



6-2023

## Movement Administrative Procedure

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### Recommended Citation

Evan D. Bernick, *Movement Administrative Procedure*, 98 Notre Dame L. Rev. 2177 ().  
Available at: <https://scholarship.law.nd.edu/ndlr/vol98/iss5/10>

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# MOVEMENT ADMINISTRATIVE PROCEDURE

*Evan D. Bernick\**

## INTRODUCITON

On April 4, 1946, *The Potters Herald*, a Thursday weekly dedicated to labor and union news, published an editorial warning readers of pending legislation “which may seriously affect labor” despite not containing a “single word about labor” in its text.<sup>1</sup> This legislation would empower “anti-labor judges” to overturn decisions by the National Labor Relations Board.<sup>2</sup> Despite its neutral appearance, it was in reality designed to “kick [labor and the NLRB] in the teeth” and would result in “a field day for the corporation lawyers.”<sup>3</sup>

The complained-of legislation was the Administrative Procedure Act of 1946 (APA). From today’s vantage point, the editorial at first seems odd, even histrionic. The APA was unanimously voted into law and has since its enactment operated as a “subconstitution”<sup>4</sup> for the modern administrative state. It has been described as having no particular ideological valence.<sup>5</sup>

But wait a bit. The APA has attracted an increasing amount of left legal scrutiny in recent years.<sup>6</sup> A growing body of evidence suggests

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1 *The McCarran-Summers Bill*, POTTERS HERALD (E. Liverpool, Ohio), April 4, 1946, at 4.

2 *Id.*

3 *Id.*

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

5 See, e.g., Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 401 (2015).

6 See generally Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019); Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616 (2019); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718 (2016) (reviewing DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014)); David Fontana, Essay, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74

that the regulatory process is dominated by business interests.<sup>7</sup> More generally, left legal scholars have trained a critical eye on claims about the law's ideological neutrality—and that of administrative law in particular.<sup>8</sup> And left efforts to use the administrative state to address interrelated contemporary crises of economic precarity, systemic racial inequality, and environmental destruction must confront the APA. Accordingly, the APA's history, text, and doctrine is overdue for hard-look review that takes seriously the possibility that—as the editorial urged—its appearance of neutrality deceives. This Article gives the APA a hard look through the lens of movement law—an approach to legal scholarship that is informed by and supportive of left social movements that seek to transform the political, economic, and social status quo.<sup>9</sup>

Part I summarizes the conventional account of the APA and ascendant left criticisms of its content and doctrine. It then describes movement law's substantive and methodological commitments, as well as how movement-law scholars have investigated the history of social movement activity around the administrative state and focused attention on the APA.

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FORDHAM L. REV. 81 (2005); ELIZABETH FISHER & SIDNEY A. SHAPIRO, *ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW* (2020).

7 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, 130–31 (2006); 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, 102 (2011).

8 See generally Corinne Blalock, *Introduction: Law and the Critique of Capitalism*, 12 S. ATL. Q. 223 (2022); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy: Response to the Columbia Law Review's 2018 Symposium*, 118 COLUM. L. REV. ONLINE 179 (2018); K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017).

9 See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021). For a sampling of this literature, see, for example, Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631 (2022); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 811–13 (2021); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 577–86 (2021); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1845–76 (2019); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877 (2019); Sameer M. Ashar & Catherine L. Fisk, *Democratic Norms and Governance Experimentalism in Worker Centers*, 82 LAW & CONTEMP. PROBS., no. 3, 2019, at 141; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464 (2017); V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 749–58, 792–802; Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147, 161–66 (2016).

Part II provides an account of the political economy of the APA. By “political economy” I mean to situate this account within a resurgent scholarly tradition that rejects a strict separation between “politics” and “the economy” and explores issues of power, wealth distribution, and democracy.<sup>10</sup> I detail how the APA was shaped by a conception of democracy as interest-group competition, fear of communism, a southern congressional veto on social and economic legislation from which people of color might have benefited, and the elite bar’s values and interests. It was conceived during liberal retreat from early New Deal efforts to fundamentally reshape the socioeconomic order, and its text and structure reflect its origins.

Part III contends that the APA has been judicially implemented in ways that are broadly consistent with its origins. Part IV proposes guiding principles for an approach to administrative procedure that is fit to meet present crises and calls for our administrative constitution to be transformed in accordance with them.

## I. THE ADMINISTRATIVE CONSTITUTION AND ITS CRITICS

In *Wong Yang Sung v. McGrath*,<sup>11</sup> Justice Robert Jackson wrote of the APA that it “represents a long period of study and strife . . . settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.”<sup>12</sup> In this presentation the APA appears as the product of careful deliberation, represented a compromise, and established a settlement that was ideologically neutral. Justice Jackson’s origin story has been perpetuated through the Supreme Court’s caselaw,<sup>13</sup> but it has also come under criticism from left legal scholars.

### A. *The Official Story*

Justice Jackson depicts the APA as a carefully considered product of nearly two decades of study that was animated by bipartisan “[c]oncern over administrative impartiality.”<sup>14</sup> In 1937, President Franklin Delano Roosevelt convened a Committee on Administrative Management that recommended a separation of investigative and prosecutorial functions within agencies;<sup>15</sup> two years later, Roosevelt directed the Attorney General to create a Committee on Administrative Procedure “to review the entire administrative process . . . and to

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10 See Britton-Purdy et al., *supra* note 8, at 1784, 1792.

11 339 U.S. 33 (1950).

12 See *id.* at 36, 40.

13 See, e.g., *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 102 (2015).

14 See *Wong Yang Sung*, 339 U.S. at 37.

15 *Id.* at 38.

recommend improvements, including the suggestion of any needed legislation.”<sup>16</sup> On Justice Jackson’s account, Roosevelt’s 1940 veto of a “comprehensive and rigid prescription of standardized procedures for administrative agencies”—known as the Walter-Logan Bill—reflected Roosevelt’s desire to enable the Committee’s experts to complete their work “in this complicated field.”<sup>17</sup>

When Congress returned to procedural reform after World War II, Justice Jackson describes its work as “painstaking,” particularly in its “consideration and hearing . . . of agency interests.”<sup>18</sup> The proposed APA was accompanied by a favorable report from the Department of Justice that noted revisions made in response to agency criticisms.<sup>19</sup> The overall impression Justice Jackson conveys is one of utmost care to balance competing interests.

Justice Jackson’s account of the APA begins with controversy and ends with compromise. “Congress” and “[t]he Executive Branch” became concerned about the administrative state’s growth and disorganization and demanded reform.<sup>20</sup> Justice Jackson contrasts the APA with the Walter-Logan Bill by noting the consultation of agency opinions during the APA’s framing, as well as revisions in response to those criticisms.<sup>21</sup> Finally, Justice Jackson notes that Democratic President Harry Truman signed the APA into law after “[i]t passed both Houses without opposition.”<sup>22</sup>

At points Justice Jackson’s account comes close to suggesting a congressional *consensus* concerning not only the need for but the substance of administrative reform. Subsequent scholarship has converged on the position that no such consensus existed; rather, the APA emerged from roiling New Deal politics in which the opposing sides fought to exhaustion.<sup>23</sup> The ascendant view is that Justice Jackson’s allusions to “hard-fought *contentions*” paint a more accurate picture.<sup>24</sup>

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16 *Id.* at 38–39.

17 *Id.* at 39 (quoting 86 CONG. REC. 13,943 (1940) (veto message of President Roosevelt of the Walter-Logan Bill)).

18 *See id.* at 40.

19 *Id.*

20 *See id.* at 37–38.

21 *See id.* at 39–40.

22 *Id.* at 40.

23 A widely cited presentation of this view is George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996).

24 *Wong Yang Sung*, 339 U.S. at 40 (emphasis added); *see, e.g.*, Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452–54 (1986); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON., & ORG. 180 (1999). *But see* Jeremy Rabkin, *The Origins of the APA: Misremembered and Forgotten Views*, 28 GEO. MASON L. REV. 547, 552–60 (2021) (arguing, against the conventional wisdom, that the APA was the product of a bipartisan consensus concerning the rule of law).

Finally, Justice Jackson depicts the APA as ideologically neutral. A response to concerns about “arbitrary” and “biased” agency decisionmaking, the APA was designed to promote reasonable, impartial administration. Who could possibly be *against* that? Further, if the APA was not in fact neutral as to the value-laden questions that divided proponents and opponents of the New Deal, how could it have passed without opposition at all?

Consider Cass Sunstein and Adrian Vermeule’s criticisms of what they term “libertarian administrative law”—a D.C.-Circuit-spear-headed “attempt to compensate for perceived departures during the New Deal from the baseline of the original constitutional order” by “us[ing] administrative law to push and sometimes shove policy in libertarian directions.”<sup>25</sup> Sunstein and Vermeule contend that libertarian administrative law is “in grave tension with the foundations of the APA and of administrative law”<sup>26</sup> because those foundations have *no* “identifiable ideological valence.”<sup>27</sup>

Sunstein and Vermeule’s insistence that the APA and administrative common law is not organized by “any kind of politicized master principle” is mainstream, and ideological neutrality has been elsewhere used to legitimate the statute.<sup>28</sup> Thus, Daniel Ernst casts the APA as an expression of an “emerging consensus” among lawyers concerning the procedures necessary to keep the regulatory state within the bounds of the rule of law.<sup>29</sup> He contends that the APA constitutes a rejection of extreme alternatives on both sides of the New Deal.<sup>30</sup>

### B. Criticism

The official story has increasingly come under challenge. Criticisms have centered on the role of the American Bar Association (ABA) in brokering the purported compromise, the APA’s place in a postwar political era characterized by retreat from early New Deal commitments, and the ways in which the APA’s processes have been dominated in practice by concentrated business interests.

In a review of Daniel Ernst’s *Tocqueville’s Nightmare*, Jeremy Kessler contends that Ernst’s account of a lawyerly consensus around administrative reform is more disconcerting than reassuring.<sup>31</sup> If Ernst is

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25 Sunstein & Vermeule, *supra* note 5, at 398–99 (footnote omitted).

26 *Id.* at 400.

27 *See id.* at 401.

28 *See id.*

29 *See* ERNST, *supra* note 6, at 125.

30 *See id.* at 144 (contending that “the builders of the new administrative state did not succumb to alien ideologies; rather, they sought to preserve, not renounce, fundamental principles of American government”).

