976) (Friendly, J.) (noting the prodeference line of cases but holding that the two rationales of vested discretion and comparative expertise did not apply in the specific case), *aff'd sub nom. Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

314 See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REGUL. 283, 308, 312 (1986) (praising *Chevron* for shifting policy-making responsibility from courts to “democratically accountable officials” in agencies).

315 See Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 495–98, 502–07 (2022); see also Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 5–6 (1985); James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739 (1980).

Bumpers-sponsored S. 1080 (1982) would have required reviewing courts to “independently decide all relevant questions of law.”³¹⁶ S. 1080 would also have added a new § 706(c):

In making determinations concerning statutory jurisdiction or authority under subsection (a)(2)(C) of this section, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action, but *in reaching its independent judgment concerning an agency’s interpretation of a statutory provision, the court shall give the agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law.*³¹⁷

This was the high-water point for the Bumpers Amendment: support from President Reagan, a unanimous vote in the Senate, and perhaps a House majority had the Amendment come to a vote (it was killed in committee).³¹⁸ Partisans on both sides of the *Chevron* debate can find comfort in the Bumpers Amendment.

The foregoing evolution of the Bumpers Amendment is significant. To begin with, it is notable that there was congressional concern, before *Chevron*, that federal courts were deferring too much to agency interpretations of law. But the concern had no clear target before *Chevron*. Senator Bumpers and most of his allies had no quarrel with *Skidmore*, which was the dominant deference regime before *Chevron*. Indeed, from the very beginning (1975), Bumpers identified *NLRB v. Hearst* as the primary example of excessive deference.³¹⁹ *Hearst* was the leading case for interpreting the National Labor Relations Act before the APA.³²⁰ The Bumpers Amendment was a concerted effort to reset the APA baseline—and recognition of that baseline renders Congress’s inaction significant.

More important, for our purposes, the Bumpers Amendment was itself subject to a great deal of internal (within the coalition) and external (public and legislative) deliberation.³²¹ It evolved. Recall that § 706(c) of the nearly-successful 1982 bill mandated that, “in reaching its independent judgment concerning an agency’s interpretation of a statutory provision, the court shall give the agency interpretation such

316 S. 1080, 97th Cong., § 5, 128 CONG. REC. S2717–18 (daily ed. Mar. 24, 1982).

317 *Id.* (emphasis added).

318 Elinson & Gould, *supra* note 315, at 505–08.

319 See 121 CONG. REC. 29,957 (1975) (statement of Sen. Dale Bumpers).

320 See Levin, *supra* note 26, at 162.

321 See generally Elinson & Gould, *supra* note 315, at 493–508 (recounting the debates over the Bumpers Amendment).

weight as it warrants, taking into account the discretionary authority provided to the agency by law.”³²² The language “give the agency interpretation such weight as it warrants” reads like an endorsement of *Skidmore*, and the final phrase “taking into account the discretionary authority provided to the agency by law” sounds like *Chevron* as it was clarified in *United States v. Mead Corp.*³²³

More recent congressional interest in this issue came in the proposed Separation of Powers Restoration Act of 2016 (SOPRA), which would have amended § 706 to “decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies.”³²⁴ There is every reason to believe that SOPRA will meet the fate of the Bumpers Amendment—insufficient political support to secure enactment, followed by a weaker version that would receive more serious consideration. The failure of both the Bumpers Amendment and SOPRA illustrate the consensus view that federal courts are deferential to agency interpretations under the APA and the minority view that this is a bad policy.

III. THE APA’S DEEP COMPROMISE, THE NONDELEGATION DOCTRINE, AND THE MAJOR QUESTIONS DOCTRINE

A. *The Roberts Court’s Creation of a Super-Strong Nondelegation Canon Versus APA Originalism*

Section 706(2)(C) says that agencies must not act “in excess of statutory jurisdiction, authority, or limitations.”³²⁵ Consistent with that directive, what Tom Merrill and Kristin Hickman dubbed *Chevron* “step zero” asks whether an agency promulgated a rule having the force of law pursuant to and within the parameters of a statutory delegation of such power.³²⁶ The Supreme Court has recognized what academics dubbed the “major questions doctrine” to deny the *Chevron* deference regime to agency rules that would wreak significant social or economic changes in the country.³²⁷ Going beyond that aggressive

322 S. 1080, 97th Cong. § 5, 128 CONG. REC. S2718 (daily ed. Mar. 24, 1982).

323 *United States v. Mead*, 533 U.S. 218, 226–27 (2001) (clarifying that agency interpretations qualify for *Chevron* deference only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”).

324 H.R. 4768, 114th Cong. § 2(3) (2016).

325 5 U.S.C. § 706(2)(C).

