

INTERPRETING THE ADMINISTRATIVE  
PROCEDURE ACT:  
A LITERATURE REVIEW

*Christopher J. Walker\** & *Scott T. MacGuidwin\*\**

*The modern administrative state has changed substantially since Congress enacted the Administrative Procedure Act (APA) in 1946. Yet Congress has done little to modernize the APA in those intervening seventy-seven years. That does not mean the APA has remained unchanged. Federal courts have substantially refashioned the APA’s requirements for administrative procedure and judicial review of agency action. Perhaps unsurprisingly, calls to return to either the statutory text or the original meaning (or both) have intensified in recent years. “APA originalism” projects abound.*

*As part of the Notre Dame Law Review’s Symposium on the History of the Administrative Procedure Act and Judicial Review, this Essay provides a literature review of the competing methodologies for interpreting the APA: textualism, originalism, purposivism (or pragmatism), and a more dynamic or living approach that encourages administrative common law. This Essay concludes by embracing a middle-ground approach: The Supreme Court (and lower courts) should answer open statutory questions based on the text, structure, context, and original understanding of the APA. But when it comes to interpretive questions courts have already answered, the pull of statutory stare decisis should be quite strong, and reform to those precedents should be left largely to Congress. This approach best advances administrative law’s rule-of-law values such as predictability, reliance, stability, and the separation of powers.*

INTRODUCTION.....	1964
I. COMPETING THEORIES OF APA INTERPRETATION .....	1966
A. <i>APA Pragmatism</i> .....	1966
B. <i>Administrative Common Lawmaking</i> .....	1971
C. <i>APA Textualism</i> .....	1976
D. <i>APA Originalism</i> .....	1982
II. A PATH FORWARD.....	1989

---

© 2023 Christopher J. Walker & Scott T. MacGuidwin. Individuals and nonprofit institutions may reproduce and distribute copies of this Essay in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

\* Professor of Law, University of Michigan Law School.

\*\* J.D., Class of 2023, University of Michigan Law School; Law Clerk to Sixth Circuit Judges Eric E. Murphy (2023–24) and Jeffrey S. Sutton (2024–25).

A. <i>APA Originalism for Open Questions</i> .....	1989
B. <i>Statutory Stare Decisis for Settled Questions</i> .....	1991
CONCLUSION.....	1996

## INTRODUCTION

Enacted in 1946 as a “fierce compromise” after a decades-long political battle in Congress,<sup>1</sup> the Administrative Procedure Act (APA) established the default rules of the road for the modern administrative state.<sup>2</sup> Forty-five years ago, Justice Scalia noted that “the Supreme Court regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished.”<sup>3</sup> Since then, Congress has done little to modernize the APA, even though there have been dramatic changes in regulatory practice.<sup>4</sup> Despite the lack of congressional action, the APA, like the U.S. Constitution, has evolved over the decades from changes in judicial interpretation, such that there are seemingly stark mismatches between the statutory text and modern judicial doctrine and regulatory practice.<sup>5</sup>

1 George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996). *But see* Evan D. Bernick, *Movement Administrative Procedure*, 98 NOTRE DAME L. REV. 2177, 2181, 2181–83 (2023) (detailing how “[t]he official story” of deliberation, compromise, and ideological neutrality with regard to the enactment of the APA “has increasingly come under challenge” from liberal-left scholars); William N. Eskridge, Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1912–23 (2023) (complicating Shepherd’s account of the APA founding and arguing that the APA should be viewed more as a “deep” compromise). *See generally* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986).

2 Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–59, 701–06 (2018)).

3 Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363 (1978); *see also* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209 (2015) (drawing on WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) to argue that the APA is a “superstatute”).

4 *See, e.g.*, Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014) (surveying the “increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation”).

5 This is the third in a series of essays by one of us that explores the evolution of the APA over the years. The first reviews the statutory amendments to the APA since its enactment in 1946 and assesses various legislative reform proposals to modernize the APA. *See* Christopher J. Walker, Essay, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 (2017) [hereinafter Walker, *Modernizing the APA*]. The second chronicles the mismatches between the text of the APA and doctrinal and regulatory reality today. *See* Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733 (2021) [hereinafter Walker, *Lost World of the APA*]. That second

As the Supreme Court and lower courts have increasingly embraced some form of textualism and originalism when it comes to statutory interpretation generally, it is perhaps no surprise that calls to return to either the APA's statutory text or its original meaning (or both) have intensified in recent years. Some have called for a textualist revival of the APA,<sup>6</sup> and others have advocated for what has been dubbed "APA originalism."<sup>7</sup> The Justices have been tracking these debates when considering calls to eliminate *Chevron* deference,<sup>8</sup> to discard the *Portland Cement* doctrine,<sup>9</sup> and to reconsider the viability of national injunctions or universal vacatur of agency rules<sup>10</sup>—just to provide a few examples.

In our contribution to this Symposium on the history of the APA, we survey the terrain of competing methodologies for interpreting the APA. Although the approaches to APA interpretation are varied and diverse, four rough though somewhat overlapping categories emerge. These categories in some ways evolve from one to the next, such that one may be tempted to tell a chronological evolutionary story.<sup>11</sup> But such an approach would oversimplify the state of play. Today, different judges and administrative law scholars have embraced and further developed all four approaches. Indeed, some even mix and match interpretive theories based on the specific statutory provisions at issue or at different points in their careers.

As detailed in Part I of this Essay, the first predominant interpretive approach is some version of textually constrained purposivism—or what we call APA pragmatism—which is an effort to read the statutory text to advance the values that motivated the enactment of the APA in the first place.<sup>12</sup> From APA pragmatism emerged a more dynamic or "living" interpretive approach to the APA—one that hews less to the statutory text and, instead, encourages the development of more wide-ranging administrative common law often motivated by perceived

---

essay left for another day the task of reviewing the literature on the various methodologies for interpreting the APA. *See id.* at 737. We turn to that project in this Essay.

6 *Infra* Section I.C.

7 *Infra* Section I.D.

8 *See, e.g.*, *Buffington v. McDonough*, 143 S. Ct. 14, 16–18 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

9 *See, e.g.*, *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 245–47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

10 *See, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay).

11 *Cf.* Beau J. Baumann, *The Force of Law After Kisor*, 42 PACE L. REV. 24 (2021) (adopting a more chronological evolutionary story when exploring how courts have interpreted "force of law" provisions in the APA).

12 *See infra* Section I.A.

constitutional values.<sup>13</sup> In response to this more dynamic approach and the rise of textualism generally in statutory interpretation, courts and scholars have called for a return to textualism—and such calls for APA textualism have increased in recent years from both conservatives and liberals.<sup>14</sup> Perhaps tracking broader trends in statutory interpretation, the reform project for some scholars has shifted from formalist textualism to APA originalism, which involves a deeper examination of the context, history, and original understanding of the terms Congress included in the APA.<sup>15</sup>

Although the central purpose of this Essay is to provide a literature review and categorization of the competing methodologies for interpreting the APA, Part II of the Essay sketches out our middle-ground approach. We urge courts to answer open statutory questions based on text, structure, context, and the original understanding of the APA. In other words, APA originalism—not formal textualism—is the best path forward for open questions. More importantly, however, when it comes to interpretive questions courts have already answered, the pull of statutory *stare decisis* should be quite strong, and reform to those statutory precedents should be left largely to Congress. When dealing with a framework statute like the APA, moreover, the Supreme Court should also give substantial weight to settled interpretations of the APA in the circuit courts. Such an approach best advances rule-of-law values such as predictability, reliance, stability, and the separation of powers.

## I. COMPETING THEORIES OF APA INTERPRETATION

Courts and scholars have employed numerous techniques in interpreting the APA, each stressing to different degrees the text, history, structure, purposes, and practical effects of the APA. These varied interpretative approaches, however, can roughly be grouped into four theories: (A) APA pragmatism, (B) administrative common lawmaking, (C) APA textualism, and (D) APA originalism. In many ways, each subsequent interpretive theory evolved in response to the prior one(s), though all are still active and evolving theories today. This Part addresses each in turn.

### A. *APA Pragmatism*

The predominant approach judges have historically employed when interpreting the APA has been a textually constrained

---

13 See *infra* Section I.B.

14 See *infra* Section I.C.

15 See *infra* Section I.D.

purposivism. Under this approach, the text of the APA provides the ceiling, but where the text, structure, or context is ambiguous, courts adopt a reading of the text that best advances rule-of-law values in administrative law, such as accountability, consistency, efficiency, expertise, predictability, stability, and transparency. In that sense, perhaps the best label for this predominant approach is APA pragmatism.<sup>16</sup> APA pragmatists are likely to find more provisions ambiguous than APA textualists or originalists. But unlike administrative common-law jurists, those exercising this approach choose to work within the framework of the text of the APA.

The judicial evolution of APA rulemaking provides a classic example of APA pragmatism.<sup>17</sup> After the Supreme Court essentially eliminated the highly proceduralized, trial-like mode of APA formal rulemaking in *United States v. Florida East Coast Railway Co.*, the Supreme Court and lower courts read more formal procedures into the APA's informal rulemaking process.<sup>18</sup> We focus on three sets of those statutory precedents here, when it comes to informal “notice-and-comment” rulemaking.