31 *See* Kessler, *supra* note 6, at 724–25.

correct to view the APA “mainly as a ‘codification’ of the earlier ‘entente’ between courts and agencies that the legal profession had brokered by 1940,” it does not follow that “anyone *else* was particularly happy about these lawyers’ architectural choices.”<sup>32</sup> The result would certainly not have been viewed as a compromise by “more left-wing political, economic, and legal voices” who “viewed the bar . . . as a major threat to a socially and economically egalitarian society.”<sup>33</sup>

Other scholars have situated the APA alongside contemporaneous legislation to question its ideological neutrality. Kate Andrias has detailed how, well into the 1940s, “[s]ignificant elements of the labor movement, along with Progressive reformers and allies in Congress and the executive branch,” favored an approach to administrative decisionmaking that selectively empowered particular representative organizations.<sup>34</sup> The Fair Labor Standards Act originally created tripartite industry committees through which employers, unions, and the public would set minimum wages on an industry-by-industry basis with a statutorily defined range, thus “embod[ying] a commitment to empowering worker organizations in the political economy.”<sup>35</sup>

Not so the APA. The APA’s notice-and-comment rulemaking process requires unions to “compete with business organizations and economic elites” on formally equal participatory footing and does nothing to account for the latter’s “disproportionate ability to engage the governing process at every level.”<sup>36</sup> The proximity to the APA of the 1947 Taft-Hartley Act, which eliminated industry committees and guaranteed to employees the right to refrain from joining unions, “not only underscores the contested origins of the lawyerly, technocratic, and liberal pluralistic approach to workplace administration; it also undermines the contemporary regime’s claim to neutrality.”<sup>37</sup>

The administrative process is dominated by concentrated business interests. Analyzing over 30 rules and over 1,700 comments from 1994 to 2001, Jason Webb Yackee and Susan Webb Yackee found not only that business commentators had a greater influence than nonbusiness commentators over the content of rules but that their influence grows as their proportion increases.<sup>38</sup> Part of the problem is that most commentators *are* business commentators. Wendy Wagner, Katherine Barnes, and Lisa Peters found in their study of ninety EPA rules governing the release of air toxins that business commentators submitted

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32 *Id.* at 723 n.32, 765 (quoting ERNST, *supra* note 6, at 7, 137).

33 *Id.* at 733–34.

34 *See* Andrias, *supra* note 6, at 707.

35 *Id.* at 625.

36 *Id.* at 639.

37 *Id.* at 708.

38 *See* Yackee & Yackee, *supra* note 7, at 128.

81% of all the comments.<sup>39</sup> They further determined that “most of the significant changes made to the rules (83%) weakened them in some way, usually by eliminating some requirement that EPA originally suggested in the proposed rule.”<sup>40</sup>

Nicholas Bagley submits that administrative law doctrine implementing the APA is partially to blame for business domination of the regulatory process.<sup>41</sup> For instance, the requirement that a final rule be a “logical outgrowth” of a proposed rule has “shifted much of the debate over agency rules to the pre-notice stage, where industry has an even more sizeable advantage.”<sup>42</sup> Similarly, the requirement that agencies respond to “vital comments”<sup>43</sup> tends to the advantage of business interests that have the resources and incentive to “swamp[] agencies with hundreds of comments containing thousands of pages of unstructured, highly technical information.”<sup>44</sup> Agencies may conclude that it is not worth the resources to respond and face litigation and instead “cave on key industry demands.”<sup>45</sup>

Bagley seeks to persuade left-liberals to reconsider their attachment to a “dogma” which holds that “strict procedural rules are both essential to agency legitimacy and necessary to guarantee public accountability.”<sup>46</sup> Bagley calls for the “reviv[al] [of] a strain of thinking that connects the legitimacy of the administrative state to its ability to satisfy public aspirations: to enable a fairer distribution of wealth and political power; to protect us from the predations of private corporations; and to minimize risks to our health, financial security, and livelihoods.”<sup>47</sup>

Bagley and Andrias’s focus on the distribution of economic power and its relation to political power situates them within an ascendant left-legal discourse of *law and political economy* (LPE).<sup>48</sup> Although “political economy” later came to be associated with the application of rational-choice models to political decisionmaking, from the eighteenth to the early twentieth centuries it encompassed a range of inquiries

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39 See Wagner et al., *supra* note 7, at 128.

40 *Id.* at 130–31.

41 See Bagley, *supra* note 6, at 393.

42 *Id.* at 395.

43 *Id.* at 353; see also *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

44 Bagley, *supra* note 6, at 394.

45 *Id.*

46 *Id.* at 400.

47 *Id.* at 400–01.

48 See sources cited *supra* note 8.



that are now regarded as the province of distinct disciplines.<sup>49</sup> Political economists like Adam Smith, David Ricardo, and Karl Marx studied the distribution of income and wealth, the balance of power between labor and capital, the relationship between income, wealth, and political power, and the way in which government policy should address such matters.<sup>50</sup> LPE scholars have revived this tradition, studying the way which the law answers distributional questions and critiquing official stories concerning legal neutrality. In particular, they have focused on how the law and legal thought and scholarship has shaped and been shaped by neoliberalism—a mid-twentieth-century shift toward a state that is primarily dedicated to promoting the operation of market activity, valorizes market competition as an indirect means to just allocation, and tethers state legitimacy to its support of the efficient functioning of the market and its facilitation of participation in entrepreneurial activity.<sup>51</sup> Andrias has in separate writings and in works coauthored with Benjamin Sachs called for “lawyers, policymakers, and legal scholars” to give “attention to the actual reality of how power is distributed as well as normative judgments and real struggle about where and by whom power should be held.”<sup>52</sup>

Andrias focuses on social movements “that have opposed, and are opposing, hierarchies of power” as sources of information and inspiration about how to “actually achieve a more egalitarian distribution of power.”<sup>53</sup> In particular, she studies “[w]orkers seeking higher minimum wages, new scheduling and benefit laws, limits on private domination, and new protection for those long or newly excluded from labor and employment regimes (think restaurant and domestic workers or Uber drivers).”<sup>54</sup> Both form and substance of a resurgent labor movement warrant attention. Not only are these workers “attempting to shift the distribution of power in politics and governance, as well as in the economy” but they are doing so by “pushing against doctrine that restricts their ability to act collectively through strikes, protest, and

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49 See Britton-Purdy et al., *supra* note 8, at 1792; see also Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 402 (1988) (stating that “[m]odern political economy was invented by Adam Smith in the 1770s”).

50 See JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 1–2 (2022).

51 See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 1, 2–3; Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 71, 86–88.

52 See, e.g., Kate Andrias, Response, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1, 8 (2016) [hereinafter Andrias, *Confronting Power in Public Law*]; Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015); Andrias & Sachs, *supra* note 9.

53 Andrias, *Confronting Power in Public Law*, *supra* note 52, at 7.

54 *Id.*

other concerted action while developing new structures for participation in policymaking.”<sup>55</sup>

Andrias’s ends and means situate her in what Amna Akbar, Sameer Ashar, and Jocelyn Simonson call “movement law.”<sup>56</sup> Movement-law scholars forthrightly embrace “visions of liberation, solidarity, and equality” and “work[] alongside grassroots social movements” that seek to realize them.<sup>57</sup> But Andrias’s attention is primarily directed at the Fair Labor Standards Act, not the APA.<sup>58</sup> Bijal Shah has observed that administrative law “lacks a comprehensive examination of its own contribution to subordination and marginalization[,]” and that the APA has yet to be “fully interrogate[d]” from a critical perspective that centers marginalized people.<sup>59</sup> Movement law is well-positioned, not merely to contribute to the growing skepticism of the APA’s official story, but to provide an agenda for administrative procedural reform.

## II. MOVEMENT LAW AND THE ADMINISTRATIVE STATE

### A. *Movement Law, In General*

Movement law recognizes the role of social movements in shaping U.S. law and politics and is committed to studying and working alongside *particular* social movements:

[T]hose that aim to redistribute life chances and resources; those that aim to end our reliance on prisons and police to solve political, economic, and social problems; those that confront systems of white supremacy, anti-Blackness, capitalism, ableism, cishnormativity, and heteropatriarchy; and those that struggle to fundamentally transform state and society.<sup>60</sup>

Like the movements with which it is in solidarity, it is “invested in disrupting the status quo and transforming political, economic, and social relations.”<sup>61</sup>

The call for movement law was issued in the midst of the COVID-19 pandemic, which “underlined the failures of the neoliberal social contract, particularly its emphases on the individual, property, profit,

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55 *Id.*

56 *See* Akbar et al., *supra* note 9.

57 *Id.* at 871, 873.

58 *See, e.g.,* Andrias, *supra* note 6.

59 Bijal Shah, *Toward a Critical Theory of Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (July 30, 2020), <https://www.yalejreg.com/nc/toward-a-critical-theory-of-administrative-law-by-bijal-shah/> [<https://perma.cc/A5AF-2VCB>].

60 Akbar et al., *supra* note 9, at 827.

61 *See id.* at 829.

and the market economy.”<sup>62</sup> Those failures include lack of access to health care, food insecurity, vulnerability to eviction, and exposure to police violence and other forms of carceral control—daily realities under neoliberalism, exacerbated by the pandemic.<sup>63</sup> Movement-law scholars have also highlighted environmental destruction,<sup>64</sup> the theft of Native land,<sup>65</sup> the precarity experienced by undocumented immigrants,<sup>66</sup> domestic workers and workers in the “gig economy,”<sup>67</sup> and mounting student debt.<sup>68</sup> And they have lifted up movements that are “meeting the existential crises of our time with vision, scale, and infrastructure.”<sup>69</sup>

It would be a mistake to attribute a unified political theory to movement law, just as it would be a mistake to attribute a unified political theory to left social movements. But movement-law scholars share a thoroughgoing opposition to domination. They insist that every person should have the power to govern all aspects of their lives, rather than to be at the mercy of arbitrary, unchecked control by others—be the latter “state” or “private” actors.<sup>70</sup> And they insist that such power will be—as it has been and is now—denied to race-class marginalized people absent determined efforts to build and institutionalize countervailing power.<sup>71</sup>

62 *Id.* at 830.

63 *See id.* at 830–32.

64 *See, e.g.,* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001); Cinnamon P. Carlarne, *Climate Courage: Remaking Environmental Law*, 41 STAN. ENV'T L.J. 125 (2022).

65 *See, e.g.,* Blackhawk, *supra* note 9; Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 114–17 (2020).

66 *See, e.g.,* Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 659–61 (2016); Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1466–68 (2017); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1880–87 (2019).

67 *See, e.g.,* Ashar & Fisk, *supra* note 9; Dubal, *supra* note 9.

68 *See, e.g.,* Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 BUFF. L. REV. 281 (2020).

69 Akbar et al., *supra* note 9, at 825.

70 *See* K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 720 (2020); K. Sabeel Rahman, *Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, 16 CONTEMP. POL. THEORY 41, 44 (2016); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010). For elaborations of domination within neorepublican political theory, see, for example, PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997); Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, in REPUBLICANISM AND POLITICAL THEORY 83 (Cécile Laborde & John Maynor eds., 2008).