326 See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 873 (2001).

327 See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000); *King v. Burwell*, 576 U.S. 473, 485–86 (2015); see also Breyer, *supra* note 276, at 390.

move, Justice Gorsuch draws from the nondelegation doctrine a canon of antideference: when an agency rule would effect significant social or economic change, courts should require a super-strong clear statement on the face of the statute.³²⁸

In the last several Terms, the Roberts Court has taken up Justice Gorsuch's suggestion and has transformed the "major questions doctrine" from an exception to agency deference into a super-strong canon of antideference.³²⁹ In *Alabama Ass'n of Realtors v. HHS*, the Court invalidated the Center for Disease Control's (CDC) effort to extend a COVID-inspired national moratorium on evictions that Congress had allowed to lapse.³³⁰ CDC claimed textual authority for its moratorium, which did not persuade the 6–3 majority.³³¹ But Chief Justice Roberts' opinion for the Court ruled that even if CDC had a plausible textual argument, it would not prevail. "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'"³³² The agency's moratorium would cover at least eighty percent of the rental units in the country; the landlord-tenant relationship is normally the domain of state and local law. "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."³³³

In COVID cases decided the next year, the Court followed *Alabama Realtors* to invalidate the Occupational Safety and Health Administration's (OSHA) regulation requiring large employers to adopt COVID-preventive protocols but upheld the Department of Health and Human Services' (HHS) mandate that hospitals receiving federal funds adopt COVID-preventive protocols for their workers.³³⁴ In *NFIB v. OSHA*, the Court invalidated OSHA's emergency rule imposing COVID-protective protocols on workplaces with more than 100 employees.³³⁵ OSHA maintained that it was acting within the four corners of its statutory authorization when it found that the COVID-19 virus was a "toxic" agent in the workplace that posed a "grave danger" to

328 See *Nat. Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 667, 668–69 (2022) (Gorsuch, J., concurring); see also *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (following *OSHA*).

329 See Mila Sohoni, Comment, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 275 (2022).

330 *Ala. Ass'n of Realtors v. Dep't Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021).

331 See *id.* at 2487.

332 *Id.* at 2489 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

333 *Id.* (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020)).

334 For the latter, see *Biden v. Missouri*, 142 S. Ct. 647 (2022).

335 *Nat. Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 662 (2022).

workers' health.³³⁶ The per curiam majority opinion applied the major questions doctrine to demand a more specific congressional authorization.³³⁷ Because OSHA had never claimed the authority to anchor a national healthcare campaign, its mandate was "a claim of power to resolve a question of vast national significance" beyond the pay grade of the agency (and apparently the President).³³⁸

In the wake of the COVID cases was the Court's decision in *West Virginia v. EPA*.³³⁹ Although the EPA was still working on rulemaking to address emissions from power plants, West Virginia and other coal-producing states challenged the EPA's statutory authority to develop rules capping emissions based on the generation-shifting approach it had earlier taken (and then abandoned) under the Obama EPA's Clean Power Plan (CPP).³⁴⁰ Citing "staggering implementation costs" the CPP would have imposed on private industry and the states, West Virginia argued that this or any similar plan were major questions well beyond the agency's delegated authority.³⁴¹ The EPA responded that the Clean Air Act's mandate requires some degree of generation shifting and, therefore, that the states and the private sector were on notice that coal production would not flourish under any regime taking air pollution seriously.³⁴² The 6–3 Court completely agreed with West Virginia. Chief Justice Roberts's opinion emphasized not only the "billions of dollars in compliance costs" the CPP would have imposed on the private sector and the states,³⁴³ but also both legislative and agency reliance on the understanding that the provision EPA relied on was "an obscure, never-used section of the law."³⁴⁴ Accordingly, the Court found that EPA's ambitious interpretation was precisely the sort of "major question" that it would not assume was delegated to advance.³⁴⁵

336 See *id.* at 668 (Gorsuch, J., concurring) (quoting 29 U.S.C. § 655(c)(1)).

337 See *id.* at 663–67 (majority opinion).

338 *Id.* at 667 (Gorsuch, J., concurring); see *id.* at 666 (majority opinion).

339 142 S. Ct. 2587 (2022).

340 See *id.* at 2603–06.

341 See Brief for Petitioners at 8, 12–13, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530); see also Brief of Respondent National Mining Association in Support of Petitioners at 14–16, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778 & 20-1780).

342 See Brief for the Federal Respondents at 12–13, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778 & 20-1780).

343 See *West Virginia*, 142 S. Ct. at 2604.

344 See *id.* at 2602 (quoting *Clean Air Act Amendments of 1987: Hearings on S. 300, S. 321, S. 1351, & S. 1384 Before the Subcomm. on Env't Prot. of the S. Comm. on Env't & Pub. Works, Part 2*, 100th Cong. 13 (1987) (statement of Sen. Durenberger)).