First, when agencies provide public notice in APA informal rulemaking, much more is required than the APA's textual requirement of “[g]eneral notice” of “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>19</sup> Courts have interpreted this statutory notice provision to require a detailed explanation of the proposed rule and a disclosure of the underlying rationales and supporting data. In *Portland Cement Ass'n v. Ruckelshaus*, the D.C. Circuit struck down an EPA rulemaking for failing to present data

---

16 We borrow this term, with a slightly different meaning discussed more in Section I.B, from Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 875 (2020) (defining “administrative pragmatism” as “seek[ing] to reconcile the reality of administrative power, expertise, and political authority with broader constitutional and rule-of-law values”).

17 This Section draws substantially from Walker, *Lost World of the APA*, *supra* note 5, at 739–46, where this example is explored in greater detail. In their contribution to this Symposium, Kristin Hickman and Mark Thomson defend these judicial interpretations of the APA rulemaking provisions in greater detail. See Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 NOTRE DAME L. REV. 2071, 2102–13 (2023).

18 410 U.S. 224, 237–38 (1973); see also Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 247 (2014) (observing that “*Florida East Coast Railway*—a case which has won little praise for its reasoning but whose policy outcome has been celebrated”—“largely put an end to formal rulemaking”). For more on this case and its impact, see, for example, Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1 (2017); Michael P. Healy, *Florida East Coast Railway and the Structure of Administrative Law*, 58 ADMIN. L. REV. 1039 (2006).

19 5 U.S.C. § 553(b), (b)(3) (2018).

adequately justifying new emission standards.<sup>20</sup> The D.C. Circuit, making no reference to the APA throughout the opinion, noted that “[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that . . . is known only to the agency.”<sup>21</sup> An APA textualist may reject such a doctrine. Indeed, as then-Judge Kavanaugh argued, the *Portland Cement* disclosure doctrine “stands on a shaky legal foundation (even though it may make sense as a policy matter in some cases)” because it “cannot be squared with the text of § 553 of the APA.”<sup>22</sup> Yet it seems like a commonsense, pragmatic gloss on the APA’s requirement that the agency provide the public with notice and an opportunity to be heard.<sup>23</sup>

Second, unlike formal rulemaking, the APA does not require informal rulemaking to be “on the record.”<sup>24</sup> As Kathryn Kovacs has observed, nothing in the informal rulemaking provisions of the APA suggests “anything resembling a record or docket for informal rulemaking” that must be maintained (much less publicly disclosed).<sup>25</sup> Notwithstanding the statutory text, the Supreme Court has repeatedly emphasized the requirement that an “administrative record [be] made.”<sup>26</sup> As Jeffrey Lubbers has argued, “[t]he development of the concept of the rulemaking record or file has been one of the most significant changes in informal rulemaking procedure since the APA was

---

20 486 F.2d 375, 392–93 (D.C. Cir. 1973), *superseded by statute*, Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, § 7(c)(1), 88 Stat. 246, 259.

21 *Id.* at 393.

22 *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see also* Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 894 (2007) (arguing that *Portland Cement* is “a violation of the basic principle of *Vermont Yankee* that Congress and the agencies, but not the courts, have the power to decide on proper agency procedures”); Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 328 (2005) (describing *Portland Cement* doctrine as “so far removed from the Act’s actual language as to make the line between ‘interpretation’ and straightforward judicial common law very blurry indeed”).

23 Peter Strauss has creatively justified this more robust notice requirement on structural grounds in light of Congress’s enactment of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2018), as “the changed rulemaking environment of the 1960s FOIA both invited its reshaping and served to give the judge confidence that her reshaping better fit the general framework of contemporary law.” Peter L. Strauss, *Statutes That Are Not Static—The Case of the APA*, 14 J. CONTEMP. LEGAL ISSUES 767, 798 (2005).

24 *See* 5 U.S.C. § 553(c) (2018).

25 Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 534 (2018).

26 *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) (first quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973); and then citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)).

enacted.”<sup>27</sup> Indeed, this judicial development “has led to substantial investments by federal agencies to create online databases to facilitate public access to the proposed rulemaking, accompanying data and studies, and the public comments lodged.”<sup>28</sup> Although the administrative record requirement seems to depart from the plain text, it certainly reinforces pragmatic and rule-of-law values in administrative law. It also arguably finds at least some textual support in the APA’s judicial review provisions, which instruct courts to “review the whole record or those parts of it cited by a party.”<sup>29</sup>

Third, the Supreme Court and lower courts have read the informal rulemaking requirement of “a concise general statement of [its] basis and purpose”<sup>30</sup> in the final rule to require much more than that. For example, as part of this statement of basis and purpose (or preamble), the Supreme Court has interpreted the APA to require that “[a]n agency must consider and respond to significant comments received during the period for public comment.”<sup>31</sup> Accordingly, preambles to final rules today are voluminous, and have led to a cottage industry in the field of administrative law about how to interpret them.<sup>32</sup> Pragmatically, extended preambles and reason giving in final rules make a lot of sense to advance rule-of-law values in administrative law. They may also be justified as gloss to the judicial review provisions of the APA, especially in light of “hard look” review discussed below. But it is difficult to square them with the APA’s textual requirement of “a *concise* [and] *general* statement of . . . basis and purpose” in the final rule.<sup>33</sup>

Aside from informal rulemaking requirements, another major example of APA pragmatism involves “hard look” review under the APA. In the 1970s, the D.C. Circuit, in a series of cases, adopted a “hard look” approach to reviewing agency actions.<sup>34</sup> The D.C. Circuit in these cases argued that such judicial review was required “in

---

27 JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 287 (5th ed. 2012).

28 Walker, *Lost World of the APA*, *supra* note 5, at 743.

29 5 U.S.C. § 706 (2018).

30 *Id.* § 553(c).

31 *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (first citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); and then citing *Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984)).

32 See, e.g., Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012); Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252 (2016); Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81 (2015); Christopher J. Walker, *Inside Regulatory Interpretation: A Research Note*, 114 MICH. L. REV. FIRST IMPRESSIONS 61 (2015).

33 5 U.S.C. § 553(c) (2018) (emphasis added).

34 See, e.g., *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 850–51 (D.C. Cir. 1970); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *superseded by statute*, Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, § 7(c) (1), 88 Stat. 246, 259; *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 643 (D.C. Cir. 1973).

furtherance of the public interest.”<sup>35</sup> The Supreme Court ultimately adopted some version of this “hard look” review standard in *State Farm*, tying this requirement to the “arbitrary” and “capricious” language in APA § 706(2)(A).<sup>36</sup> This requires agencies to “explain the evidence which is available,” and to “offer a ‘rational connection between the facts found and the choice made.’”<sup>37</sup> The Court in *FCC v. Fox Television Stations* later explains that this also requires agencies to “display awareness that [they are] changing position.”<sup>38</sup> Nowhere in the APA is there any requirement that agencies present evidence found, explain the connection between this evidence and their conclusions, or display awareness of changes in position. But these principles reinforce rule-of-law values and seem to comfortably fit within the APA’s opaque statutory terms “arbitrary” and “capricious.”<sup>39</sup>

So who are the administrative pragmatists when it comes to interpreting the APA? The answer is probably most administrative law scholars and many, many judges across the country.<sup>40</sup> Although there will no doubt be disagreements on particulars, these are the widely shared views of the leadership and membership of the American Bar Association (ABA) Section of Administrative Law and Regulatory Practice and the Administrative Conference of the United States (ACUS). Indeed, in 2016, the ABA Administrative Law Section sponsored a resolution adopted by the ABA House of Delegates that urged Congress to formally codify a number of these pragmatic judicial interpretations,

---

35 *Int'l Harvester*, 478 F.2d at 647.

36 *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41, 46–49 (1983).

37 *Id.* at 52 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

38 556 U.S. 502, 515 (2009).

39 5 U.S.C. § 706(2)(A) (2018).