71 *See* Akbar et al., *supra* note 9, at 874 (calling for “attention to the layers of subordination that structure material realities, and a focus on movements that hope to transform both those layers and those realities”).

### B. *Movements and the APA*

The APA has only just begun to receive considered attention from a movement-centered standpoint. Sophia Lee's article, *Racial Justice and Administrative Procedure*, is the leading example, and it focuses on movements for racial justice.<sup>72</sup>

Lee contends that the APA was not designed to promote racial justice. It was drafted by the American Bar Association, an "all-white organization" that was "concern[ed] in the 1930s about the growth of administrative power during the New Deal."<sup>73</sup> Further, owing to the segregated South's stranglehold on civil-rights legislation, "[t]he [APA] would not have passed, let alone passed with Southern Democrats' support, were it seen as a tool in the Black freedom struggle."<sup>74</sup>

Lee has shown, however, that the NAACP and civil-rights allies were able to use the APA's processes to combat racial discrimination. Racial-justice advocates used formal-adjudication processes under the APA to persuade the NLRB to adopt its interpretation of labor law as prohibiting racial discrimination by companies and unions as an unfair labor practice.<sup>75</sup> They also filed complaints about discriminatory broadcasters with the FCC, shaping administrative law in the process.

Lee details the D.C. Circuit's decisions in *Office of Communication of the United Church of Christ v. FCC*.<sup>76</sup> The case arose from a challenge by civil-rights advocates to the renewal of a Mississippi television station, WLBT, that was known for racist programming.<sup>77</sup> Reverend Everett Parker of the Office of Communication of the United Church of Christ (UCC) spearheaded the opposition to WLBT's license renewal as part of a broader effort to contest racist reporting across the South.<sup>78</sup> Together with civil-rights activist and state NAACP President Aaron Henry and Reverend R.L.T. Smith, Parker contended that the broadcasters failed to give a fair presentation of race relations and petitioned to intervene in the FCC's renewal proceedings.<sup>79</sup>

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72 Sophia Z. Lee, *Racial Justice and Administrative Procedure*, 97 CHI-KENT L. REV. 161 (2022).

73 *Id.* at 166.

74 *Id.*

75 SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 42–52 (2014).

76 *Off. of Comm'n of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Off. of Comm'n of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969); see also Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 822 (2010).

77 *United Church of Christ*, 359 F.2d at 998.

78 See Sidney A. Shapiro, *United Church of Christ v. FCC: Private Attorneys General and the Rule of Law*, 58 ADMIN. L. REV. 939, 942–45 (2006).

79 *Id.*; 5 U.S.C. § 706(2) (A) (2006).

The FCC denied the petition and renewed WLBT's license for a year.<sup>80</sup> In two pivotal decisions, the D.C. Circuit held that the UCC had standing to intervene and determined that a subsequent decision to renew WLBT's license for three years was unsupported by substantial evidence.<sup>81</sup> Sidney Shapiro explains that the second decision was "foundational for the development of the 'hard look' doctrine" that is used to implement APA § 706(2)(A)'s prohibition of agency actions that are "arbitrary [or] capricious."<sup>82</sup> Reviewing the entirety of the record, the court criticized the Commission for failing to "assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee's performance of his duty to serve the public interest."<sup>83</sup> It also found evidence of "impatience with the Public Intervenors, . . . hostility toward their efforts to satisfy a surprisingly strict standard of proof, [and] plain errors in rulings and findings."<sup>84</sup> Accordingly, it ordered the Commission to start an entirely new proceeding rather than remanding the case for a third decision.

That hard-look review served racial justice in *United Church of Christ* does not demonstrate that hard-look review has on balance done so over the course of its lifespan, any more than the Supreme Court's invalidation of an ordinance prohibiting the sale of real estate across racial lines demonstrates the racial progressivity of *Lochner*-era liberty-of-contract doctrine.<sup>85</sup> The same can be said about the full spectrum of values that movement-law scholars seek to realize. Administrative power has throughout U.S. history been used to secure racial, economic, and environmental justice. It has also been used to perpetrate some of the worst injustices in the Nation's history—the recapture of freedom-seeking enslaved people and the outright kidnapping of free Black people,<sup>86</sup> the dispossession and removal of Native people from ancestral lands and the attempted erasure of their culture,<sup>87</sup> and the exclusion of Asian immigrants from the country,<sup>88</sup> to name only a few. It is by and through administrative power that noncitizens are deported from the country,<sup>89</sup> that pipelines are permitted to run through

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80 Shapiro, *supra* note 78, at 945.

81 See *United Church of Christ*, 359 F.2d 994; *United Church of Christ*, 425 F.2d 543.

82 Shapiro, *supra* note 78, at 958; 5 U.S.C. § 706(2)(A) (2006).

83 *United Church of Christ*, 425 F.2d at 548.

84 *Id.* at 550.

85 See *Buchanan v. Warley*, 245 U.S. 60 (1917).

86 See generally Farbman, *supra* note 9, 1890–95.

87 See STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY 2–5 (2010).

88 See Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1 (2002).

89 See generally Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040 (2021).

Native land,<sup>90</sup> and that SWAT teams are deployed to brutalize Black Lives Matter protestors in Portland.<sup>91</sup> Evaluating the APA from a movement-law perspective entails assessing its operation on a wholesale rather than retail basis.

### C. *Why Movement Administrative Procedure?*

An initial case for applying a movement-law lens to administrative procedure is easily summarized. Movement-law scholars seek to achieve left social transformation by drawing upon and supporting the work of left social movements. No agenda for social transformation can be realized in the United States without engagement with the federal administrative state. Administrative procedure empowers and constrains the administrative state in ways that can support and impede left social movements. Therefore, movement administrative law.

The history of left criticisms of the administrative state makes movement law's application to administrative law and the APA especially attractive. Movement-law scholars draw upon a critical legal studies tradition that includes trenchant critiques of bureaucracy as undermining left political projects.<sup>92</sup> At the same time, movement-law scholars have emphasized that the proliferation of administrative agencies in the late nineteenth and early twentieth centuries was driven in significant part by resistance to domination.<sup>93</sup> And their work is informed by critical race scholarship that broke with the critical legal studies movement in part because of the latter's neglect of the capacity of formal structures—including bureaucratic structures—to provide security for marginalized people.<sup>94</sup> So, too, is it informed by an LPE movement that has emphasized the role that “purportedly neutral and technocratic visions” of the regulatory state have played in consolidating a neoliberal political order and called for the development of “means to bring representatives of affected communities to participate in

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90 See generally NICK ESTES, *OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE* (2019).

91 See Jonathan Levinson, Conrad Wilson, James Doubek & Suzanne Nuyen, *Federal Officers Use Unmarked Vehicles To Grab People in Portland, DHS Confirms*, NAT'L PUB. RADIO (July 17, 2020, 1:04 PM), <https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland> [<https://perma.cc/PZZ6-2RPA>].

92 See, e.g., Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978).

93 See, e.g., RAHMAN, *supra* note 8, at 68–75; Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 247–54 (2021).

94 See, e.g., Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 431 (1987); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 315 (1987).

administrative decision-making, aiming at modalities of democratic voice that could meet our needs for both (a broadened conception) of expertise and for institutionalized forms of countervailing power.”<sup>95</sup> The complex, contested relationship of left politics and legal scholarship to bureaucracy and administrative law invites considered movement-law inquiry. The next Part uses the APA to begin that inquiry.

### III. A MOVEMENT-LAW HISTORY OF THE APA

#### A. *The Political Economy of the APA*

By the late 1930s, the question was not whether the administrative state would continue to exist but how much of it and how it would operate. In her exhaustive history of administrative reform, Joanna Grisinger details how Americans had “transformed the political relationships, institutional framework, and legal structure of the federal government” by “plac[ing] ever more legislative, executive, and judicial authority in executive agencies and departments and in a new ‘fourth branch’ of independent regulatory commissions.”<sup>96</sup>

But the “how?” questions were deemed vitally important and were debated in the context of broader ideological conflicts. The APA was not framed or advertised as a decisive answer to those questions or a resolution of these conflicts. It was, however, addressed to them.

#### 1. Redefining the New Deal—and Democracy

Calls for reform of administrative procedure coincided with what New Deal critics dubbed the “Roosevelt recession.” The Dow Jones Industrial Average dropped by forty-eight percent from August 1937 to the spring of 1938—the swiftest in U.S. history.<sup>97</sup> The result was what Alan Brinkley describes as “not just a severe recession, but an intense ideological struggle . . . to define the soul of the New Deal.”<sup>98</sup>

In the midst of this crisis the American Bar Association Committee issued a report denouncing “administrative absolutism” and proposing a number of administrative reforms.<sup>99</sup> The Walter-Logan Bill, based on the APA’s proposal, made its first appearance in 1939. Although Roosevelt in vetoing the bill charged that it was designed by

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95 See Britton-Purdy et al., *supra* note 8, at 1831.

96 JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 2–3 (2012).

97 See ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 23, 28–29 (1995).

98 *Id.* at 30.

99 *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 339–40 (1938).

“[g]reat interests . . . which desire to escape regulation” and calculated to “strike at the heart of modern reform,” he also emphasized that efficient administration was necessary to wartime mobilization as the country prepared for a potential war with Nazi Germany.<sup>100</sup> The following year, he purged the NLRB of left-wing members.<sup>101</sup>

By 1946, many avowed New Dealers had retreated from or abandoned ends and means that had once been central to the New Deal. They had abandoned support for corporatist “industrial councils” in which representatives of labor, capital, and government would cooperate to regulate industrial sectors.<sup>102</sup> They had become convinced that the problem of corporate monopoly power was best addressed through targeting practices that artificially inflated prices rather than attacking “bigness” as such through antitrust law.<sup>103</sup> Most fundamentally, they no longer believed that something was fundamentally wrong with actually existing capitalism that required major changes to its institutions.<sup>104</sup> Landon Storrs has shown that those who even discussed tensions between capitalism and democracy invited “coordinated attacks” that “force[ed] policymakers and administrators to leave government or reinvent themselves as centrists.”<sup>105</sup> Months after the APA’s enactment, President Truman instituted a federal loyalty-security apparatus that finished what Roosevelt had started at the NLRB.<sup>106</sup>

The New Dealers did not seek to redistribute power among social groups to prevent class domination or to use administrative power to accomplish that end. Ascendant among them was pluralism—a vision of democracy that eschewed substantive ends and valorized competition between interest groups, none of which had a greater claim on the state’s attention.<sup>107</sup> This vision did not distinguish between labor and capital, haves and have-nots; in it, a managerial state administered by insulated experts took as given existing distributions of power and focused on correcting market failures.<sup>108</sup>

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100 See FRANKLIN D. ROOSEVELT, *The President Vetoes the Bill Regulating Administrative Agencies*, in 1940 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT WITH A SPECIAL INTRODUCTION AND EXPLANATORY NOTES BY PRESIDENT ROOSEVELT 616, 619 (Samuel I. Rosenman ed., 1941); Kessler, *supra* note 6, at 754.