345 See *id.* at 2609–14.

In a concurring opinion in the OSHA COVID case, Justice Gorsuch explicitly tied the major questions canon to his effort to give unprecedented teeth to the nondelegation doctrine.³⁴⁶ By his account, the nondelegation doctrine

ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. . . . If Congress could hand off all its legislative powers to unelected agency officials, it “would dash the whole scheme” of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives.³⁴⁷

In his dissenting opinion in *Gundy v. United States*, Justice Gorsuch had earlier argued that the Court should reject the reasoning of its leading nondelegation precedent, which allowed delegation of lawmaking authority so long as Congress accompanied the delegation with an “intelligible principle” that could serve as the basis for judicial review.³⁴⁸ Under original public meaning, Gorsuch argued, “it would frustrate ‘the system of government ordained by the Constitution’ if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.”³⁴⁹ While the Court had not invalidated a law based on the nondelegation doctrine since the 1930s, Justice Gorsuch cited the major questions “canon” as an acceptable tool to achieve the same result.³⁵⁰

Justice Gorsuch repeated that view in the OSHA COVID Case. Thus, the major questions doctrine “serves a similar function” as the nondelegation doctrine “by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power.”³⁵¹ He warned that Congress sometimes enacts broadly worded or vague statutes, with delegation of implementation to an agency. “The major questions doctrine guards against [the] possibility” that an “agency may seek to exploit some gap, ambiguity, or doubtful expression in

346 *Nat. Fed’n of Indep. Bus. v. OSHA*, 141 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).

347 *Id.* at 669 (quoting *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring)).

348 *Gundy v. United States*, 139 S. Ct. 2116, 2138–41 (2019) (Gorsuch, J., dissenting) (arguing for the abrogation of the test for acceptable delegation of lawmaking authority announced in *J.W. Hampton, Inc. v. United States*, 276 U.S. 294 (1928)).

349 *Id.* at 2133 (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)); see also Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002) (arguing that a strong nondelegation doctrine is required by the original meaning of the Constitution of 1789).

350 *Gundy*, 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting).

351 *OSHA*, 141 S. Ct. at 669 (Gorsuch, J., concurring).

Congress's statutes to assume responsibilities far beyond its initial assignment."³⁵² Just as the Gorsuch-expanded nondelegation doctrine polices what he considers the legislative branch's tendency to over delegate, so the Gorsuch-created major questions canon polices what he considers the executive branch's tendency to overregulate.

This new version of the major questions doctrine turns *Chevron's* presumption of deference when the statute is unclear into a strong presumption against the agency position even when it is supported by statutory plain meaning. The Court has assessed against Congress, the agencies, and the public what John Manning calls a "clarity tax."³⁵³ We all know that the Court does not have the power to tax—and this clarity tax is inconsistent with any serious APA originalism. Unlike his attack on *Chevron*, Gorsuch's new version of major questions does not purport to rest on the APA. He grounds it in the Constitution, which he interprets to entail a nondelegation doctrine with greater bite than it has ever had in American history.

APA originalists like Professor Kovacs ought to be sharply critical of Justice Gorsuch's, and the Court's, new super-strong clear statement rule. First, the APA's text and structure impose on agencies no special burden for demonstrating authority when they issue rules having wide socio-economic effects. Thus, the APA defines "rule" very broadly, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."³⁵⁴ The APA stipulates that a "sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law"³⁵⁵—and does not say "jurisdiction explicitly delegated to the agency to adopt rules having large socio-economic effects."³⁵⁶ And the APA's provision of judicial review to make sure that agencies act in accordance with law and their authority makes no mention of any clear statement requirement for certain issues.³⁵⁷ What is striking about the APA is that all its directives are set forth in general terms and do not in any way authorize courts to impose extra jurisdictional and other requirements.

352 *Id.*

353 John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403–04, 422–27, 434 (2010).

354 5 U.S.C. § 551(4) (2018).

355 *Id.* § 558(b).

356 The quotation in text is our suggestion of statutory text that would support the Gorsuch super-strong clear statement rule; it is significant that Congress adopted nothing like such a text.

357 *See* 5 U.S.C. § 706(2) (2018).

If Congress has delegated broad authority to an agency in the text and structure of a statute, the APA is satisfied. The broadest delegation of agency authority in American history had been accomplished during World War II, when the OPA regulated prices and rents and oversaw nationwide rationing.³⁵⁸ We are not aware of any judicial decision requiring special clear statements to justify OPA's exercise of broad rulemaking power under the even broader delegation of the Emergency Price Control Act of 1942.³⁵⁹ Indeed, the leading statutory interpretation decision involving OPA was *Seminole Rock*, where the Court deferred to the agency's interpretation of its "General Maximum Price Regulation," which had "brought the entire economy of the nation under price control with certain minor exceptions."³⁶⁰ Imposing an antideference rule to rein in OPA was inconceivable in the 1940s—as it would have been at any point in American history before then or since then—until the Roberts Court in recent cases. We are aware of no Supreme Court or widely known court of appeals decision before 1946—or for decades after 1946—that applied a strong presumption against agency authority over issues having significant social or economic impact.