40 See, e.g., CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 9 (2020) (observing that “[t]he morality of administrative law that we will defend rests on principles that are themselves, in certain cases, difficult to root in the text of the APA”); Desirée LeClercq, *Judicial Review of Emergency Administration*, 72 AM. U. L. REV. 143 (2022) (arguing for a pragmatic approach to judicial review under the APA for “emergency administration”). Indeed, although we borrow the “pragmatism” label from Professor Pojanowski’s *Neoclassical Administrative Law*, his label of “administrative pragmatism” seems much more like our “administrative common law” category discussed in Section I.B. And his preferred “neoclassical administrative law” approach seems to fall within our “APA pragmatism” category. See, e.g., Pojanowski, *supra* note 16, at 857–58 (defining neoclassical administrative law to uphold the purposes of Congress’s design with respect to the “traditional notions of the judicial role and separation of powers within the administrative state that Congress had chosen to construct,” “provide[] a clearer, more appealing allocation of responsibilities between courts and agencies,” and pay “closer attention to the APA . . . than does the current doctrine’s working pragmatism”).



including the *Portland Cement* doctrine and the agency rulemaking record requirement.<sup>41</sup>

We also see administrative pragmatism embraced by the Roberts Court. Two prominent examples from the Trump Administration come immediately to mind. First, in *Department of Commerce v. New York* (the census citizenship question case), the Court held that under APA judicial review, an agency must “offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.”<sup>42</sup> In other words, reasons that are pretextual are not sufficient. Second, in *Department of Homeland Security v. Regents of the University of California* (the DACA immigration relief rescission case), the Court held that arbitrary-and-capricious review under the APA requires the agency, when changing an existing agency policy, to consider reasonable regulatory alternatives and to demonstrate that it has adequately considered the reliance interests at stake in changing the regulatory baseline.<sup>43</sup> Both decisions provide additional pragmatic gloss on the judicial review provisions of the APA.<sup>44</sup>

### B. Administrative Common Lawmaking

In the 1970s and 1980s, the D.C. Circuit not only recognized administrative law doctrines that seem to have at least some plausible textual basis in or gloss on the APA, but it also developed expansive administrative common law based on broader constitutional and APA quasi-constitutional values.<sup>45</sup> As Kenneth Culp Davis famously observed in 1980, “Most administrative law is judge-made law, and most

---

41 AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 106B (2016), <https://www.acus.gov/sites/default/files/documents/ABA-Resolution-106B-and-Report.pdf> [<https://perma.cc/6M36-JMLS>]; see also Connor N. Raso, *New ABA Administrative Law Section Resolution on Improving the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 19, 2015), <http://yalejreg.com/nc/new-aba-administrative-law-section-resolution-on-improving-the-apa-by-connor-raso/> [<https://perma.cc/V84M-D4NA>]. This ABA resolution and other positions of the ABA Administrative Law Section and ACUS regarding the APA are further explored in Walker, *Modernizing the APA*, *supra* note 5, at 638–48 (discussing ABA Resolution 106B) and *id.* at 648–69 (discussing other ABA Administrative Law Section positions and ACUS recommendations).

42 139 S. Ct. 2551, 2575–76 (2019).

43 140 S. Ct. 1891, 1911–13 (2020).

44 For an extended exploration of these cases as a mix of APA pragmatism and administrative common lawmaking, see Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748 (2021).

45 See generally Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 776–93 (2015) (detailing how administrative law has changed in various ways over the decades since the enactment of the APA in 1946).

judge-made administrative law is administrative common law.”<sup>46</sup> Today, the latter observation may be less true, with the rise of APA textualism and originalism. But Jack Beermann’s observation in 2011 strikes us as still accurate: “The most that one can confidently say today is that administrative law contains elements that appear to be highly statutorily focused alongside elements in which courts exercise the discretion of a common law court.”<sup>47</sup>

Administrative common-law jurists argue that the APA should be viewed more like a common-law statute—like the Sherman Antitrust Act—where Congress is inviting courts to adopt additional practices and procedures to improve administrative governance. Or in the Eskridge-Ferejohn terminology, these framework statutes are “super-statutes,” which are interpreted and “applied in accord with a pragmatic methodology that is a hybrid of standard precepts of statutory, common law, and constitutional interpretation.”<sup>48</sup> Those exercising the administrative common lawmaking approach are less constrained by the text than APA pragmatists, textualists, or originalists. Common-law jurists see the text of the APA as a floor and an invitation for courts to innovate. Even if a decision contradicts the text of the APA, the benefits of stare decisis, agency reliance, and effective administrative governance exceed any benefits of confining administrative law to the APA’s text or express purposes.<sup>49</sup> Under this administrative common lawmaking approach, Jack Beermann explains, “doctrinal systems governing important areas of administrative law become so well-developed that it becomes virtually unnecessary to refer to the text of the APA when deciding cases concerning APA provisions.”<sup>50</sup>

---

46 Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 3.

47 Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 4 (2011).

48 William N. Eskridge, Jr. & John A. Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001). In their contribution to this Symposium, William Eskridge and John Ferejohn agree that the APA is a superstatute, but they present a more nuanced view on when and whether administrative common lawmaking is appropriate when interpreting the APA. See Eskridge & Ferejohn, *supra* note 1, at 1927–46.

49 Some scholars believe these practices have also been utilized for political ends. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 466–68 (2015).

50 Beermann, *supra* note 47, at 3; see also Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1220–21 (2014) (“The unwritten constitution theory puts administrative common law in a broad institutional context and provides a solid, structural foundation for the practice. It explains why, in the administrative context, federal common law is necessary to preserve the separation of powers and other fundamental constitutional values.”).

Consider, for instance, Alan Morrison's classic 1986 articulation of this "dynamic"<sup>51</sup> or "living" approach to interpreting the APA:

[T]he APA is more like a constitution than a statute. It provides for flexibility in decision-making; it can be changed through interpretation without the need for amendment; its movements are more pendulum-like than linear. Its fundamental role is to shape the relationship between the people and their government, giving the government considerable leeway in carrying out the substantive laws that Congress has enacted, while at the same time providing the governed with a considerable degree of procedural protection. Considering the vast expansion of governmental regulation since 1946, it is a real tribute to the drafters of the APA that it remains the centerpiece of administrative procedure with virtually no amendments.<sup>52</sup>

To commemorate the APA's fiftieth anniversary, Peter Strauss returned to this theme of a living, common-law APA, bemoaning the increasingly textualist Supreme "Court's new and static approach" to interpreting the APA, which "denies the possibilities of accepted accommodation and of adjustment that are such central elements of the common law."<sup>53</sup>

In recent years, Gillian Metzger has been perhaps the most forceful advocate for administrative common law.<sup>54</sup> Professor Metzger

51 See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

52 Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 253–54 (1986); see also Craig N. Oren, *Be Careful What You Wish For: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1141, 1143 (2004) (arguing that the APA is so effective because of the flexible approach that courts take with interpretation); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 271 (1986) ("Flexibility . . . is especially valuable in administrative law.").

53 Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1422 (1996). For a broader elaboration of Professor Strauss's theory on the interplay between statutes and common law, see Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225 (1999).

54 See Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1297 (2012) ("The argument for embracing administrative common law goes beyond establishing that it is ubiquitous, inevitable, and legitimate. Openly acknowledging the role that judicial lawmaking plays in administrative contexts is critical to clarifying and improving administrative law."); see also Strauss, *supra* note 23, at 768–69 (similar); Adrian Vermeule, *Rules, Commands, and Principles in the Administrative State*, 130 YALE L.J.F. 356, 358 (2021) ("Whatever the details, administrative law has not come to be dominated by ad hoc agency commands, as theorists of the Progressive Era and afterwards anticipated. Rather administrative law features a thick ecology of legal principles that jostle, compete, and develop over time."); Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 599–602 (2018) (arguing that courts should generally prefer to interpret more amendable statutes but that courts should dynamically interpret statutes like the APA because it will push Congress to pass more amendable statutes).

argues that the difficulty of amending the APA puts more pressure on courts to ensure the APA “function[s] in a way that serves Congress’s interests.”<sup>55</sup> She argues that administrative common law is effective as a constitutional avoidance technique—permitting courts to avoid potential separation of powers problems.<sup>56</sup> She believes that common-law doctrines are necessary to prevent “statutory obsolescence.”<sup>57</sup>

Professor Metzger cites decisions like *Mayo Foundation for Medical Education and Research v. United States* and *Talk America, Inc. v. Michigan Bell Telephone Co.* positively for upholding uniformity in judicial review and precedent, even though they do not engage with the text of the APA.<sup>58</sup> She also notes that administrative common law can foster a greater role for Congress in assessing agency action; it was “judicial elaboration of § 553, rather than the minimal requirements incorporated into § 553 itself, that allowed this provision to foster congressional oversight by forcing agencies to disclose detailed information on regulatory actions in advance.”<sup>59</sup> Professor Metzger further argues that § 559 of the APA provides a textual hook for administrative common law.<sup>60</sup> That is because it states that the APA provisions “do not limit or repeal additional requirements imposed by statute or otherwise recognized by law.”<sup>61</sup> Given that “statute” is expressly listed, she argues that “otherwise recognized by law” is likely judge-created law.<sup>62</sup>

In Sections I.C and I.D, we explore specific examples of administrative common law, in the context of textualist and originalist criticisms. It is fair to wonder how to draw the line between textually constrained, yet purposivist APA pragmatism and the more dynamic or living interpretive approach that embraces and encourages administrative common lawmaking. Some, no doubt, would view the examples of APA pragmatism provided in Section I.A as really the more dynamic or living category. Others may view examples of administrative common law as more appropriately falling within APA pragmatism, having at least some plausible APA textual hook. Indeed, as Ron Levin has observed, “the line of division between creative statutory interpretation and overt common law is blurry and frequently inconsequential (although it does matter in some contexts, such as for purposes of the

---

55 Metzger, *supra* note 54, at 1329, 1328–29.

56 *Id.* at 1320–21.

57 *See id.* at 1331.