101 See LANDON R.Y. STORRS, *THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT* 61–66 (2013); Jeremy K. Kessler, *The Political Economy of “Constitutional Political Economy”*, 94 TEX. L. REV. 1527, 1549 (2016) (“In 1940, Roosevelt himself purged the agency of its left-wing members, battered by charges of communist infiltration.”).

102 BRINKLEY, *supra* note 97, at 103.

103 *Id.* at 113.

104 See *id.* at 5.

105 See STORRS, *supra* note 101, at 263–64.

106 *Id.* at 2–3; Kessler, *supra* note 101, at 1549.

107 Andrias, *supra* note 6, at 707.

108 See RAHMAN, *supra* note 8, at 32–33.



None of this should be taken to deny that the APA emerged from “a pitched political battle for the life of the New Deal.”<sup>109</sup> But we must also consider whether agreement between pro- and anti-New Dealers on the APA was in part a product of left-liberal reconceptualization of the New Deal and the administrative state. That the debate over the APA was less fierce than that over Walter-Logan and did not trigger a veto by a Democratic president or opposition from any Democratic legislator may reflect how differently Democrats thought about political-economic questions and the administrative state in 1946 rather than evince the APA’s neutrality on those questions and their institutional resolution.

## 2. Administrative Procedure as Anticommunism

Administrative reform was influenced by fears of totalitarianism and the specter of communism in particular. The 1938 ABA Committee Report reflects the influence of the Committee’s chairman, Roscoe Pound, whose “vituperative writings against the New Deal leaned heavily on associating the New Deal with foreign socialism.”<sup>110</sup> In condemning “administrative absolutism” the Report associated the latter with the “Marxian idea” that “there are no laws—only administrative ordinances and orders” and charges the FDR administration with defining “law” as “whatever is done officially.”<sup>111</sup>

As Daniel Ernst has written, this rhetoric should be seen in political context as “highbrow . . . red-baiting.”<sup>112</sup> In May 1938 the House of Representatives created the Committee on Un-American Activities. Charges of communist infiltration led Roosevelt and Truman to make personnel and organizational changes that had profound, lasting impacts. Loyalty investigations inspired shifts from redistributive to rehabilitative social security and public assistance policies, the resignation of many proponents of redistribution, and the silencing of others.<sup>113</sup>

At the outset of debate over the Walter-Logan Bill in the Senate, Democratic Senator William King cited Pound for the proposition that “there is a similarity between the philosophy of many of those who seek to transfer to legislative agencies authority and power granted by the Constitution, and the teachings of Karl Marx.”<sup>114</sup> He warned that there existed “a tendency in our country through administration agencies

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109 Shepherd, *supra* note 23, at 1560.

110 JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 256 (2007).

111 *Report of the Special Committee, supra* note 99, at 340, 343–44.

112 ERNST, *supra* note 6, at 126.

113 See STORRS, *supra* note 101, at 206, 237.

114 86 CONG. REC. 13,672 (1940).

toward social and, indeed, political policies and practices of the Soviet Government.”<sup>115</sup> The floor debates are “riddled with comparisons of the administrative state to . . . communist governments.”<sup>116</sup> Much of this language expresses more general concerns about totalitarianism.<sup>117</sup> Yet, the Walter-Logan Bill and the APA took shape at a time when Democrats and Republicans both considered communism in particular to be a pressing threat to the American constitutional order. And the lawyers who framed the APA regarded the reforms that they championed as means of warding off anticapitalism at a time of bipartisan desire to do precisely that.

### 3. The Rule of Lawyers

The APA was advertised by its proponents as a combination of codification, clarification, and constitutionalization. It was said to make mandatory on all agencies the best practices of the best-performing among them, clarify standards of judicial review about which there had been some confusion, and implement two constitutional rights in particular—the right to due process of law and the right to petition the government for redress of grievances.

There was truth in this advertising. The APA’s content and structure tracked the contours of existing due process doctrine,<sup>118</sup> and it formalized participation in administration that was rooted in Founding-era petitioning.<sup>119</sup> But to describe the APA as an entrenchment of the status quo is to invite normative questions about the baseline and the perceived importance of preserving it.

Consider Chief Justice Charles Evans Hughes’s pivotal 1932 opinion in *Crowell v. Benson*,<sup>120</sup> affirming that judicial deference to agency fact-finding was consistent with Article III’s vesting of the judicial power in the federal courts as well as the Fifth Amendment’s Due Process of Law Clause. In *Crowell*, Chief Justice Hughes sought to strike a balance between the exigencies of a modern industrial economy—which, in his view, demanded expertise-driven regulatory policymaking—and the rule of law—which, in his view, demanded judicial dominance of legal interpretation, as well as the judicial finding of

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115 *Id.*

116 Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 87 (2000).

117 See Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573, 589 (2021).

118 See Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 385 & n.22 (2021).

119 See Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1575 (2018).

120 285 U.S. 22 (1932).

“jurisdictional” and “constitutional” facts.<sup>121</sup> In a key passage, Chief Justice Hughes wrote that “oust[ing] the courts of all determinations of fact” would “sap the judicial power as it exists under the Federal Constitution, and . . . *establish a government of a bureaucratic character alien to our system.*”<sup>122</sup>

We have good reason to believe that Chief Justice Hughes had a particular kind of alien government in mind. That same year, in an address to the Fourth Circuit, Chief Justice Hughes brooded about the danger posed by “new social schemes resting upon coercion by a class.”<sup>123</sup> Pound’s Committee Report was published within months of the Court’s decision in *Morgan v. United States*<sup>124</sup>—also authored by Chief Justice Hughes—holding unlawful an order issued by Henry Wallace, President Roosevelt’s leftist Secretary of Agriculture, that lowered the rates that “commission men” at stockyards could charge farmers who bought livestock. The emergence of a lawyerly consensus in favor of court-structured, court-supervised administrative justice that encompassed Chief Justice Hughes, Pound, and other luminaries whose shaped the contours of the APA’s compromise should not be considered apart from concerns that the administrative state would—absent lawyerly management—become an instrument of class warfare.

Nor should the APA be considered apart from the challenges that administrative government presented to the social and economic status of the legal profession. As Ronen Shamir has written, “[t]he historic centrality of courts in the development of law in the United States was the foundation upon which lawyers, as a professional group in ‘civil society,’ acquired prestige, influence, and wealth.”<sup>125</sup> There were considerable client interests at stake. Nicholas Zeppos points out that “the dominant voices in the ABA spoke on behalf of the large financial and industrial concerns most threatened by New Deal administrative government.”<sup>126</sup>

This is not to deny that their concerns about administrative government were genuine. Indeed, it is entirely possible that members of the elite bar believed that the administrative state needed to be court-structured and court-supervised for the sake of the rule of law, capitalism, *and* their corporate clients. This would go a long way toward explaining why the primary targets of their ire—the NLRB and SEC—

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121 *Id.* at 58.

122 *Id.* at 57 (emphasis added).

123 See 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 692–93 (1951).

124 304 U.S. 1 (1938).

125 RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* 80 (1995).

126 Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119, 1135 (1997).

were agencies that most departed from the formalist conception of law, most “threatened the basic foundations of capitalist structure” in virtue of their regulation of labor-management disputes and capital markets, and most threatened their most powerful clients.<sup>127</sup>

#### 4. The Southern Cage

Throughout the period of administrative reform, southern members of the House and Senate worked to ensure that legislation would not disturb racial apartheid. Not only did they exercise an effective veto on civil-rights legislation, they tailored New Deal bills to exclude Black people from their benefits.<sup>128</sup> Among the most vivid examples is the exclusion of maids and farmworkers from the NLRA and the FLSA.<sup>129</sup>

Ira Katznelson contends that this “southern cage” had profound tactical and ideological consequences.<sup>130</sup> The Democratic Party’s representatives unified around spending based on revenue generated by progressive income taxes while de-emphasizing support for organized labor because labor organizing, for southern Democrats, invited civil-rights activism that threatened the South’s racial order.<sup>131</sup> Southern structural power thus encouraged the emergence and rationalization of a “state of procedures” that did not distinguish between the various groups seeking to shape public policy.<sup>132</sup> Thus did racial apartheid facilitate the rise of a pluralist conception of democracy.

This procedural state ended up Janus-faced.<sup>133</sup> Domestically, it appeared constrained—indeed, as Jeremy Kessler summarizes it, “too weak to check private economic power.”<sup>134</sup> Internationally, it appeared formidable, capable of “dol[ing] out overwhelming violence with little democratic oversight.”<sup>135</sup>

There is no mention of race in the recorded debates over the APA, nor in the newspaper coverage of the statute. But it went without saying that any administrative reform would have to accommodate Jim

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127 See *id.* at 1134, 1134–35.

128 See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 18–19* (2005).

129 *Id.* at 54–55.

130 See generally IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 16* (2014).

131 *Id.* at 398–99.

132 *Id.* at 475.

133 See *id.* at 18–20, 484–86 (contending that “[m]uch like the Roman God Janus,” the post-New Deal American state “possessed two distinctive faces”).

134 Jeremy K. Kessler, *The Last Lost Cause*, JACOBIN, Spring 2013, at 96, 97 (reviewing KATZNELSON, *supra* note 130).

135 *Id.*

Crow. And we would expect as well that it would constrain domestic policy more than it would foreign policy.

## 5. Assessment

Given the foregoing, the APA looks pretty much how we would expect it to look. It institutionalizes interest-group pluralism. It enacts an emergent lawyerly consensus about how to make the administrative state compatible with capitalism and the rule of law. And it is Janus-faced in ways that reflect the constraints of the southern cage.

The APA's procedures do not distinguish between labor, capital, or concerned individual members of the public. "[I]ndividual[s], partnership[s], corporation[s], association[s], [and] public or private organization[s]" participate in the administrative process on formally equal footing.<sup>136</sup> Unions are not given a special place in recognition of their antidomination capacity. No effort is made to address resource and power imbalances between groups. Some legislators appear to have expected that both agencies and courts would put meat on the bones of § 553's skeletal provisions to facilitate participation.<sup>137</sup> But the APA itself does not express any substantive commitments concerning how to do so.