Second, there is nothing in the APA's legislative history to suggest any kind of special antideference when an agency, acting within a broad congressional delegation, is having a big impact on society or the economy. Instead, the APA's legislative history is replete with statements, from both New Dealers and the ABA's allies, that agency rulemaking could extend as broadly or narrowly as the congressional delegation, read in plain terms.³⁶¹ Introducing the final version of the APA

358 See Daniel K. Fetter, *The Home Front: Rent Control and the Rapid Wartime Increase in Home Ownership*, 76 J. ECON. HIST. 1001, 1007 (2016). OPA's rent-control authority alone had massive effects on all aspects of American society, culture, and the economy. See *id.* at 1008, 1010, 1032; see also Cuéllar, *supra* note 151, at 1346–47 (similar).

359 Emergency Price Control Act of 1942, 50 U.S.C. app § 901.

360 *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413, 417–18 (1945).

361 See, e.g., 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 116–19 (arguing that unless a statute expressly dictates otherwise, "the presence of a rational relationship between a regulation and the governing statute" is all that is necessary for the regulation to be valid); *Administrative Procedure: Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. of the S. Comm. on the Judiciary*, *supra* note 147, at 331 (statement of Robert E. Healy, SEC member) ("[Y]ou can carry out the intention of Congress by this type of legislative rule, and those rules, if they are within the powers given by Congress, if they are fairly designed to accomplish the Congressional objective, have the force of law.") (emphasis added); *id.* at 920–21 (statement of Jacob M. Lashly, ABA President) ("Congress provides a general framework of a subject[,] leaving the details or the mechanics of the legislative process to be devised by the executive agency. That seems necessary to me . . ."); *id.* at 1446 (statement of Francis Biddle, acting Attorney General) ("Congress legislates necessarily in broad and general terms. In many cases it can only lay down policies and standards, leaving the agencies to fill in the gaps.").

on the floor of the House, Representative Walter described the “legislative functions of administrative agencies” as similar in their effect to “statutes of the Congress. Among these are such regulations as those which state minimum wage requirements or agricultural marketing rules,”³⁶² both regulatory regimes that had “vast” social, economic, and political significance.

Indeed, and this is our third point, a highly lenient view of Congress’s authority to delegate broad lawmaking power to agencies was entrenched in American public law in 1946. When the New Deal Congress delegated lawmaking authority to private companies and persons or to the President without any directive, the Supreme Court said no,³⁶³ but every other New Deal statute delegating enormous lawmaking authority to government agencies was upheld against nondelegation challenges. Indeed, the most lenient version of the “delegation” doctrine was handed down by the Supreme Court at precisely the time Congress was working on the final compromises that would be enacted as the APA in 1946. In *Yakus v. United States* the Supreme Court upheld the massive delegation of lawmaking authority to OPA³⁶⁴—essentially controlling the entire economy during World War II.³⁶⁵ So long as Congress had provided standards by which courts could judge whether the agency was acting to carry out Congress’s purposes and policy, the delegation doctrine was satisfied.³⁶⁶

If the APA was a shallow compromise, a carefully negotiated deal between exhausted adversaries, it was a compromise that was decidedly hostile to the creation of an enforceable nondelegation doctrine or its progeny, the super-strong clear statement rule barring agencies from addressing major questions (whatever they might be). As we shall now see, the case against these doctrines is even stronger if one views the APA as a deep compromise.

362 92 CONG. REC. 5648 (1946).

363 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521–23, 529–30 (1935); see also *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (companion case, striking down another delegation in the same statute for the same kind of reason: Congress did not set guardrails on the executive branch lawmaking).

364 *Yakus v. United States*, 321 U.S. 414, 423 (1944).

365 The Court made clear that *Yakus* was different from the only occasion in the Court’s history that it struck down a law on nondelegation grounds: the Emergency Price Control Act vested lawmaking authority in a government agency, in contrast to the delegation of lawmaking authority to private groups that was invalidated in *Schechter Poultry*. See *id.* at 424.

366 See *id.* at 426–27.

B. *The APA's Deep Compromise and the Delegation Doctrine*

The super-strong version of the major questions doctrine is best explained or justified as the Court's effort to give some teeth to an "underenforced" constitutional norm, namely, a strong "nondelegation" doctrine.³⁶⁷ This justification is inadequate. To begin with, it is hotly debated whether there is a constitutional "nondelegation" doctrine that has any bite, even if fully "enforced." Nicholas Bagley and Julian Mortensen maintain that several Framers of the Constitution of 1789 that Congress could not alienate legislative authority (i.e., give it away permanently) but could delegate it to other government organs and officials, including the President.³⁶⁸ And, they add, the post-1789 Congresses repeatedly delegated lawmaking authority to the executive branch, with few or no guardrails.³⁶⁹ To the contrary, Ilan Wurman argues that James Madison and the other Framers believed that Congress did not have unlimited discretion to delegate its lawmaking authority and that the Constitution as originally understood required Congress to decide "important" questions.³⁷⁰ In the most thorough analysis to date, however, Nicholas Parrillo demonstrates that, whatever their abstract views, the Framing generation approved large-scale delegation in practice, specifically in federal real estate tax legislation.³⁷¹