58 *Id.* at 1308–09 (first citing 562 U.S. 44 (2011), and then citing 564 U.S. 50 (2011)).

59 *Id.* at 1329.

60 *See id.* at 1328–29.

61 5 U.S.C. § 559 (2018).

62 Metzger, *supra* note 54, at 1350.

*Vermont Yankee* doctrine).<sup>63</sup> This is further complicated by the fact, as John Duffy chronicles, that many of the APA pragmatism interpretations were originally developed as administrative common law, and then APA pragmatists and textualists subsequently attempted to ground them in the text and structure of the APA.<sup>64</sup>

Notwithstanding line-drawing difficulties, we think that it is important to separate out these two categories. The former, more pragmatic approach strikes us as more faithful to statutory text and most concerned with making sure the APA works as its enacting Congress most likely intended (and it assumes Congress had specific intentions as to administrative procedure and judicial review as opposed to an open invitation for courts to innovate). The latter, more dynamic approach views the APA as an open-ended, common-law superstatute, which merely establishes the floor or framework on which courts can further build out administrative procedures and judicial review doctrines motivated by constitutional and quasi-constitutional values. Some living APA jurists may even view the various administrative common-law doctrines—and the modern administrative state more generally—as constitutionally required.<sup>65</sup> Or as Professor Metzger puts it, much of administrative common law is “constitutionally inspired” or even “constitutionally mandated.”<sup>66</sup> “The linkages between constitutional law and ordinary administrative law are not only diverse,” she argues, “they are longstanding and deeply rooted in current doctrine.”<sup>67</sup>

To be sure, administrative common lawmaking is not—and never has been—just a progressive or pro-regulatory project. One need look no further than the “major questions quartet” from last Term,<sup>68</sup> which culminated in the Supreme Court invalidating the Obama-era EPA’s

---

63 Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI-KENT L. REV. 7, 10 (2022).

64 See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 116–20 (1998).

65 See, e.g., Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 87 (2017) (“The modern national administrative state is now constitutionally obligatory, rendered necessary by the reality of delegation.”); see also Pojanowski, *supra* note 16, at 861–69 (labeling this view as part of the “administrative supremacy” category).

66 Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 487–97 (2010).

67 *Id.* at 536.

68 See Mila Sohoni, *The Supreme Court, 2021 Term—Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

Clean Power Plan based on a novel major questions doctrine.<sup>69</sup> Writing for the majority in *West Virginia v. EPA*, Chief Justice Roberts grounded the doctrine—a rule of statutory interpretation that requires “clear congressional authorization” for agencies to regulate in areas of great economic or political significance—in “both separation of powers principles and a practical understanding of legislative intent.”<sup>70</sup> This doctrine has already received—and will no doubt continue to receive—exhaustive and exhausting scholarly attention.<sup>71</sup> We do not aim to add to that here, other than to note that the new major questions doctrine, as articulated in *West Virginia v. EPA*, strikes us as fitting comfortably within the category of administrative common lawmaking.<sup>72</sup>

### C. APA Textualism

Textualism has become the increasingly dominant approach to interpreting the APA in recent years. This textualist shift gained impetus from the Supreme Court’s 1978 decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>73</sup> Eschewing procedural requirements set by D.C. Circuit precedent, the Court held that agencies “should be free to fashion their own rules of procedure,” barring “constitutional constraints or extremely compelling

---

69 *West Virginia v. EPA*, 142 S. Ct. 2587, 2615–17 (2022); see also Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4165724> [<https://perma.cc/E37Z-3XSP>]. But see Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 195–96 (2023) (arguing that, “[c]ontrary to some scholars’ claims, the Court did not invent the doctrine in the past few decades” but the doctrine “claims roots extending at least into the mid-to-late nineteenth century, when courts demanded clear evidence that legislatures had delegated power to others”).

70 142 S. Ct. at 2609 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

71 For a literature review to date, see Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 18, 2023), <https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann/> [<https://perma.cc/TYP9-4UTD>]. One of us explores elsewhere how Congress could respond to the new major questions doctrine to more expeditiously review rules invalidated by courts on major questions doctrine grounds. See Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL’Y 773 (2022).

72 But see Eskridge & Ferejohn, *supra* note 1, at 1964, 1964–2036 (arguing that “the APA’s deep compromise did not empower the Supreme Court to create clear statement rules [like the new major questions doctrine] to enforce the constitutional nondelegation doctrine way beyond what the Constitution has long been read to require”).

73 435 U.S. 519, 543 (1978). Many scholars have incidentally challenged aspects of *Vermont Yankee* on textual grounds. See, e.g., Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1816 (1978) (critiquing *Vermont Yankee*’s assumption that agencies create a record for courts to review); Nathaniel L. Nathanson, *The Vermont Yankee Nuclear Power Opinion: A Masterpiece of Statutory Misinterpretation*, 16 SAN DIEGO L. REV. 183, 189–99 (1979).

circumstances.”<sup>74</sup> By contrast, “courts are generally not free to impose [procedures on agencies not required by the APA (or other statutes)] if the agencies have not chosen to grant them.”<sup>75</sup> *Vermont Yankee* stands as a rebuttal to aggressive administrative common lawmaking, emphasizing the primacy of statutes over judge-made law.<sup>76</sup> But its admonition also has been widely understood as a textualist call for courts to stick to the text of the APA when reviewing federal agency actions. As such, *Vermont Yankee* sparked extensive scholarly and judicial commentary on administrative law precedents that had developed under both APA pragmatism and administrative common lawmaking, discussed below.<sup>77</sup>

In 2015, the Supreme Court doubled down on APA textualism in *Perez v. Mortgage Bankers Ass’n*.<sup>78</sup> There, the Court rejected another D.C. Circuit administrative common-law doctrine—the *Paralyzed Veterans* doctrine requiring rulemaking to reverse certain major agency guidance<sup>79</sup>—holding that it “improperly imposes on agencies an obligation beyond the ‘maximum procedural requirements’ specified in the APA.”<sup>80</sup> Shortly after the Court’s decision in *Mortgage Bankers*, Professor Kovacs, an avowed APA textualist herself, suggested that the Court could, and maybe should, “have gone on to admonish the lower courts to respect the public deliberation reflected in the APA itself and to avoid creating administrative common law doctrines that conflict with the statute.”<sup>81</sup>

APA textualists start (and often end) with the text of the statute, focusing closely on the text, employing the various canons of statutory interpretation, and considering structural arguments. The first wave of APA textualists seems to have consisted mostly of conservatives and libertarians. In the legal academy, Professor Duffy is often viewed as one of the earliest advocates of a comprehensive textualist approach

---

74 *Vermont Yankee*, 435 U.S. at 543 (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)). See generally Gillian E. Metzger, *The Story of Vermont Yankee*, in *ADMINISTRATIVE LAW STORIES* 124, 149–50 (Peter L. Strauss ed., 2006) (observing that the *Vermont Yankee* “opinion is a masterpiece of obfuscation”); Scalia, *supra* note 3, at 356 (similar).

75 *Vermont Yankee*, 435 U.S. at 524.

76 See, e.g., Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 750–51 (2009).

77 For further discussion of the post-*Vermont Yankee* developments, see *infra* notes 89–93 and accompanying text.

78 575 U.S. 92, 100 (2015).

79 *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”), *abrogated by Perez*, 575 U.S. 92.

80 *Perez*, 575 U.S. at 100 (quoting *Vermont Yankee*, 435 U.S. at 524).

81 Kathryn E. Kovacs, *Pixelating Administrative Common Law in Perez v. Mortgage Bankers Association*, 125 YALE L.J.F. 31, 33 (2015).

to the APA.<sup>82</sup> In *Administrative Common Law in Judicial Review*, Professor Duffy argues that the doctrines of exhaustion, ripeness, judicial control of agency procedures, and the standards of review for questions of law all contravene the text of the APA.<sup>83</sup> On exhaustion, for example, he contends that for decades, lower courts had improperly imported the exhaustion doctrine from equity and pre-APA precedent in dismissing challenges to agency action.<sup>84</sup> Professor Duffy argues that the Court in *Darby v. Cisneros* properly overruled this exhaustion doctrine when it “directed its energies solely to interpreting the language of Section 704.”<sup>85</sup> Section 704 provides review for “final agency action for which there is no other adequate remedy in a court.”<sup>86</sup> In *Darby*, given that the agency action was final, and no rule required parties to appeal in the agency, the APA conferred a right of judicial review.<sup>87</sup> With respect to *Chevron* deference, to which we return in Section I.D, Professor Duffy argues that “the *Chevron* doctrine requiring deferential review of an agency’s interpretation of a statute it administers seems to contradict the command in Section 706 of APA that reviewing courts ‘shall decide all relevant questions of law.’”<sup>88</sup>

Elsewhere, one of us provides a more extended literature review of the various mismatches between the text of the APA and modern administrative law doctrine and regulatory practice, including the rule-making evolution discussed in Section I.A.<sup>89</sup> We do not reproduce that review here. But it is important to underscore that APA textualists criticize both administrative common lawmaking, as Professor Duffy does, and APA pragmatism. For an example of the latter, Gary Lawson and Jack Beermann argue that the *Portland Cement* doctrine requiring agency disclosure of information is “a violation of the basic principle

---

82 To be sure, Professor Duffy was not the first APA textualist. *Vermont Yankee* came two decades before, and administrative law scholars had been raising textualist critiques of APA statutory interpretations ever since. See, e.g., Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 2–3 (1996) (“Perhaps little more can be expected from a court that, in this age of statutes, still retains strong common law habits. But it is doubtful that this practice conduces to clarity or exactness in the explanation of the APA’s textual foundations.”).