The APA's enactment of the rule of lawyers is evident both in what it preserves and what it endeavors to change in existing law. The APA devotes most of its attention to agency adjudication because agencies at the time acted primarily through adjudication. Adjudicative procedure was shaped by the Supreme Court's constitutional decisions to require intra-agency separation of investigative, prosecutorial, and adjudicative functions; the APA codified the separation of functions.<sup>138</sup> *Crowell* provided for judicial deference to agency fact-finding but insisted that the courts could not be displaced from making "independent" determinations of questions of law.<sup>139</sup> The APA provides for judicial deference to agency fact-finding that is supported by "substantial evidence"; whether it allows for any deference at all to agency interpretations of law is hotly contested.<sup>140</sup>

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136 Administrative Procedure Act § 2(b), 5 U.S.C. § 551(2) (2018).

137 See Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 132 (2022).

138 See ERNST, *supra* note 6, at 137.

139 See *Crowell v. Benson*, 285 U.S. 22, 60 (1932).

140 For arguments that it does not, see, for example, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 995–99 (2017); 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 (2022). For arguments that it does, see Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613 (2019); Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 130 (2021); Blake

The administrative state is less constrained by the APA when it faces outward than inward. Its rulemaking functions exempt any “military or foreign affairs function of the United States.”<sup>141</sup> The conduct of military functions is also exempt from the APA’s adjudication provisions.<sup>142</sup> Its judicial review provisions exempt “military . . . authority exercised in the field in time of war or in occupied territory.”<sup>143</sup>

The southern cage is evident in the APA’s exemption from its rulemaking requirements all matters related to public property, loans, grants, benefits, or contracts.<sup>144</sup> As Sophia Lee summarizes, the APA thus “excepted the social welfare programs that defined the New Deal state from the procedural requirements of notice and comment rulemaking” and thereby “foreclosed mechanisms for civil rights advocates to participate in the formulation of those policies and to hold officials accountable for their choices.”<sup>145</sup> Most administrative action continued to be handled informally—to the dismay of racial-justice advocates who unsuccessfully pressed federal housing officials to prevent government funds from being used to build segregating housing, neighborhoods, or schools.<sup>146</sup>

The political economy of the APA explains how it could win bipartisan approval and yet *not* be ideologically neutral. It was fit for a moment at which interest-group pluralism was the democratic theory to beat, the radically democratic edge of the New Deal had been dulled, fears of socialism were inspiring purges of leftists within Democratic Administrations, and southern legislators could veto anything that could provide a path toward racial justice. Those who regarded interest-group jostling to be a desiccated form of democracy, considered capitalism fundamentally flawed, distrusted the elite bar, or sought racial justice did not participate in the “painstaking” deliberation that led to it.

Of course, the APA is not what it was. The text has been amended several times by Congress, and the courts have created a body of “administrative common law” implementing various provisions.<sup>147</sup>

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Emerson, “Policy” in *the Administrative Procedure Act: Implications for Delegation, Deference, and Democracy*, 97 CHI.-KENT L. REV. 113 (2022).

141 See Administrative Procedure Act § 4(1), 5 U.S.C. § 553(a)(1) (2018).

142 5 U.S.C. § 554(a).

143 5 U.S.C. § 551(1)(G). For an exhaustive history of these exemptions, see generally Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673 (2010).

144 5 U.S.C. § 553(a)(2).

145 Lee, *supra* note 72, at 182.

146 See *id.* at 167.

147 On administrative common law, see Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012); Emily S. Bremer, *The*

Indeed, so far removed does modern administrative law appear to be from the original APA that the latter's political economy might seem irrelevant. The next Section argues otherwise.

### B. *The Political Economy of Administrative Common Law*

The basic contours of the development of administrative common law are familiar. Beginning in the 1960s, agencies began relying on informal notice-and-comment rulemaking rather than adjudication to make major policy decisions. Courts responded to this unanticipated development by creating novel agency-constraining doctrines. They did so because of ascendant-among-progressive concerns about “regulatory capture,” whereby agencies would be diverted from their public-spirited missions by industry groups.<sup>148</sup> This Section situates the APA's administrative common law in a shifting political-economic context and explains its continuities with and differences from the original APA in light of that context.

#### 1. From Interest Group Pluralism to Public Interest Law

Both the APA and its common law emerged from a crisis of faith. By the 1960s, left-liberals had perceived that the regulatory state was dominated by capital.<sup>149</sup> Regulatory agencies chartered to pursue public-interested goals—consumer protection, wildlife protection, fair market competition, health—were instead serving private interests.<sup>150</sup> Pluralism and the state of procedures had been tried, and they hadn't worked.

At a time when the Supreme Court's—and so the judiciary's—capacity to achieve progressive social change was at its zenith, the courts appeared to left-liberal lawyers as an effective means of redress.<sup>151</sup> The environmental lawyers who created the most prominent early “public interest” law firms—so named because of their goal of ensuring that agencies fulfilled their public-interested missions—claimed a number of early successes: delaying pipelines; defeating resort proposals;

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*Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215 (2014); Kathryn E. Kovacs, *Super-statute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1212–17 (2015).

<sup>148</sup> For an account of the influence of capture theory, see generally Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039 (1997).

<sup>149</sup> See PAUL SABIN, *PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM* 9–13 (2021).

<sup>150</sup> See *id.*

<sup>151</sup> See Schiller, *supra* note 116, at 75–76, 81.

pushing pesticides off the market; and thwarting plans for highways, airports, and nuclear power plants.<sup>152</sup>

The doctrinal fruits of public-interest law are many. The D.C. Circuit in *Environmental Defense Fund, Inc. v. Ruckelshaus*<sup>153</sup> held that courts are duty bound to examine concededly complex administrative records—in this case, concerning ensuring “administrative officers . . . articulate the standards and principles that govern their discretionary decisions in as much detail as possible.”<sup>154</sup> The Supreme Court embraced this “hard look” review in *Citizens to Preserve Overton Park, Inc. v. Volpe*, which involved a challenge by a citizens group to a decision by the Secretary of Transportation to authorize the use of federal funds for the construction of a highway through a public park in Memphis, Tennessee.<sup>155</sup> The First Circuit announced a “logical outgrowth” rule, which requires that the final rules that agencies adopt not “differ[] so radically from the [rules] proposed” that those affected by them have “no meaningful forewarning of [their] substance.”<sup>156</sup> Finally, the D.C. Circuit held in *Home Box Office, Inc. v. FCC*<sup>157</sup> that agencies were obliged to respond to “[significant] comments” that “if true, raise points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule cast doubt on the reasonableness of a position taken by the agency.”<sup>158</sup>

These successes prompted a conservative-libertarian reaction. On August 23, 1971, Lewis Powell, a corporate attorney and former president of the ABA, sent a thirty-three page memorandum entitled *Attack on American Free Enterprise System* to Eugene Sydnor, Jr., the education director of the U.S. Chamber of Commerce.<sup>159</sup> Intended as confidential, it was circulated to other chamber officials and business leaders and eventually leaked to the press.<sup>160</sup> In it, Powell detailed what he considered necessary to resolve “[o]ne of the bewildering paradoxes of our time,” namely, that U.S. capitalism “tolerates, if not participates

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152 See Paul Sabin, *Environmental Law and the End of the New Deal Order*, 33 LAW & HIST. REV. 965, 965–66 (2015).

153 439 F.2d 584 (D.C. Cir. 1971).

154 *Id.* at 598.

155 401 U.S. 402 (1971).

156 *S. Terminal Corp. v. EPA*, 504 F.2d 646, 656 (1st Cir. 1974).

157 567 F.2d 9 (D.C. Cir. 1977).

158 *Id.* at 35 n.58.

159 Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Com. (Aug. 23, 1971) (on file with Washington and Lee University School of Law) [hereinafter Powell Memorandum].

160 *Powell Memorandum: Attack on American Free Enterprise System*, WASH. & LEE UNIV. SCH. OF LAW: SCHOLARLY COMMONS, <https://scholarlycommons.law.wlu.edu/powellmemo/> [https://perma.cc/9EJU-YF29].



in, its own destruction.”<sup>161</sup> Among them: lawyers had to be met with lawyers.

Powell lamented that “[o]ther organizations and groups . . . have been far more astute in exploiting judicial action than American business.”<sup>162</sup> He singled out Ralph Nader, “the single most effective antagonist of American business” and founder of Public Citizen—the first avowed “public interest” law firm.<sup>163</sup> And Powell encouraged Sydnor to assemble a “highly competent staff of lawyers” that would “undertake the role of spokesman for American business.”<sup>164</sup>

The Powell memo catalyzed decades of conservative-libertarian legal-institution building that was modeled on and meant to counter left-liberal public-interest litigation.<sup>165</sup> Left-liberal public interest strategies proved to be “easily adopted by conservative antagonists backed by corporate donors and private philanthropists, and proved to be overly dependent on sympathetic judges.”<sup>166</sup> Indeed, the capture critique could be deployed for deregulatory purposes.

## 2. Neoliberal Administrative Law

The leading left-liberal proponents of capture theory were skeptical of the existing regulatory state because of concerns about official corruption by private power. They did not, however, regard this corruption problem as intractable. Capture was a tendency that could be resisted, and its outputs could be thwarted—by the judiciary.

But what if the problem ran deeper? In the late 1950s and early 1960s, James Buchanan and Gordon Tullock drew upon Nobel laureate Kenneth Arrow’s studies showing the impossibility (given certain assumptions) of aggregating individual preferences into collective preferences to model politics as a marketplace through which self-interested officials and interest groups maximize their utilities.<sup>167</sup> Mancur Olson contended that collective action problems prevent diffuse

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161 Powell Memorandum, *supra* note 159, at 3.

162 *Id.* at 26.

163 *Id.* at 6; *see also* SABIN, *supra* note 149, at 35–57.

164 Powell Memorandum, *supra* note 159, at 27.

165 Important studies include, for example, JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* (2016); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (John M. Conley & Lynn Mather eds., 2008); AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015).

166 SABIN, *supra* note 149, at 193.

167 *See* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (Yale Univ. Press 2d ed. 1963) (1951); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

publics from organizing to resist the efforts of small, highly organized, and self-interested groups;<sup>168</sup> and Anthony Downs claimed that it was rational for individual voters to remain ignorant or involved in the political process because of their limited ability to affect outcomes.<sup>169</sup> The upshot of this “public choice” theory was that “capture” was inevitable and large segments of the economy should be deregulated.<sup>170</sup> These arguments circulated throughout a growing conservative movement, bankrolled by business interests and conservative philanthropists.<sup>171</sup>

Defenders of the regulatory state did not respond with expressions of confidence in agency public spiritedness. Instead, many embraced an expertise-forcing framework that encouraged agencies to engage in quantified cost-benefit analysis (QCBA) and consideration of market-friendly alternatives to regulation.<sup>172</sup> QCBA was institutionalized through executive orders—issued by Republican and Democratic presidents—requiring agencies to perform QCBA and establishing an office dedicated to evaluating their work;<sup>173</sup> and judicial use of QCBA to perform arbitrary-and-capricious review.<sup>174</sup>

No one disputes that regulatory agencies should consider in some rough sense the costs and the benefits of their decisions. Things get more complicated when we start specifying how to calculate costs and benefits, which requires determining what we value and to what extent. QCBA is controversial to the extent that it calculates costs and benefits by asking how much people are willing to pay, in dollar terms, to avoid certain risks or receive certain rewards—without accounting for race, class, or indeed anything else.<sup>175</sup>

Call the proliferation of QCBA “neoliberal administrative law,” after the political-economic order in which it arose and the premises of

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168 See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

169 See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

170 See DANIEL T. RODGERS, *AGE OF FRACTURE* 86–89 (2011). For general overviews, see generally Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988); DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003).