It appears likely that the Framers had no objection to congressional delegation of extensive authority to executive branch officials to set forth binding rules to implement statutory purposes. What limits does a potential "nondelegation" doctrine impose on Congress? And should courts enforce such limits? The leading case was and remains *Hampton v. United States*,³⁷² where Chief Justice Taft upheld a broad delegation of lawmaking power; his opinion reasoned that Congress was not giving away "legislative" authority so long as the delegating statute set forth an "intelligible principle" for the administrators to apply.³⁷³

367 See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 171–77 (2010) (relying on William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992)); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).

368 See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 312–13 (2021).

369 See *id.* at 332–49.

370 See Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1493–94, 1504–08 (2021).

371 See Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1302 (2021).

372 276 U.S. 394 (1928).

373 *Id.* at 407–09.

Reviewing more than 2000 cases over the entire history of the country, Keith Whittington and Jason Iuliano have documented that “there was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power.”³⁷⁴

The Whittington-Iuliano finding would not have surprised the pre-APA Congress. On the eve of the Great Depression, staff for the Republican-controlled Senate reviewed the cases in a thorough document now known as the “Turney Memo.”³⁷⁵ Reasoning that the Air Commerce Act of 1926’s delegation of broad rulemaking authority was easily constitutional,³⁷⁶ the Turney Memo set forth this accepted view of the nondelegation doctrine:

If it would be too arduous for Congress to work out all the details, and if the executive officer has a special competence in the field, it is probable that the delegation to him of exceedingly broad powers will be upheld as a mere administrative filling up the details in the execution of a clear Congressional policy.³⁷⁷

As understood by both Congress and the Supreme Court, and presumably by Presidents of both parties, the operative requirement of the nondelegation doctrine was that when Congress delegates lawmaking authority to executive branch officials, it is obliged to provide a principle or policy to guide those officials to implement the statute as Congress designed it.

This bipartisan consensus reflected in the Turney Memo came under pressure during the New Deal Congresses, which delegated lawmaking authority on a larger scale than before, and the New Deal agencies created regulatory regimes that had “vast social and political significance,” as they reshaped the market for stocks and bonds, labor relations, and public finance.³⁷⁸ In *Schechter Poultry*, a unanimous Court (pro-New Deal liberals as well as anti-New Deal conservatives) had ruled that delegation of lawmaking authority to private associations, with unguided review by the President, was beyond the power of

374 Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381 (2017).

375 See Beau J. Baumann, *The Turney Memo*, 97 NOTRE DAME L. REV. REFLECTION 170, 171–72 (2022) (analyzing and reprinting the memo).

376 See Memorandum from C.E. Turney, Off. of Legis. Couns. of the U.S. Senate, to the U.S. Senate (July 1, 1929), *reprinted in* Baumann, *supra* note 375, at 176, 186.

377 *Id.*

378 GRISINGER, *supra* note 10, at 1–3; cf. Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH L. REV. 399, 404–05 (2007) (noting that historians “have long acknowledged that the rise of the federal administrative state during the New Deal was another crucial and arguably preeminent component of the modern legal and political order”).

Congress to delegate.³⁷⁹ Before *Schechter Poultry*, the ABA had assailed the New Deal for excessive delegation of power to administrators to infringe on Americans' property and liberties.³⁸⁰ But the ABA's objections were mainly to delegation of judicial authority, not legislative authority: the main virtue of agencies, the ABA opined in 1934, was the "exercise of legislative functions, including formation of rules and regulations by the bodies of experts, rather than in their judicial functions."³⁸¹ Consistent with that stance, the ABA proposed legislation to create a court to handle administrative appeals.³⁸² That legislation went nowhere, and even the ABA-drafted Walter-Logan Bill was lost to the presidential veto in 1940.³⁸³

Colonel McGuire and Dean Pound, the chairs of the ABA's Administrative Procedure Committee from 1935 to 1941, voiced broader objections to the suddenly expansive agency authority.³⁸⁴ Reflecting the outrage of private property and business interests, they considered the arbitrary exercise of agency power tyrannical.³⁸⁵ Within the ABA, there was broad frustration for the lack of transparency, consistency, and due process in agency processes—and it is those concerns for which the ABA representatives on the Attorney General's Committee (Vanderbilt and McFarland) found common ground with the New Deal representatives (such as Biddle).³⁸⁶ In 1941, McFarland replaced McGuire as chair of the ABA's Committee, which was reconstituted with younger men who were academics, judges, and practical lawyers.³⁸⁷ In 1943–1944, McFarland's committee accepted the fact that the "impact of administrative regulation has vastly increased both in degree and in scope" as a result of the war mobilization, but strenuously objected to the lack of notice, regularized procedures, and consistency in public administration.³⁸⁸ These observations were con-

379 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935).