83 Duffy, *supra* note 64, at 115–18.

84 *Id.* at 154–58.

85 *Id.* at 159 & n.232 (citing 509 U.S. 137 (1993)).

86 5 U.S.C. § 704 (2018).

87 See *Darby*, 509 U.S. at 146–47; Duffy, *supra* note 64, at 160.

88 Duffy, *supra* note 64, at 118 (footnote omitted) (quoting 5 U.S.C. § 706 (2018)).

89 See Walker, *Lost World of the APA*, *supra* note 5, at 739–46 (discussing APA rulemaking provisions); *id.* at 746–51 (discussing APA adjudication provisions); *id.* at 751–61 (discussing APA judicial review provisions, including threshold doctrines of exhaustion, ripeness, standing, and presumption of reviewability; standards of judicial review, including hard look review, *Chevron* deference, and *Auer* deference, and judicial remedies, including remand without vacatur, nationwide injunctions, and harmless error).



of *Vermont Yankee* that Congress and the agencies, but not the courts, have the power to decide on proper agency procedures.”<sup>90</sup>

In that article, Professors Lawson and Beermann were responding to prior calls by two scholars to extend *Vermont Yankee* to other APA contexts. The first was Paul Verkuil, who argued that “hard look” review, discussed in Section I.A, is similarly inconsistent with the textualist approach in *Vermont Yankee*.<sup>91</sup> The second was Richard Pierce, who argued that the First Circuit should abolish its presumption that an agency must engage in APA formal adjudication when its governing statute requires a “hearing”<sup>92</sup>—something the First Circuit ultimately did.<sup>93</sup> Professor Pierce also responded to the Lawson-Beermann proposal to eliminate three other current administrative law doctrines in addition to *Portland Cement*: “the limits on ex parte communications in informal rulemakings; the prohibition on bias and prejudgment of issues by decision makers in informal rulemakings; and the . . . requirement[] that a final rule must be a logical outgrowth of the rulemaking process.”<sup>94</sup> As a textual matter, Professor Pierce largely agreed with Professors Beermann and Lawson when it comes to the prohibition of bias in informal rulemaking and the logical outgrowth doctrine, but disagreed as to the *Portland Cement* doctrine and the limits of ex parte communications.<sup>95</sup>

In recent years, APA textualism has become a more bipartisan enterprise. This largely tracks general trends in statutory interpretation, in which liberals and progressives have begun to embrace textualism—either as a matter of first principles or as a matter of strategy.<sup>96</sup> Indeed,

---

90 Beermann & Lawson, *supra* note 22, at 894.

91 See Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418, 419–21 (1981).

92 Richard J. Pierce, Jr., *Waiting for Vermont Yankee II*, 57 ADMIN. L. REV. 669, 673–83 (2005).

93 See *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 15–19 (1st Cir. 2006).

94 Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 903 (2007).

95 See *id.* at 910–20. To be sure, Professor Pierce has advanced textualist arguments for interpreting the APA, but he has also criticized the Supreme Court’s sometimes “hypertextualist” approach. See, e.g., Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995) (“I see great value in the use of textualist tools of statutory construction. My concerns are rooted in the extremes to which the Court has gone in its use (or abuse) of textualist tools to the exclusion of other evidence of legislative intent . . .”).

96 See, e.g., Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63 (2019); Jeffrey Rosen, *How New Is the New Textualism?*, 25 YALE J.L. & HUMS. 43 (2013); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437 (2022). Similar progressive textualist moves have been made in constitutional law.

perhaps the most prominent victory for the progressive textualism to date is the Supreme Court's decision in *Bostock v. Clayton County*, recognizing that discrimination based on sexual orientation or gender identity is "because of sex" under Title VII of the Civil Rights Act.<sup>97</sup>

When it comes to progressive textualism in administrative law, Professor Kovacs has led the charge. In 2015, she argued that the entrenched nature of the APA qualifies it as a "superstatute" in Eskridge-Ferejohn terms.<sup>98</sup> As noted in Section I.B, William Eskridge and John Ferejohn view superstatutes as opportunities for dynamic interpretation and the creation of accompanying administrative common law. Professor Kovacs, by contrast, argues against such dynamism when it comes to interpreting the APA.<sup>99</sup> "[G]iven the extraordinary legislative process that led to the APA's enactment and the relative paucity of agency-based deliberative feedback since then," she argues, "courts should be particularly cautious about interpreting the APA's text in a way that shifts the balance Congress reached through the political process."<sup>100</sup> Like Professor Duffy but from the other side of the ideological aisle, Professor Kovacs argues that much of "administrative common law is suspect"—for her because it "contradicts that deliberation-focused approach."<sup>101</sup> In subsequent work, Professor Kovacs has called on the Court to eliminate numerous atextual and dynamic interpretations of the APA,<sup>102</sup> including the judge-made procedural

---

See, e.g., James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011).

97 140 S. CL. 1731, 1737, 1740 (2020); see, e.g., Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020, 10:23 AM), <https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/> [https://perma.cc/GU4J-876Q] ("This ruling—which has enormous implications for equality for LGBTQ workers—also makes clear why progressive textualism, i.e., progressive arguments for the centrality of legal text, is important for the future of equality change."); see also Tara Leigh Grove, *The Supreme Court, 2019 Term—Comment: Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020) (exploring the competing versions of textualism in *Bostock*).

98 Kovacs, *supra* note 3, at 1209. See generally ESKRIDGE & FERREJOHN, *supra* note 3.

99 Kovacs, *supra* note 3, at 1209–11.

100 *Id.* at 1254.

101 *Id.* at 1260.

102 See, e.g., Kathryn E. Kovacs, *Scalia's Bargain*, 77 OHIO ST. L.J., 1155, 1157–58 (2016) (interpreting the 1976 APA amendment's effect on sovereign immunity); Kathryn E. Kovacs, *Abandoning Administrative Common Law in Mortgage Bankers*, 95 B.U. L. REV. ANNEX 1, 7 (2015) (questioning, though not asserting, whether *Auer* deference to agency regulatory interpretations is consistent with the APA); Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 583–84 (2011) (questioning heightened deference to the military); Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 720–25 (2010).

requirements for notice-and-comment rulemaking discussed in Section I.A.<sup>103</sup> She has also argued that a textualist interpretation of the APA would include the President as an agency for APA purposes.<sup>104</sup>

Nicholas Bagley is another scholar who has leveraged textualist arguments to advance progressive (or at least pro-regulatory) ends in administrative law. He has argued that the APA's harmless error provision should more regularly excuse agencies' procedural errors from judicial invalidation.<sup>105</sup> When it comes to a variety of agency mistakes in notice-and-comment rulemaking and inadequate agency reason giving, Professor Bagley argues that "there is often a mismatch between the underlying violation and the harshness of the conventional remedy."<sup>106</sup> In a subsequent article, provocatively titled *The Procedure Fetish*, Professor Bagley expands on those arguments to call for the potential reconsideration of "[t]he judicially imposed rigors of notice-and-comment rulemaking, the practice of invalidating guidance documents that are 'really' legislative rules, the Information Quality Act, the logical outgrowth doctrine, [and] nationwide injunctions against

---

103 Kovacs, *supra* note 25, at 547 ("Conflict with the text and history of the APA provides reason enough to abandon the judicial rules about rulemaking. Those rules, however, also have had significant, negative, unintended consequences."); cf. Levin, *supra* note 63, at 26–32 (responding to Kovacs's progressive textualism theory as part of his broader defense of some version of APA pragmatism).

104 Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63 (2020) (arguing that *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), misinterpreted the APA as a textualist matter when it held that the President is not an "agency" under the APA); see also Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573, 606 (2021) (arguing that "the APA should be reinterpreted or amended to apply to the President when exercising authority delegated by statute to either the President or another federal officer"). In his contribution to this Symposium, Noah Rosenblum examines the history of the APA and suggests alternative reasons why Congress, when it enacted the APA, did not expressly address the President. See Noah Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143 (2023).

105 See Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 258–60 (2017); see also 5 U.S.C. § 706 (2018) (instructing courts that "due account shall be taken of the rule of prejudicial error").

106 Bagley, *supra* note 105, at 255.

invalid rules.”<sup>107</sup> In a somewhat similar vein, he has questioned the presumption of reviewability in administrative law.<sup>108</sup>

Unsurprisingly, Professor Kovacs applauds Professor Bagley’s *The Procedure Fetish*, which she believes “is destined to be a classic” as it “systematically dismantles . . . the arguments that procedure is necessary to legitimize the administrative state and avoid agency capture.”<sup>109</sup> She then more directly connects Professor Bagley’s work to progressive textualism, declaring that “[i]t is time for progressive administrative law scholars to claim the APA as their own.”<sup>110</sup> It remains to be seen whether more liberal and progressive judges and scholars take up Professor Kovacs’s call to action.