171 See KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* 13–19 (2009).

172 See RAHMAN, *supra* note 8, at 44.

173 See Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982), *revoked* by Exec. Order No. 12,866, 3 C.F.R. 638, 649 (1994); Exec. Order No. 13,563, 3 C.F.R. 215, 215 (2012). That office is the Office of Information and Regulatory Affairs. See Exec. Order No. 13,563, 3 C.F.R. at 217.

174 See, e.g., *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (identifying the SEC’s failure to quantify costs in issuing a proxy access rule as a defect in its economic analysis and concluding that the rule was arbitrary and capricious).

175 Compare, e.g., MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006), with FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004).

which it takes on board. Neoliberal administrative law does not reject the regulatory state; instead, it disciplines it with technocratic tools. Those tools are designed to measure the social value of government policy by treating citizens as consumers of government services and assessing their preferences by determining how much they are willing to pay for them. No court has yet held that the APA requires QCBA. But, as Bridget Dooling has detailed “[a]n agency that fails to adequately consider the costs and benefits of its proposed regulatory changes increasingly places its rules at risk upon judicial review.”<sup>176</sup>

### 3. Assessment

The APA’s origins still matter. Even as elaborated through administrative common law, it does not redress asymmetries of resources and power, makes judges and elite lawyers into managers of the administrative state, and impedes achieve transformative social change. Indeed, administrative common law is making things worse.

Requiring that final rules be “logical outgrowth[s]” of proposed rules has discouraged agencies from being responsive to public comments.<sup>177</sup> Requiring that agencies respond to “significant comments” had encouraged industry to swamp agencies with complex technical arguments that is nearly impenetrable to laypeople and agencies to prioritize engagement with those arguments.<sup>178</sup> And requiring that agencies demonstrate that they exercised “reasoned discretion” on the basis of the administrative record in technocratic terms has led to record-generating activity that “may have little connection to the actual decisionmaking process.”<sup>179</sup>

Even uses of administrative common law that produced “wins” for the left on close inspection disclose missed opportunities that reflect the APA’s origins. Take *Overton Park*, in which the Court embraced hard-look review.<sup>180</sup> Peter Strauss has detailed how racial dynamics influenced the decision to route a freeway through Overton Park.<sup>181</sup> Like

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176 Bridget C.E. Dooling, *Bespoke Regulatory Review*, 81 OHIO ST. L.J. 673, 673 (2020).

177 See Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 807 (2021).

178 See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325, 1354 (2010); Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIA. L. REV. 149, 152 (2012).

179 Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 763 (2006).

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

181 See Peter L. Strauss, *Citizens to Preserve Overton Park—Race-Inflected Below Its Surface*, YALE J. ON REGUL.: NOTICE & COMMENT (July 16, 2020), <https://www.yalejreg.com/nc/citizens-to-preserve-overton-park-race-inflected-below-its-surface-by-peter-l-strauss> [https://perma.cc/AWN7-8NEM].

many contemporaneous “urban renewal” projects, the freeway routing decision would have produced a disparate racial impact—specifically, by separating two historically Black colleges from the Black community.<sup>182</sup> But neither the briefs in the case nor the opinion of the Court mention any of this. Cristina Isabel Ceballos, David Freeman Engstrom, and Daniel E. Ho documented how, beginning shortly after the passage of the Civil Rights Act of 1964, courts created a “walled garden that shut out race” from hard-look review.<sup>183</sup> The southern cage is gone, but the APA contains to occlude inquiry into the role of race in administrative governance.

It is undeniable that advocates for racial, environmental, and economic justice have used the APA’s procedures to accomplish their goals. In the main, however, the APA and its doctrine have not proven fit instruments for transformative left social change. Such transformative change requires transforming the APA.

#### IV. TOWARD MOVEMENT ADMINISTRATIVE PROCEDURE

The APA’s basic institutions are entrenched. The number of final rules published following notice-and-comment is “generally in the range of 3,000 to 4,500.”<sup>184</sup> There are nearly 2,000 administrative law judges who preside over thousands of formal adjudications each year.<sup>185</sup> Agency enforcement of regulations is structured about the separation of functions specified by the APA. Even if it were desirable to do away with the APA and its institutions entirely, seeking to accomplish that goal overnight would be foolish.

Movement-law scholars have embraced the concept of *nonreformist reform* in pursuing transformative change. Amna Akbar explains that “non-reformist reform[]” was coined by French economic-philosopher André Gorz in the 1960s<sup>186</sup> and is today “prevalent in abolitionist organizing against the prison industrial complex and deployed by

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182 Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370, 466 (2021).

183 *Id.* at 462.

184 MAEVE P. CAREY, CONG. RSCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 1 (2019).

185 See Administrative Law Judges: ALJs by Agency, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=By-Agency> [<https://perma.cc/DLS3-CTCT>]; *Information About SSA’s Hearings and Appeals Operations*, SOC. SEC. ADMIN., [https://www.ssa.gov/appeals/about\\_us.html](https://www.ssa.gov/appeals/about_us.html) [<https://perma.cc/3ZG6-AZX8>] (explaining that at the Social Security Administration alone, “[e]ach year, more than 1,500 ALJs render over 650,000 decisions at the hearing level”).

186 See ANDRÉ GORZ, *STRATEGY FOR LABOR: A RADICAL PROPOSAL* 6–8 (Martin A. Nicolaus & Victoria Ortiz trans., 1967).

those who embrace racial justice, anticapitalism, and socialism more broadly.”<sup>187</sup>

Akbar identifies three hallmarks of nonreformist reform. First, nonreformist reforms do not “aim to improve, ameliorate, legitimate, and even advance the underlying system”; instead, they “aim for political, economic, social transformation.”<sup>188</sup> Second, nonreformist reforms “aim to shift power away from elites and toward the masses of people.”<sup>189</sup> To that end, they prioritize the needs of “working-class, and directly impacted people making demands for power over the conditions of their lives and the shape of their institutions.”<sup>190</sup> Third, they “come from contestatory exercises of popular power” and “attempt to expand organized collective power to build pathways for transformation.”<sup>191</sup>

What would nonreformist administrative procedural reforms aim at, exactly? They would not seek to deconstruct the administrative state *or* to legitimate it in its current form. Rather, they would seek to build within the administrative state democratic means of ameliorating the harms generated by our political-economic order and building power to achieve transformative socioeconomic change in the future. What follows are some guiding principles and proposals for administrative constitutional amendment.

### A. *Nonreformist Administrative Reform*

#### 1. Tactical Pluralism

Social movements in the United States have invoked the big-C Constitution to achieve their political goals since the country’s Founding. Movement-law scholars’ focus on proliberation, antidomination movements’ use of the Constitution has shed light on a diversity of tactics. Scholars have been attentive to groups that have taken an oppositional stance to the Constitution, as well as those that have laid claim to it.

Aziz Rana has sought to illuminate oppositional possibilities by telling the stories of leftist groups that forthrightly rejected the Constitution.<sup>192</sup> He spotlights the Black Panther Party’s constitutional convention—attended by some 12,000 people, including members of the

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187 Akbar, *supra* note 65, at 101 (footnote omitted).

188 *Id.* at 104.

189 *Id.* at 104–05.

190 *Id.* at 105.

191 *Id.* at 106.

192 See Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 285–86 (2015).

American Indian Movement, the Young Lords, Students for a Democratic Society, the Young Patriots, and other radical groups. In calling for the convention, the BPP condemned the Constitution for its role in economic and political subordination and declared that “[t]he Constitution of the U.S.A. does not and never has protected our people or guaranteed to us those lofty ideals enshrined within it.”<sup>193</sup>

Dorothy Roberts and Brandon Hasbrouck have instead urged that the Constitution—as amended—be claimed by leftists as a limited but potent instrument of liberation. Roberts has found in the “abolitionist constitutionalism” that informed and was ultimately entrenched in the Reconstruction Amendments resources with which modern prison abolitionists can resist a “system of carceral punishment that legitimizes state violence against the nation’s most disempowered people to maintain a racial capitalist order for the benefit of a wealthy white elite.”<sup>194</sup> Similarly, Hasbrouck contends that the Reconstruction Amendments are themselves the product of movement law—“the culmination of the abolitionist project in the Reconstruction Amendments after decades of publicizing their meanings through litigation and organizing”—and that it would be a mistake to surrender them.<sup>195</sup>

Closest to this Article’s institutional focus, a number of scholars have documented a phenomenon termed *administrative constitutionalism* by Sophia Lee: “regulatory agencies’ interpretation and implementation of constitutional law.”<sup>196</sup> Agencies have interpreted and implemented constitutional law in creative ways, often in response to liberatory social movements. Examples include the Equal Employment Opportunity Commission’s interpretation of civil-rights statutes to bar pregnancy discrimination as a form of sex discrimination,<sup>197</sup> the NLRB’s decertification of discriminatory unions,<sup>198</sup> the Freedmen’s Bureau’s interpretation of the Thirteenth Amendment to disallow or void indenture arrangements that were designed to assist former enslavers in expropriating the labor of freed children,<sup>199</sup> and the Federal

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193 See THE BLACK PANTHERS SPEAK 269 (Philip S. Foner ed., 1970).

194 Roberts, *supra* note 9, at 14.

195 Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 128 (2022).

196 See, e.g., Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010); LEE, *supra* note 75; Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519 (2015); Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163 (2017).

197 See Metzger, *supra* note 196, at 1923.

198 See LEE, *supra* note 75, at 153.

199 See Karen M. Tani, *Administrative Constitutionalism at the “Borders of Belonging”: Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1610–21 (2019).

Social Security Board's application of a nondeferential rationality model of equal protection to assess state welfare rules when administering federal grants for state-run welfare programs.<sup>200</sup> But administrative constitutionalism has also enabled domination. Thus, Joy Milligan has shown how the federal administrators who oversaw the nation's public-housing program adhered to *Plessy v. Ferguson's* "separate but equal" principle—in large part because of conservative and business opposition to public housing.<sup>201</sup>

The APA's place in U.S. political life isn't comparable to that of the big-C Constitution. But it isn't going anywhere anytime soon. Thus, movement-law scholars' study of liberatory movements that take a variety of stances toward the Constitution counsels against a one-size-fits-all, inflexible approach to nonreformist administrative procedural reform. The proposals put forward below are thus not intended to be exhaustive, and the suggestion that they take the form of amendments to the APA is just that—a suggestion.