380 See *Lawyers Say NRA Undermines Bench*, N.Y. TIMES, Aug. 27, 1934, at 3.

381 *Id.*

382 See *Urges New Court for Federal Bodies*, N.Y. TIMES, July 27, 1936, at 1.

383 See *supra* note 74 and accompanying text.

384 See Shepherd, *supra* note 19, at 1590–92.

385 *Id.* (documenting McGuire and Pound's likening of strong administrative agencies to Soviet dictatorships).

386 *Id.* at 1632–36 (noting the commonalities between the conservative and liberal views in the Attorney General's report).

387 Compare *Report of the Special Committee on Administrative Law*, 67 ANN. REP. A.B.A. 226, 226–27 (1942), with *Report of the Special Committee on Administrative Law*, 66 ANN. REP. A.B.A. 439, 454 (1941) (reflecting the replacement of O.R. McGuire, Walter F. Dodd, Eugene L. Garey, and W.W. Montgomery, Jr., with Carl McFarland, Ugo Carusi, Ralph M. Hoyt, and Ashley Sellers).

388 See *Report of the Special Committee on Administrative Law*, 68 ANN. REP. A.B.A. 249, 249, 249–51 (1943).

sistent with the analyses provided by the Attorney General's Committee (on which McFarland and Vanderbilt served). In its *Final Report*, the Attorney General's Committee explained how agencies "formulat[ed] . . . new policies" in rulemaking.³⁸⁹ The most important agency "choices of policy" involve "the proper balancing of objectives—safety of transportation as against minimizing the expenditures of transportation companies; conformity to the idea of consumers as against freedom for manufacturers to follow practices for their own choosing; and the like—or to a choice of methods to achieve given objectives."³⁹⁰

All participants in both the ABA's and Attorney General's committees agreed with the legality of large-scale delegation of lawmaking authority to agencies, including authority to handle issues that had a large social or economic impact. No statute in American history has had as large an impact on the economy as the Emergency Price Control Act of 1942,³⁹¹ which established the OPA and vested it with broad lawmaking authority over prices and rents and with authority to impose rationing of scarce commodities.³⁹² In 1944, the Supreme Court upheld that delegation in *Yakus v. United States*.³⁹³ The opinion for the Court was delivered by Chief Justice Stone (Coolidge's Attorney General, whom he appointed to the Court): "The standards prescribed by the present Act . . . are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards."³⁹⁴ Hence, the Court was "unable to find in them an unauthorized delegation of legislative power."³⁹⁵ One Justice dissented from this holding, based on the argument that the statutory standards imposed no realistic limit on administrative discretion.³⁹⁶ Not a single Justice considered the "vast" economic impact of the delegation remotely relevant to the constitutional issue.

The deep compromise in the APA was that it was constitutional for Congress to delegate broad rulemaking authority to agencies to regulate large portions of the economy and society (*Hampton/Yakus*), so long as Congress provided a standard or principle that public comments could address and a reviewing court could apply to constrain

389 1941 ATTORNEY GENERAL REPORT, *supra* note 118, at 117.

390 *Id.*

391 Emergency Price Control Act of 1942, 50 U.S.C. app § 901.

392 *See supra* note 360 and accompanying text.

393 321 U.S. 414 (1944).

394 *Id.* at 426.

395 *Id.*

396 *See id.* at 448–52 (Roberts, J., dissenting). Two other Justices dissented from the procedural holding. *Id.* at 460–61, 489 (Rutledge, J., dissenting).

agency discretion. Just before the APA's enactment, a former official of the Chamber of Commerce put it simply: "One thing seems certain: The average citizen may look forward to federal regulation 'from the cradle to the grave.' . . . The hope is that something may soon be done to make administrative law consistent, reasonable and, to the fullest possible extent, uniform in procedure."³⁹⁷

If Justice Gorsuch wants to create an unprecedented version of the nondelegation doctrine, he not only has to explain away a lot of original meaning (especially the Parrillo evidence) and two centuries of caselaw that culminated in *Hampton* and *Yakus*. Indeed, he would have to overrule *Hampton* and *Yakus* and many other constitutional precedents. The Supreme Court has repeatedly upheld *stare decisis* for such precedents and has cautioned that mere error does not justify an overruling.³⁹⁸ Specifically, the Court considers (1) whether "the prior decision [was] not just wrong, but grievously or egregiously wrong," (2) whether "the prior decision caused significant negative jurisprudential or real-world consequences," and (3) whether "overruling the prior decision [would] unduly upset reliance interests."³⁹⁹ Even under his law office history standards, it will be hard for Justice Gorsuch to argue that *Hampton* and *Yakus* are "egregiously" wrong. And the reliance interests are overwhelming: not only did the APA, a super-statute, rely on the settled understanding of the delegation doctrine, but dozens of subsequent statutes have relied on the APA and that settled understanding.