Regardless, textualism will likely remain a major theory for interpreting the APA for years to come.

#### D. APA Originalism

Over the past decade, many scholars have begun to employ a more originalist approach to interpreting the APA. This approach looks to the original understanding of the text and statutory provisions of the APA. As Emily Bremer describes APA originalism in her contribution to this Symposium, “much of the statute’s meaning is apparent only if one reads the brief text [of the APA] against the rich context that produced it,” which includes “pre-APA administrative common law” as well as “a wide variety of pre-APA statutes and the agency precedents and practices that had developed and crystallized to varying degrees

---

107 Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 348 (2019). One of us penned a response to Professor Bagley’s *Remedial Restraint in Administrative Law*, and those arguments would similarly apply to Professor Bagley’s expanded arguments in *The Procedure Fetish*. See Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 110 (2017) (“For those of us who are less trusting of the federal bureaucracy, we are much less likely to find agency errors harmless—especially errors related to the structures and procedures that attempt to compensate for the regulatory state’s democratic deficits. The current rule-based approach of the ordinary remand rule better accounts for this distrust. And this rule-based approach is consistent with the text and structure of the APA’s appellate review model, especially as the model has evolved over the decades to address various separation-of-powers concerns.”).

108 Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1287 (2014) (“The ostensible statutory source for the presumption—the Administrative Procedure Act (APA)—nowhere instructs courts to construe statutes to avoid preclusion.” (footnote omitted)).

109 Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. ONLINE 134, 134 (2019).

110 *Id.* at 139.

before the APA's enactment."<sup>111</sup> The emergence of APA originalism is perhaps best exemplified by HeinOnline making publicly available a massive database of APA historical sources, edited and compiled by Professors Bremer and Kovacs.<sup>112</sup>

APA originalism seems to mirror originalist constitutional interpretation methodologies, and may reflect the quasi-constitutional status that the APA has achieved. Like the distinction between APA pragmatism and administrative common lawmaking, the line between APA textualism and APA originalism is not easy to draw—and many APA textualist approaches engage in at least some originalist methods. Notwithstanding, we think it is important to separate out these two types of APA interpretive theories, as the more originalist versions of APA textualism venture beyond a more formalist textualist inquiry, such as that advanced by Tara Leigh Grove with respect to statutory interpretation more generally.<sup>113</sup> Moreover, some APA innovations may be consistent with the statutory text, but not with the original understanding of the APA.<sup>114</sup>

Evan Bernick is one of the pioneers of APA originalism. In *Envisioning Administrative Procedure Act Originalism*, he argues that APA originalism, if adopted, would encourage interpreters to focus on: (1) evidence contained in the text and structure of the APA, including definitions; (2) “contemporaneous evidence of word usage and patterns and regularities in grammar and syntax;” and (3) judicial development

---

111 Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 NOTRE DAME L. REV. 1873, 1887 (2023); see also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 635 n.123 (1996) (“[T]he framers of the APA meant its judicial review provisions to be a restatement of pre-APA standards.”). See generally JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* (2012) (exploring the history of administrative politics in the 1940s and 1950s).

112 Emily S. Bremer & Kathryn E. Kovacs, Essay, *Introduction to the Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act of 1946* (HeinOnline 2021), 106 MINN. L. REV. HEADNOTES 218 (2022). Notably, the Bremer-Kovacs Collection received the 2022 Joseph L. Andrews Legal Literature Award from the American Association of Law Libraries. See Lauren Zazarra, *Bremer-Kovacs Collection Receives Joseph L. Andrews Legal Literature Award*, HEINONLINE BLOG (July 21, 2022), <https://home.heinonline.org/blog/2022/07/bremer-kovacs-collection-receives-joseph-l-andrews-legal-literature-award/> [https://perma.cc/Y4CB-NRA3].

113 Grove, *supra* note 97, at 267 (arguing in favor of “‘formalistic textualism,’ an approach that instructs interpreters to carefully parse the statutory language, focusing on semantic context and downplaying policy concerns or the practical (even monumental) consequences of the case”).

114 See, e.g., Levin, *supra* note 63, at 21 (“The significance of the distinction that I am drawing between originalism and textualism lies in the fact that quite a few of the ‘creative’ APA interpretations . . . are at least compatible with the APA’s text, even though the authors of the Act and contemporaneous administrative lawyers would probably not have subscribed to those positions.”).

in the years preceding the APA.<sup>115</sup> Professor Bernick argues that under APA originalism, *State Farm* hard-look review for arbitrary and capricious decisions is consistent with, but not required by, APA § 706(2)(A).<sup>116</sup> But he argues that the requirement that final rules be a “logical outgrowth” of the proposed rule is nonoriginalist.<sup>117</sup>

Professor Bernick argues that APA originalism is more legitimate as law, and thus provides more legitimacy to the administrative state from a rule-of-law and democracy standpoint than other approaches.<sup>118</sup> But he acknowledges that downsides of this theory are that it rarely yields clear answers, that the original APA was normatively bad, that common-law approaches have improved the APA, and that his approach will not yield legitimacy benefits in a nonoriginalist world.<sup>119</sup> Professor Bernick ultimately seems to vacillate on whether courts should fully embrace APA originalism, but not on whether it should grow and thrive as a scholarly enterprise. Among other benefits, he argues, “insights derived from APA originalism may inspire efforts to replace the APA with a written administrative constitution that is better suited to today’s administrative state.”<sup>120</sup>

APA originalism projects have proliferated in recent years. Perhaps the most ambitious and sweeping is Jeffrey Pojanowski’s *Neoclassical Administrative Law*—a theory that “is more likely to see the text’s original meaning, statutory context and structure, linguistic canons, and perhaps historical intent as appropriate tools for interpretation, rather than normative canons or legislative purpose at a high level of generality.”<sup>121</sup> Similarly, using APA originalist and related historical methods, Professor Bremer has advanced pathbreaking reconceptions

---

115 Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 843, 843–44 (2018).

116 *Id.* at 849.

117 *Id.* at 854–55.

118 *Id.* at 856–60.

119 *Id.* at 860–67.

120 *Id.* at 871. Professor Bernick’s theory of APA originalism has garnered praise and constructive criticism. Compare Jeffrey Pojanowski, *Rediscovering the APA*, JOTWELL: ADMIN. L. (Sept. 20, 2018), <https://adlaw.jotwell.com/rediscovering-the-apa/> [<https://perma.cc/J7Z3-BA7L>] (“What APA originalism might unearth should be of interest to originalists and also to non-originalists who see original meaning or intention as an important input in the interpretive process.”), with Levin, *supra* note 63, at 25–26 (“[I]f [Professor Bernick] hopes to convince others that originalism has much to add to the legal world’s interpretations of the APA, perhaps he will first need to convince himself.”).

121 Pojanowski, *supra* note 16, at 896–97 (footnote omitted); cf. Levin, *supra* note 63, at 37 (“In sum, much about Pojanowski’s ‘neoclassical’ model strikes me as largely undefended. That doesn’t make it wrong, but it raises doubt about the extent to which one could expect many readers to buy into it.”).

of agency adjudication and rulemaking under the APA.<sup>122</sup> As one of us has observed, “[i]t is not often that an article requires a field to fundamentally reconsider its foundations. Yet, Bremer’s *Rediscovered Stages* is such an article for administrative law (and agency adjudication in particular).”<sup>123</sup>

Scholars have engaged in APA originalism with respect to a number of specific provisions of the APA. For instance, based on the APA’s text, structure, and history, Aram Gavoor and Steven Platt conclude that the administrative record “should include *only* those materials that individuals working on the decision actually and directly considered.”<sup>124</sup> APA originalism has also featured prominently in two of the most prominent debates in administrative law today: *Chevron* deference to agency statutory interpretation and the nationwide injunction/universal vacatur of agency rules. We discuss each in turn.

First, there has been a growing call among scholars and judges—mostly from conservatives and libertarians—to eliminate *Chevron* deference to agency statutory interpretations, based largely on constitutional and policy grounds.<sup>125</sup> But there are also questions whether *Chevron* deference is a proper interpretation of § 706 of the APA. Professor Duffy, as noted in Section I.C, has made a mostly textualist case against *Chevron*.<sup>126</sup> In more recent years, Aditya Bamzai has advanced a more originalist argument against *Chevron*.<sup>127</sup> In concluding that *Chevron* is nonoriginalist, Professor Bamzai looks to the theory and practice of interpretation prior to the APA. He argues that judicial deference to executive interpretation only began after the APA, and to the extent courts deferred to agencies before the APA, the APA was enacted “to stop this deviation.”<sup>128</sup> Under this approach, the “most natural reading” is that “section 706 established deferential standards of review for issues other than ‘relevant questions of law,’ thereby

---

122 See Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021); Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69 (2023). William Funk has also utilized an originalist approach to critique the Court’s shift away from APA adjudication. William Funk, *Slip Slidin’ Away: The Erosion of APA Adjudication*, 122 PENN ST. L. REV. 141 (2017).