## 2. Shift Power

There is no more debated normative theme in administrative law scholarship than what James O. Freedman called the "enduring sense of crisis" haunting the administrative state.<sup>202</sup> This crisis is often discussed in terms of *democratic* legitimacy. Defenses of the administrative state have traditionally come in deliberative forms that emphasize the epistemic benefits of agency expertise to fulfillment of democratically chosen (via statutory enactment) ends,<sup>203</sup> pluralist forms that rely on interest-group competition and electoral control (via Congress and the President) of agency officials,<sup>204</sup> and civic-republican forms that hold that agency officials are ideally situated to pursue the polity's consensus values.<sup>205</sup>

Nonreformist reform is not concerned with legitimating status quos. It is, however, deeply concerned with democracy. Movement-law scholars have highlighted how left grassroots efforts to transform law enforcement, workplaces, and infrastructure are characterized by

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200 See Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015).

201 Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924 (2020).

202 James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1043 (1975).

203 See, e.g., BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* (2019).

204 See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

205 See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

a desire, not merely to facilitate participation in policymaking but to shift power over policy to race-class subjugated populations. Jocelyn Simonson and K. Sabeel Rahman have conceptualized these efforts as forms of *agonistic* democracy.<sup>206</sup>

As developed by Chantal Mouffe, Jacques Rancière, James Tully, Bonnie Honig, and William Connolly, among others, agonism distinguishes itself from deliberative and civic-republican conceptions of democracy by denying the possibility of any stable polity-wide consensus on values and regarding efforts to create consensus as dangerous.<sup>207</sup> Against pluralist models, it promotes direct public participation in law-making.<sup>208</sup> Positively, it is committed to the recognition of ineradicable political conflict; the empowerment of all members of the polity to shape public decisions; and the exposure and challenging of domination.<sup>209</sup>

Rahman and Daniel Walters have highlighted examples of and contended for the institutionalization of agonistic practices within the administrative state. Rahman has celebrated the Consumer Financial Protection Bureau's office of community affairs, which is "charged with organizing outreach to consumer advocacy groups and seeking input from constituencies like minorities, students with debt, and homeowners," as well as its investment in "creating opportunities to engage grassroots constituencies in helping shape the agency's agenda and rulemakings."<sup>210</sup> Walters has fleshed out a theory of the administrative state as an "agon," calling for "emphasiz[ing] the inevitability of [political] conflict and build[ing] democratic legitimacy around" that conflict rather than attempting to elide it by achieving or declaring a settlement.<sup>211</sup> To make the administrative state more agonistic, he urges that notice-and-comment be repurposed "so that it no longer seeks to sample the public passively with the goal of reaching poly-archal settlements but instead seeks to find and amplify dissenting perspectives."<sup>212</sup>

Nonreformist reform does not require a particular theory of democracy. It does, however, require a commitment to reckoning with and remedying disparities in power to effect political outcomes. Nonreformist administrative procedural reform entails shifting power that

206 See Rahman & Simonson, *supra* note 70, at 690–91.

207 See MARIE PAXTON, *AGONISTIC DEMOCRACY: RETHINKING POLITICAL INSTITUTIONS IN PLURALIST TIMES* (2020).

208 See *id.* at 10–12.

209 *Id.* at 11–12.

210 See RAHMAN, *supra* note 8, at 160, 157–60.

211 See Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 *YALE L.J.* 1, 14 (2022).

212 *Id.* at 77; see also *id.* at 35–41.



is widely recognized as unbalanced at present to those who suffer from the imbalance.

### 3. Embrace Political Judgment

In 2009, Kathryn Watts caused a stir by proposing that arbitrary-and-capricious review allow for agencies to explain their decisions in political rather than “statutory, factual, scientific, or otherwise technocratic terms.”<sup>213</sup> Doing so, she urged, would harmonize arbitrary-and-capricious review with other administrative law doctrines, like *Chevron* deference, that seem to be informed by pluralist conceptions of democracy which embrace presidential control as a source of democratic legitimacy.<sup>214</sup>

From a movement law standpoint, the pluralist conception of democracy on which Watts relies is deficient. But Watts’s proposal is detachable from its pluralist premises. Her critique of the conventional view of arbitrary-and-capricious review as excluding consideration of politics—except to the extent that they are expressly stated in a statute or some other formal instrument—can rest on the premise that decisions are inescapably political, in the broad sense of involving recourse to contested normative values. Blake Emerson has urged that encouraging reviewing courts to allow agencies to state those values directly and “explain how they have ranked or weighted the relevant concerns” can help members of the public prepare comments that stand a better chance of actually affecting outcomes.<sup>215</sup> Judicial opinions can help build countervailing power by lowering the costs of determining just what comments stand to be persuasive.

More generally, making clear that technocratic reasons are not the only ones that are acceptable to which agencies can be responsive would open up discursive space. In an illuminating study of the lawsuits brought by the Standing Rock Sioux tribe, the Cheyenne River Sioux tribe, and the Yankton Sioux tribe against the Dakota Access Pipeline (DAPL), Danielle Delaney describes how “the use of litigation, while often being critical to achieving the goals of political protest, can distort the expression of politics not already recognized within

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213 See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 2 (2009). For critical responses, see Enrique Armijo, *Politics, Rulemaking, and Judicial Review: A Response to Professor Watts*, 62 ADMIN. L. REV. 573 (2010); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811 (2012).

214 Watts, *supra* note 213.

215 Blake Emerson, *The Values of the Administrative State: A Reply to Seidenfeld*, 119 MICH. L. REV. ONLINE 81, 91 (2021); see EMERSON, *supra* note 203, at 180.

the legal discourse.”<sup>216</sup> The #NoDAPL protests and the social movement to which they gave rise “were an explosive expression of indigen-ous resistance to systems that silence and ignore them while attempt-  
ing to extract resources from their lands and communities.”<sup>217</sup> The price of delaying the construction of the pipeline was the marginaliza-  
tion of arguments that captured “the fundamental harm arising from the construction and operation of the pipeline”—namely, “not that the Tribe or that tribal members would be prevented from the use of the land, but rather that the land itself would be used at all.”<sup>218</sup> If, to borrow from Robert Cover, “[c]ourts, at least the courts of the state, are characteristically ‘jurispathic’” because they kill off through compet-  
ing legal traditions, understandings, and arguments, judicial review that allows more space for value-laden argumentation will do less violence.<sup>219</sup>

#### 4. Expand Expertise

At this point, the reader may be wondering whether there is any place for expertise in movement administrative procedure. Movement administrative procedure would elevate the on-the-ground expertise of people who are most directly impacted by administrative decisions and yet structurally disadvantaged from influencing them.

The notion that race-class subjugated people have an epistemic advantage concerning the operation of governance systems that have contributed to their subjugation is not new. Critical race scholars have encouraged us to “[l]ook[] to the bottom” for decades on moral *and* epistemological grounds.<sup>220</sup> But the administrative state, responding to movement demands, institutionalized dependence on on-the-ground expertise prior to the flourishing of academic theorizing about its value.

As part of the War on Poverty, Congress in the Economic Opportunity Act of 1964 created and funded local nongovernment Community Action Agencies that allocated federal poverty relief. These agencies were required by the Act to seek the “maximum feasible participation” of the people impacted by the decisions of the board. As Tara Melish summarizes: “The concept was simple: those most affected by social disadvantage—‘the indigenous disadvantaged’—were

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216 Danielle Delaney, *Under Coyote’s Mask: Environmental Law, Indigenous Identity, and #NoDAPL*, 24 MICH. J. RACE & L. 299, 331 (2019).

217 *Id.*

218 *Id.* at 321.

219 Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

220 See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325–26 (1987); Akbar et al., *supra* note 9, at 838.

necessarily better positioned to understand poverty's causes, to identify the most effective solutions to them, and to advocate their own communities' interests than were 'outside' middle-class professional reformers lacking any direct experience with those conditions."<sup>221</sup> The goal of statutorily requiring community engagement was to "build[] the political power required to ensure that the interests of the poor were in fact adequately represented in institutional decisionmaking[,] " which would in turn result in policy that would better ameliorate poverty than any that "outside" experts could arrive at on their own.<sup>222</sup>

The APA does not require that agencies take into account the experiences of the race-class subjugated. Although as Michael Sant'Ambrogio and Glen Staszewski have highlighted, "[a]gencies have a host of tools to obtain information from missing stakeholders or unaffiliated experts and to understand the values, priorities, and concerns of ordinary citizens during agenda setting and rule development—when agencies are genuinely open to alternative courses of action[,] " their use of these tools is "unsystematic, unstructured, and ad hoc."<sup>223</sup> Requiring agencies to treat comments by race-class subjugated communities that stand to be affected by regulatory decisions as "significant" could change that.

Such a requirement would be continuous in spirit with Executive Order 13,985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, signed by President Biden in January 2021.<sup>224</sup> Executive Order 13,985 requires each executive branch agency to "assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities available pursuant to those policies and programs."<sup>225</sup> But executive orders can be rescinded, and the order does not mandate that the comments by underserved majorities be prioritized. Indeed, doing so to the neglect of business comments would invite judicial invalidation. Statutory amendment thus seems necessary.

## 5. End the Rule of Lawyers

The past and present of unchecked administrative power in the United States is too grim to leave fundamental liberty interests entirely

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<sup>221</sup> Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 18 (2010).

<sup>222</sup> *Id.* at 21.

<sup>223</sup> Sant'Ambrogio & Staszewski, *supra* note 177, at 830, 854.

<sup>224</sup> Exec. Order No. 13,985, 3 C.F.R. 409 (2022).

<sup>225</sup> *Id.* at 411.

in the hands of agency officials. The brutal conduct of the country's immigration authorities, often unchecked by any meaningful procedure at all, has inspired movement demands to abolish Immigration and Customs Enforcement—the agency charged with internal enforcement of immigration laws—and indeed end deportation entirely.<sup>226</sup> As Jill Family has written, the APA did not specifically address deportation because “[t]he regulation of human beings by deciding some of life’s most basic questions, including whether someone could live with immediate family members, simply was not the focus of [administrative] reformers.”<sup>227</sup> Congress’s subsequent exclusion (via the Immigration and Nationality Act) of deportation proceedings from the APA’s separation of prosecutorial and decision-making strictures governing administrative adjudication should be regarded as an unqualified evil.<sup>228</sup>

But the APA experience has elsewhere vindicated early New Deal skepticism of the courts and their receptivity to the claims of the powerful.<sup>229</sup> Hard-look review, for instance, is formally neutral because a decision to issue and a decision to rescind (say) a passive-restraint requirement will receive the same level of scrutiny to determine whether

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>230</sup>

In practice, because “the evidence before the agency” is the product of a process that is dominated by concentrated interests, hard-look review replicates the democratic deficits of the regulatory process.