C. *The APA's Deep Compromise and the Major Questions Doctrine*

Justice Gorsuch surely believes that the nondelegation doctrine is radically "underenforced,"⁴⁰⁰ but precedent repeatedly confirmed and applied by both the Supreme Court and Congress (APA) establishes that the constitutional doctrine only requires Congress to set forth guardrails that a reviewing court can apply to agency lawmaking. That is the doctrine. The super-strong clear statement rule the Supreme Court applied in the OSHA case was not applying the doctrine at all, as the OSHA statute provided clear standards for the agency, which consulted experts and provided unimpeachable fact-based reasoning

397 Henry P. Fowler, *All Motor, No Brakes*, NATION'S BUS., June 1944, at 27, 27.

398 If you care about original meaning, the "judicial Power" in Article III is premised upon courts adhering to precedents. See THE FEDERALIST NO. 78, *supra* note 9, at 391 (Alexander Hamilton).

399 *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part); see also *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014); *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986).

400 See *supra* note 367 and accompanying text.

to support the COVID-emergency measure that carried out the statutory purpose (i.e., protect workers against dangers to their health).⁴⁰¹ The Court's rationalization that OSHA is nothing more than a workplace "safety" agency belies its actual title (Occupational Safety and Health Administration) and ignores the fact that a workplace where one is exposed to a potentially fatal disease is neither "safe" nor conducive to "health."⁴⁰² Besides, the huge shift to working from home during the COVID emergency expanded America's workplace away from traditional places.

By this point, it goes without saying that the APA's deep compromise did not empower the Supreme Court to create clear statement rules to enforce the constitutional nondelegation doctrine way beyond what the Constitution has long been read to require. The cogency of this point receives further support from the post-APA congressional deliberation on judicial deference. Recall, from our earlier discussion, that the Bumpers Amendment sought to reset the APA balance and remove what its supporters believed were unfair agency advantages in judicial review proceedings.⁴⁰³ The evolution of the Bumpers Amendment is significant for appreciating the illegitimacy of the Roberts Court's version of the major questions doctrine.

The first iteration of the Bumpers Amendment was a 1975 bill that would not only have prohibited any "presumption that any rule or regulation of any agency is valid," but would have instantiated the reverse default rule: no challenged regulation could be upheld on judicial review unless its "validity [was] clearly and convincingly shown."⁴⁰⁴ The Amendment's reverse presumption earned strong opposition from the Ford White House and Justice Department and from liberals who had supported legislation that had just vested discretion in the EPA and OSHA to impose standards for protecting clean air, clean water, and safe/healthy workplaces.⁴⁰⁵

The Carter White House and Justice Department were even more adamantly opposed to subsequent versions of the Bumpers Amendment.⁴⁰⁶ In negotiations with the White House, Senator Bumpers argued that "agencies should be restricted to the authority *clearly* granted

401 See Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 670 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

402 See *id.* at 665.

403 See *supra* notes 318–20 and accompanying text.

404 See S. 2408, 94th Cong. (1975); see also 121 CONG. REC. 29,957 (1975).

405 Elinson & Gould, *supra* note 315, at 497–98.

406 *Id.* at 501.

them by Congress.”⁴⁰⁷ This was never going to be acceptable to the Carter Administration and liberal legislators supporting regulation (all members of the sponsor’s own party), so Bumpers agreed to narrow his bill in order to have some chance of enactment.⁴⁰⁸ Specifically, Bumpers agreed to eliminate the presumption against agency interpretations and to require judges simply to follow the plain meaning and legislative intent of the law.⁴⁰⁹

The version of the Bumpers Amendment that was reported by the House Judiciary Committee in September 1980 and then introduced in the Senate reflected significant concessions by Senator Bumpers. The September 1980 version of the amendment would have amended the APA to require that reviewing courts must “independently decide all relevant questions of law;”⁴¹⁰ moreover, the bill stipulated that the court shall require that action by the agency should be

within the scope of agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent. In making determinations on other questions of law, as distinguished from questions of fact or discretion, under this section, the court shall not accord any presumption in favor of or against agency action.⁴¹¹

Notice the logic of the amendment. Courts should decide questions of law “independently,” but the amendment would have twice vetoed any kind of judicial thumb on the scales against the agency: the agency’s jurisdiction should be decided only on the basis of the statutory text and legislative intent, and all other issues of law should be decided with no presumption either for or against the agency. This modified version of the Bumpers Amendment and its similar 1982 iteration were supported by the ABA and legislators from both parties in Congress but were successfully opposed by the DOJ and consumer groups.⁴¹²

One lesson from the near success of the Bumpers Amendment is that even critics of OSHA and the EPA—the very agencies the Roberts Court undermined in the 2021 Term—conceded that the APA baseline could not, and perhaps should not, be changed to create a higher

407 Letter from Senator Bumpers to Stuart E. Eizenstat, Assistant to the President for Domestic Affs. and Pol’y (Aug. 27, 1980), *as excerpted in* O’Reilly, *supra* note 315, at 766, 773–76 (emphasis added by source).