123 Christopher Walker, *Unearthing the Lost World of APA Adjudication*, JOTWELL: ADMIN. L. (Aug. 30, 2021), <https://adlaw.jotwell.com/unearthing-the-lost-world-of-apa-adjudication/> [https://perma.cc/F8JP-JC73].

124 Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 26, 33 (2018) (emphasis added).

125 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). One of us surveys those arguments elsewhere. See Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103, 110–15 (2018).

126 See Duffy, *supra* note 64, at 193–99.

127 Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

128 *Id.* at 916–18.

indicating that Congress knew how to write a deferential standard into statute when it wanted to do so.”<sup>129</sup>

Ron Levin and Cass Sunstein have both written thoughtful responses, engaging with the text, structure, and history of the APA as well as the judicial landscape that preexisted the APA with respect to judicial deference to administrative interpretations of law.<sup>130</sup> In his review, Professor Levin concludes that “the text of § 706, related APA provisions, legislative history, case law background, and contemporaneous understanding all fail to support the no-deference interpretation of § 706.”<sup>131</sup> He argues that Professor Bamzai understates the extent to which pre-APA caselaw relied on deference principles.<sup>132</sup> In Professor Levin’s view, the drafters of the APA were not particularly concerned about the issue of judicial deference on legal questions, so they wrote broad language into the APA, leaving that issue open for later development.<sup>133</sup> Indeed, he contends, almost all contemporaneous courts and commentators understood the APA as having made no change in the law on this subject.<sup>134</sup> Professor Sunstein similarly concludes that, “in the 1940s, the contextual evidence on behalf of Bamzai’s claim is not strong. Actually, it is difficult to find, and that difficulty can be seen as a dog who did not bark in the night—a probative silence.”<sup>135</sup> The interpretive debate over *Chevron* deference continues,<sup>136</sup> and several Justices have relied on Professor Bamzai’s argument in their separate opinions questioning administrative law’s judicial

---

129 *Id.* at 985, 987 (footnote omitted) (quoting 5 U.S.C. § 706 (2018)).

130 *See* Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125 (2021); Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613 (2019).

131 Levin, *supra* note 130, at 130.

132 *Id.* at 167–70.

133 *See id.* at 170–74.

134 *Id.* at 175–83.

135 Sunstein, *supra* note 130, at 1650.

136 *Compare* Aditya Bamzai, *Judicial Deference and Doctrinal Clarity*, 82 OHIO ST. L.J. 585 (2021), *with* Cass R. Sunstein, *Zombie Chevron: A Celebration*, 82 OHIO ST. L.J. 565 (2021). *See also* 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, 1308–10, 1314–23 (2022) (responding to Levin and Sunstein); Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, 105 CORNELL L. REV. 1465, 1472 (2020) (“Textualists who reject the justifications for [*Chevron*] deference to agency interpretations can accept the quite different rationale for deference to agency constructions.”).



deference doctrines.<sup>137</sup> Indeed, this coming Term the Supreme Court will hear oral argument on whether *Chevron* should be overruled.<sup>138</sup>

Second, the debate about the constitutionality, lawfulness, and wisdom of nationwide or universal injunctions has been ongoing for years, with supporters<sup>139</sup> and opponents.<sup>140</sup> Part of this debate has focused on whether nationwide injunctions and universal vacatur are available under the APA with respect to agency rules. Section 706 of the APA permits reviewing courts to “hold unlawful and set aside agency action, findings, and conclusions found to be” arbitrary and capricious or contrary to law.<sup>141</sup> The conventional understanding has been that “set aside agency action” authorizes universal vacatur of the agency rule or regulatory action. But Sam Bray and John Harrison have raised independent reasons, as a matter of APA textualism and APA originalism, to argue that universal vacatur is not a remedy available under the APA.<sup>142</sup> In response, Mila Sohoni and Ron Levin have come to the defense of universal vacatur, assessing the same textual and originalist evidence and reaching the contrary conclusion.<sup>143</sup> In their contributions to this Symposium, Professors Bamzai and Levin continue the debate.<sup>144</sup>

---

137 See *Buffington v. McDonough*, 143 S. Ct. 14, 16 (2022) (Gorsuch, J., dissenting from the denial of certiorari); *Baldwin v. United States*, 140 S. Ct. 690, 693 (2020) (Thomas, J., dissenting from the denial of certiorari); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment).

138 See *Loper Bright Enters. v. Raimondo*, No. 22-451, 2023 WL 3158352 (U.S. May 1, 2023) (mem.).

139 See, e.g., Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 56 (2017); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019).

140 See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019).

141 5 U.S.C. § 706(2) (2018).

142 Samuel Bray, *Does the APA Support National Injunctions?*, REASON: VOLOKH CONSPIRACY (May 8, 2018, 2:15 PM), <https://reason.com/volokh/2018/05/08/does-the-apa-support-national-injunction/> [perma.cc/7EV5-LGD2]; John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37 (2020).

143 See, e.g., Ronald M. Levin, *The National Injunction and the Administrative Procedure Act*, REGUL. REV. (Sept. 18, 2018), <https://www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act/> [perma.cc/6HNB-TJVA]; Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121 (2020).

144 Compare Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037 (2023), with Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997 (2023).

This is a live controversy at the Supreme Court. In the pending case *Texas v. United States*, the United States adopted these arguments in challenging universal vacatur under § 706 of the APA.<sup>145</sup> It recognized that the Supreme Court “has affirmed decisions granting universal relief under the APA.”<sup>146</sup> Notwithstanding this precedent, the United States noted that the Court “has never directly addressed the issue, and ‘[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon,’ do not ‘constitute precedents.’”<sup>147</sup> In challenging circuit court precedent, the United States noted that “cases postdating the APA by more than four decades are hardly probative of the Act’s original meaning.”<sup>148</sup> The United States looked to the contemporary uses of the text in other statutes and judicial opinions,<sup>149</sup> original intent of Congress,<sup>150</sup> and background rules of equity.<sup>151</sup> At oral argument, Chief Justice Roberts and Justices Kavanaugh and Jackson seemed quite skeptical of this argument, while some of the other Justices seemed more receptive.<sup>152</sup> In response to Solicitor General Elizabeth Prelogar, Chief Justice Roberts quipped: “your position on vacatur, that sounded to me to be fairly radical and inconsistent with . . . those of us who were on the D.C. Circuit . . . five times before breakfast, that’s what you do in an APA case.”<sup>153</sup>

APA originalism arguments will no doubt continue to develop in the years to come. Unlike APA textualism, we have not seen an overt progressive turn—at least not yet—when it comes to APA originalism.

---

145 Reply in Support of Application for a Stay at 15, *United States v. Texas*, No. 22-58 (U.S. July 14, 2022) (“[T]he APA was enacted against a background of party-specific relief. Nothing in the text of the APA suggests that Congress intended to displace that tradition.”).

146 *Id.* at 16.

147 *Id.* (alteration in original) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

148 Reply Brief for the Petitioners at 20, *United States v. Texas*, No. 22-58 (U.S. Nov. 17, 2022).

149 *Id.* at 21–22.

150 *Id.* at 22.

151 *Id.* at 23.

152 See Amy Howe, *Justices Delve into a Trio of Thorny Issues in States’ Challenge to Federal Immigration Policy*, SCOTUSBLOG (Nov. 29, 2022, 4:55 PM), <https://www.scotusblog.com/2022/11/justices-delve-into-a-trio-of-thorny-issues-in-states-challenge-to-federal-immigration-policy/> [perma.cc/4UGH-U2E8].

153 Transcript of Oral Argument at 35, *United States v. Texas*, No. 22-58 (U.S. argued Nov. 29, 2022). For contrasting takes on what the D.C. Circuit usually does when it vacates a rule, compare Jonathan H. Adler, *On Universal Vacatur, the Supreme Court, and the D.C. Circuit*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 1, 2023), <https://www.yalejreg.com/nc/on-universal-vacatur-the-supreme-court-and-the-d-c-circuit-by-jonathan-h-adler/> [https://perma.cc/RF36-N45J], with Ronald M. Levin, *Is Universal Vacatur Only an Illusion?*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 18, 2023), <https://www.yalejreg.com/nc/is-universal-vacatur-only-an-illusion-by-ronald-m-levin/> [https://perma.cc/FAT8-E7GQ].

But some administrative law scholars have argued for progressive interpretations of the APA based on text, context, and history, with Blake Emerson perhaps most prominently among them.<sup>154</sup>

## II. A PATH FORWARD

These four competing theories—pragmatism, administrative common lawmaking, textualism, and originalism—will all continue to influence how judges and scholars approach interpreting the APA. It would not surprise us, with the current Supreme Court majority's approach to statutory interpretation, to see a further rise of APA textualism and APA originalism, and perhaps a further cutting back of administrative common lawmaking. As noted in Section I.A, however, the Roberts Court continues to dabble in APA pragmatism. Its more searching review of agency reason giving in the census citizenship question case and the DACA rescission case come immediately to mind. Indeed, some may well consider these precedents more consistent with administrative common lawmaking than mere APA pragmatism. And, of course, there is the new major questions doctrine, discussed in Section I.B, which suggests administrative common lawmaking is not dead at the Supreme Court today.