Neil Komesar and Wendy Wagner have advocated several means of making domination through litigation more difficult. Two of them seem particularly promising for power-shifting purposes.<sup>231</sup> First, claims made by concentrated interests—relatively small groups with relatively high per capita stakes in the regulatory outcome—who have structural advantages in rulemaking could be given minimal scrutiny,

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226 See Cházaro, *supra* note 89.

227 Jill E. Family, *Regulated Immigrants: An Administrative Law Failure*, 66 HOW. L.J. (forthcoming 2023) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4125506#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4125506#) [<https://perma.cc/4LZC-4HUM>].

228 See *Marcello v. Bonds*, 349 U.S. 302 (1955).

229 On New Dealers’ skepticism of the courts and their prescription of judicial deference, see Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007).

230 *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

231 See Neil Komesar & Wendy Wagner, Essay, *The Administrative Process from the Bottom Up: Reflections on the Role, if Any, for Judicial Review*, 69 ADMIN. L. REV. 891 (2017).

comparable to rational-basis review in constitutional cases.<sup>232</sup> Second, courts could be required to shift the costs of unsuccessful litigation to any concentrated-interest challenger.<sup>233</sup> Lowering the odds of success and increasing the costs in case of failure would make litigation over the reasonableness of regulations less attractive to concentrated interests and thus hopefully less frequent.

## 6. Learn from Movements—ALL of Them

Left social movements are not monolithic, nor are their experiences engaging the administrative state. Movement administrative procedure must be prepared to learn from it all, including inside-the-system movements that have enabled marginalized groups to gain power through administrative law; outside-the-system, oppositional left movements that reject the legitimacy of taken-for-granted features of administrative law; and conservative and libertarian movements that have succeeded in shaping administrative law doctrine to realize their conceptions of the Constitution and the rule of law.

As to inside-the-system movements, Maggie Blackhawk has detailed how Native advocates have succeeded in securing “increased recognition of inherent tribal sovereignty, retaking of land over which Native nations could wield jurisdiction, and gaining power over the instrumentalities of the federal government” in significant part through “formal lawmaking fora—predominantly Congress and the administrative state” and drawing upon “formal legal texts . . . to prevent the dominant ideology from becoming law.”<sup>234</sup> They have done so by “focus[ing] . . . on legal reforms that would not necessarily result in a substantive change in their daily lives but would leverage the law to shift power to their communities, enabling those communities to shape their own daily lives.”<sup>235</sup> What might have been lawmaking institutions that operated in accordance with “a dominant ideology that perpetuates the erasure of Native people entirely” have been repurposed and leveraged to “recognize and, at times, remedy the harm caused by present and historical injustices.”<sup>236</sup>

Blackhawk emphasizes, however, that inside-the-system Native advocacy has taken place in tandem with “radical strategies like land seizures, including the island of Alcatraz, and the occupation of offices of

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232 *See id.* at 937.

233 *See id.* at 941.

234 Maggie Blackhawk, *On Power and the Law: McGirt v. Oklahoma*, 2020 SUP. CT. REV. 367, 402–04.

235 *Id.* at 402.

236 *Id.* at 404, 406.

the Bureau of Indian Affairs.”<sup>237</sup> And some institutions may prove beyond reposing. In the summer of 2018, the demand for deportation abolition became part of a national conversation about immigration when activists called to “Abolish ICE” in response to the Trump Administration’s family separation policy.<sup>238</sup> Though new to many, the demand was longstanding and rested on the premise that not merely Immigration and Customs Enforcement (ICE) but—as Angélica Cházaro has put it—*deportation itself* “expands and swells the indefensible and illegitimate uses of state force and should be ended.”<sup>239</sup>

Herself the primary drafter of the platform for the Latinx deportation-abolitionist organization Mijente, Cházaro urges caution concerning procedural reform, even when aimed at easing the suffering of immigrants. She contends that reforms may have the effect of legitimating a system that is durably committed to inflicting “inevitable and irremediable violence” and discouraging efforts to reduce the reach of the deportation state—for example, through defunding agencies, disempowering immigration officials, and repealing laws that expand deportability categories.<sup>240</sup> The point is not that, all else equal, more assigned counsel in deportation proceedings or Article III rather than immigration-judge review would be better than what Jennifer Koh calls shadow removals that do not require the person deported to ever step foot in a courtroom.<sup>241</sup> The point is that all else is never equal, and that the Abolish ICE movement is instructive in focusing attention on whether substantive commitments of a system are so durably institutionalized and so unjust that procedural reform may prove inadequate to it.

Finally, movement administrative procedure must learn from the conservative legal movement. The latter is not a “movement” of a kind that movement-law scholars could comfortably work alongside or take inspiration from. But it has achieved a degree of influence that leftists cannot afford to ignore.<sup>242</sup> That influence extends across administrative law, thanks to what Gillian Metzger has described as “a mutually

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237 *Id.* at 403.

238 See Tina Vasquez, *Abolish ICE: Beyond a Slogan*, N.Y. REV. (Oct. 10, 2018), <https://www.nybooks.com/daily/2018/10/10/abolish-ice-beyond-a-slogan> [https://perma.cc/9QSW-NEAS]; Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html> [https://perma.cc/73F5-TH86].

239 Cházaro, *supra* note 89, at 1046.

240 *Id.* at 1114.

241 See generally Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017).

242 See generally TELES, *supra* note 165; DECKER, *supra* note 165; SOUTHWORTH, *supra* note 165.

reinforcing relationship between judicial and academic attacks on the administrative state[,]” with conservative and libertarian legal scholars publishing articles that are cited by conservative and libertarian judges in cases litigated by conservative and libertarian legal groups.<sup>243</sup> It has been cultivated over the course of decades’ worth of institution building that, far from taking a linear path to hegemony, has proceeded through trial and error and has made substantial tactical changes in pursuit of its ideological goals.<sup>244</sup>

Leftists have compelling reasons not to mimic the conservative legal movement’s tactics. The thought of foundations run by billionaire industrialists dedicating resources to law-school centers that are committed to creating a world in which there are no billionaire industrialists should seem laughably implausible, because it is. The thought of leftists accepting those resources should seem profoundly hypocritical, because it would be. Can the same be said of an effort to create a critical mass of what Hasbrouck terms “movement judges” who “stand in solidarity with movements including Black Lives Matter, abolition, and environmental justice” in their constitutional and statutory interpretation?<sup>245</sup> Would seeking the appointment of movement judges *for the sake of* movement administrative procedure be unrealistic or incompatible with movement law’s commitments?

It is becoming conventional left legal wisdom that in the wake of the heady days of the Warren Court, left liberals placed too much confidence in judges to transform society.<sup>246</sup> Administrative common law is part of this story. But it does not follow that left social transformation does not require judges. If judges cannot bring about such change themselves, they can and have obstructed it, and will continue to do so if the left disregards the judiciary.

There is, however, an important disanalogy between the big-C Constitution and the small-c administrative constitution that must be taken into account. Brandon Hasbrouck writes that “our Constitution contains the democracy-affirming tools we need to dismantle systems

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243 See Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreward: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 33 (2017).

244 Among those tactical changes was the decision by conservative public interest law firms to distance themselves from the business community and rely instead upon conservative-libertarian donors for whom litigation did not directly result in profit increases. See TELES, *supra* note 165, at 68 (explaining that “the privileged role of business in the movement . . . hampered [the movement’s] ability to seize the moral high ground”).

245 Hasbrouck, *supra* note 9, at 639.

246 See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); FISHKIN & FORBATH, *supra* note 50; LOUIS MICHAEL SEIDMAN, FROM PARCHMENT TO DUST: THE CASE FOR CONSTITUTIONAL SKEPTICISM (2021).

of oppression and to achieve true equality for all people.”<sup>247</sup> By this he means primarily the Reconstruction Amendments, which he understands to support “the complete reconstruction of American society into an integrated democracy” and to empower “Congress and—to a lesser degree—the courts to bring about the political, civil, economic, and social equality necessary to fully realize the citizenship of formerly enslaved Black people.”<sup>248</sup> The same cannot be said for the Administrative Procedure Act.

Fortunately, amending the administrative constitution is considerably easier than amending the big-C Constitution. With transformation will come new stories that movement judges can tell, confident that they are contributing to rather than undermining democracy by doing so.

### CONCLUSION

Origins should not be considered conclusive of the truth or value of ideas or institutions. But they can often explain a great deal about how the latter took shape and encourage us to consider them with a more critical eye. So with the APA. Its political-economic origins help us understand how what has long been regarded as an ideologically neutral compromise between pro- and anti-New Dealers has operated to the advantage of the kind of interests that New Dealers once decried and hindered the sort of transformative change that the latter once sought.

It would be a mistake, however, to try to imagine what the early New Dealers might have come up with had they focused their attention on administrative procedural reform. Tellingly, the Green New Deal (GND)—the ambitious climate action plan developed by the grassroots Sunrise Movement and introduced by Representative Alexandria Ocasio Cortez in 2019—acknowledges the original New Deal’s limitations even as it celebrates its accomplishments.<sup>249</sup> In the same sentence, the GND credits the New Deal with “creat[ing] the greatest middle class that the United States has ever seen” and emphasizes that “members of frontline and vulnerable communities were excluded from many of the economic and societal benefits.”<sup>250</sup> The GND identifies social goals, the scope and scale of which recall early New Dealers’ confidence in administrative power to transform society. But it centers—as the New Deal did not—the needs of “indigenous peoples, communities of color, migrant communities, deindustrialized

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247 Hasbrouck, *supra* note 9, at 633.

248 *Id.* at 692.

249 *See* Green New Deal, H.R. Res. 109, 116th Cong. (2019).

250 *Id.*



communities, depopulated rural communities, the poor, low-income workers, women, the elderly, the unhoused, people with disabilities, and youth.”<sup>251</sup>

To acknowledge the New Deal’s limitations or the democratic deficits of the administrative constitution is not to cede ground to those who regard administrative governance as illegitimate. It is to appreciate that there are more important and pressing crises than abstract legitimacy debates. It is to recognize that those crises must be met through robustly democratic governance that reckons with structural inequalities and includes, learns from, and empowers marginalized groups. And it is to accept that the APA was not designed for and does not enable such governance. Movement administrative procedure is how we get there.

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251 *Id.* For a warning about the procedural hurdles that the GND would face under current environmental statutes absent transformative reforms that are in keeping with the spirit of this Article, see generally J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693 (2020).