408 Elinson & Gould, *supra* note 315, at 501–03.

409 See O’Reilly, *supra* note 315, at 777.

410 H.R. 3263, 96th Cong. § 207(c) (1979); see also O’Reilly, *supra* note 315, at 768 (quoting and discussing the amendment).

411 H.R. 3263, § 207(c).

412 Elinson & Gould, *supra* note 315, at 504, 506–08.

hurdle for an agency applying statutory directives to new situations, including the workplace health emergency addressed in OSHA's COVID mandate. Even more clearly than the APA, the Bumpers Amendment as renegotiated by Senator Bumpers bristles with antipathy for any kind of judicial thumb on the scales as agency interpretations are evaluated.

There is a broader point. The OSHA COVID case, in particular, reflects a Supreme Court majority that is conducting a guerilla campaign to undermine the administrative state that was entrenched by the APA's deep compromise. That is a big move on the part of the Supreme Court, with potentially vast economic and political consequences. OSHA's big move was authorized by the plain meaning of the statutory text, was consistent with the health purpose of the statute, and was carried out by executive branch officials accountable to the public, with the President himself taking responsibility. What authorized or legitimated the Roberts Court's big move? Neither the Constitution nor the APA. The Bumpers Amendment as drafted before September 1980 might have provided some justification for a mild clear statement rule—but Congress refused to make that big move, and even Senator Bumpers abandoned that big of a move.

There was not even a critical election that might justify some adjustment in the APA's deep compromise.⁴¹³ Realistically, the empowerment of a Supreme Court majority attacking the APA's deep compromise consists of one Justice appointed by the first President Bush, two Justices appointed by the second President Bush (himself elected by a one-vote margin in *Bush v. Gore*),⁴¹⁴ one Justice appointed by President Trump after the GOP Senate refused to consider President Obama's nominee in an election year, one Justice appointed by President Trump under normal circumstances, and one Justice appointed by President Trump weeks before he was turned out of office in 2020. However one evaluates the legitimacy of the political construction of the new Roberts Court, it is not an assembly of actors empowered by any serious democratic mandate.

CONCLUSION

We do not intend our account of the APA to be excessively celebratory. As Evan Bernick argues in his contribution to this Symposium,

413 The 1964 and 1980 elections empowered liberal regulators and conservative deregulators, respectively.

414 531 U.S. 98 (2000) (per curiam).

the APA reflects a pluralist retreat from the redistributive goals sometimes advanced by the early New Deal.⁴¹⁵ And subsequent critics of notice-and-comment rulemaking demonstrate that it falls short of its democratic potential.⁴¹⁶ In our view, however, that is not sufficient reason to denigrate the APA's achievement, which is substantial. More important, the APA is the chief legal firewall against efforts by polluters, science deniers, and partisan demagogues to destroy agency efforts to protect the entire public from climate disaster, pandemics, and other national emergencies. Pluralism is not the biggest crisis facing the country; instead, it is rent seeking by partisan and corporate interests that poses a threat, and the deep compromise reflected in the APA looks pretty good in that light.

We agree with the critics, that current administrative common law or originalism is not the best that progressives ought to settle for. Properly interpreted, the APA provides a framework for administrative constitutionalism that advances the public interest in consumer law (the CFPB), the environment (EPA), health and safety (OHSAs, HHS), and so forth. But elections matter. Lack of effective progressive mobilization in 2016 set back administrative constitutionalism for years to come. Our understanding of the APA creates space for progressive administration but cannot guarantee it.

415 See Evan D. Bernick, *Movement Administrative Procedure*, 98 NOTRE DAME L. REV. 2177, 2191–92 (2023).

416 See, e.g., Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128 (2006) (finding that “business commenters, but not nonbusiness commenters, hold important influence over the content of final rules”); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 151 (2011) (finding “that at least some publicly important rules that emerge from the regulatory state may be influenced heavily by regulated parties, with little to no counterpressure from the public interest”); Andrei Kirilenko, Shawn Mankad & George Michailidis, *Do U.S. Financial Regulators Listen to the Public? Testing the Regulatory Process with the RegRank Algorithm* (June 30, 2014) (unpublished manuscript) (manuscript at 1) (finding that the Commodity Futures Trading Commission mostly adjusts final rules “[i]n response to comments from the regulated financial industry”). But see Gabriel Scheffler, *Failure to Capture: Why Business Does Not Control the Rulemaking Process*, 79 MD. L. REV. 700 (2020) (finding that, in the case of one major regulation promulgated by the Department of Transportation, business influence on the rule was limited).