The main objective of our contribution to this Symposium on the history of the APA and judicial review has been to chronicle and categorize the theories of APA interpretation. We hope this literature review, presented in Part I, helps focus the scholarly debate going forward, as well as guide judges and litigants (and agencies) when interpreting the APA on the ground. We do not endeavor to fully develop our own comprehensive theory of APA interpretation in this Essay. But in this Part, we do make two recommendations—one short, and the other a bit longer.

### A. *APA Originalism for Open Questions*

When it comes to open statutory questions, we urge courts to interpret the APA based on the statute's text, structure, context, and original understanding. In other words, APA originalism is the best

---

154 See, e.g., Blake Emerson, "Policy" in the Administrative Procedure Act: Implications for Delegation, Deference, and Democracy, 97 CHI-KENT L. REV. 113, 115 (2022) ("Whereas critics of the administrative state want to eliminate or sharply circumscribe agencies' policymaking role, the APA's text and history are clear that agencies can and should make important policy judgments through fair procedures." (footnote omitted)); Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL'Y REV. 35, 35 (2021) ("The administrative procedure of public care, which is recognized by the Administrative Procedure Act of 1946, requires that federal agencies act with due regard for the interests and input of affected parties." (emphasis omitted)).

path forward for open questions. We are sympathetic to more formalist textualism in certain statutory contexts, in large part because textualism (compared to originalism) sometimes may lead to more certainty and predictability in the law and can set clearer rules of the road for Congress's legislative action (and reaction to judicial statutory interpretations). In other words, it is true at least some of the time that, as Professor Bernick argues, APA originalism may not yield as many clear, predictable answers compared to more formalist textualism.<sup>155</sup> To do this originalism well involves a "daunting task of examining the historical, original meaning of the terms Congress included in the APA."<sup>156</sup>

When it comes to a framework statute like the APA, however, we believe a more originalist approach to open questions better respects Congress's role enacting the APA—a seldom-amended framework statute that emerged as a political compromise after more than a decade of congressional deliberation. In that sense, Professor Kovacs's arguments against administrative common lawmaking have a lot of force here:

Given the extraordinary legislative process that led to the APA's enactment and the relative paucity of agency-based deliberative feedback since then, courts should be particularly chary of interpreting the APA's text in a way that shifts the balance Congress reached through the political process. Courts should look more closely at the context and history of the APA's individual provisions, including Congress's treatment of each provision in the original legislative process and the quality of deliberation the provision has seen since enactment.<sup>157</sup>

Moreover, for reasons similar to those advanced by Professors Bernick, Duffy, and Kovacs,<sup>158</sup> APA pragmatism and administrative common lawmaking are less ideal than APA originalism (or APA textualism), in terms of respecting Congress's Article I legislative role,

---

155 See Bernick, *supra* note 115, at 860–61.

156 Walker, *Lost World of the APA*, *supra* note 5, at 737.

157 Kovacs, *supra* note 3, at 1211.

158 See Bernick, *supra* note 115, at 856–60 (focusing on how APA originalism, compared to administrative common lawmaking, is the law, better legitimizes the administrative state, better promotes the rule of law, and is more democratically legitimate); Duffy, *supra* note 64, at 142 (“[T]he courts creating and applying administrative common law doctrines already claim to eschew those values; indeed, they claim to pursue principles of democratic accountability and judicial restraint that are inconsistent with the New Federal Common Law enterprise of which this administrative common law is part. Inconsistent with statute, inconsistent with itself, this administrative common law can no longer be considered stable.” (footnote omitted)); Kovacs, *supra* note 3, at 1255 (criticizing administrative common law because it fails to “answer concerns related to not only separation of powers and political accountability but also public deliberation”).

especially when dealing with a seldom-amended framework statute like the APA.

In this Essay, we do not endeavor to comprehensively identify, much less work through, the various open questions when it comes to interpreting the APA. But a couple potential examples come to mind. As explored elsewhere in this Symposium, courts arguably have not settled on what it means to be “impracticable, unnecessary, or contrary to the public interest”<sup>159</sup> so as to excuse an agency from engaging in notice and comment before issuing a rule.<sup>160</sup> Additionally, fleshing out the rule of prejudicial error, discussed in Section I.C, in various judicial review contexts may be another open area for APA originalism.<sup>161</sup> To be sure, even these statutory provisions have acquired judicial gloss in the lower courts, such that a reviewing court would need to carefully consider the reliance interests and stability concerns discussed in the following Section before returning to an original understanding of the APA.

### B. *Statutory Stare Decisis for Settled Questions*

For similar reasons, when it comes to APA statutory interpretation questions courts have already answered, we urge courts and litigants (and agencies) to emphasize the strong pull of statutory stare decisis.<sup>162</sup> Statutory stare decisis arguably is already part of APA originalism, as stare decisis is part of “our law.”<sup>163</sup> In that sense, our approach is,

---

159 5 U.S.C. § 553(b)(B) (2018).

160 See Hickman & Thomson, *supra* note 17, at 2094–2102 (exploring this statutory interpretation question in the context of interim-final rulemaking).

161 See *supra* notes 105–08 and accompanying text.

162 See, e.g., BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 333 (2016) (“Stare decisis applies with special force to questions of statutory construction.”); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 731 (1999) (asserting that the Supreme Court’s heightened deference toward statutory precedent first surfaced in the late nineteenth century and “crystallized in a series of opinions in the Hughes Court”). One of us has argued elsewhere not to overturn certain statutory precedents on stare decisis grounds. See Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856–63 (2018) (considering qualified immunity with respect to 42 U.S.C. § 1983); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1236 n.204 (2021) (discussing *Chevron* deference with respect to 5 U.S.C. § 706).

163 William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2360 (2015) (“Precedent, like waiver, was a well-established common-law-doctrine at the time of the Founding.”). Even Justice Thomas, who gives the least weight to stare decisis on the Court today, has respected its force in the statutory context. See, e.g., *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2526–31 (2015) (Thomas, J., dissenting) (arguing that *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was wrongly decided, but accepting it under statutory stare decisis).

again, more in line with APA originalism than APA textualism, the latter of which in at least some forms may be less willing to adhere to the doctrine of statutory *stare decisis*.<sup>164</sup>

When it comes to judicial precedents interpreting statutes, the Supreme Court has made clear that “*stare decisis* carries enhanced force” because those who think the judiciary got the issue wrong “can take their objections across the street, and Congress can correct any mistake it sees.”<sup>165</sup> In this “superpowered form” of *stare decisis*, the Court has required “superspecial justification to warrant reversing” the statutory precedent.<sup>166</sup> Unlike constitutional *stare decisis*, statutory *stare decisis* is grounded in legislative supremacy. As then-Professor Amy Coney Barrett explained, this legislative supremacy rationale comprises two distinct strands: congressional acquiescence and separation of powers.<sup>167</sup> Especially with respect to longstanding statutory precedents, “congressional inaction following the Supreme Court’s interpretation of a statute reflects congressional acquiescence in it.”<sup>168</sup> With respect to separation of powers, the concern is that the legislature—not the judiciary—has greater institutional competence to revisit statutory precedents.<sup>169</sup> Some scholars have further argued that statutory *stare decisis* serves a democracy-forcing function.<sup>170</sup>

---

164 See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 413–14 (2012) (“*Stare decisis* . . . is not a part of textualism. It is an exception to textualism . . . .”); Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 160 (2018) (reviewing recent Supreme Court decisions and concluding that “the Court’s textualists—or at least some subset of them—regularly are willing to overturn statutory precedents”—“far more willing to do so than are their purposivist counterparts”). In a forthcoming article, Tara Leigh Grove explores in much greater detail the interactions between textualism and statutory *stare decisis*, concluding that at least some types of statutory *stare decisis* are compatible with textualism. See Tara Leigh Grove, *Is Textualism at War with Statutory Precedent?*, 102 TEX. L. REV. (forthcoming 2024) (manuscript at 49) (on file with authors).

165 *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015); see also, e.g., William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1427–39 (1988) (listing twenty-six Supreme Court decisions explicitly overruling statutory precedents between 1961 and 1987, another twenty-four implicitly overruling statutory precedents, and another thirty-five significantly curtailing statutory precedents or overruling their reasoning).

166 *Kimble*, 135 S. Ct. at 2410.

167 Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 322–27 (2005).

168 *Id.* at 322 & n.23 (compiling Supreme Court cases referencing this rationale); see, e.g., *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972) (“Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.”).

169 Barrett, *supra* note 166, at 323 & nn.28–31 (compiling Supreme Court cases referencing this rationale).

170 Lawrence C. Marshall, “*Let Congress Do It*”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 208–15 (1989); accord Barrett, *supra* note 166, at 327.

When it comes to the APA, the justifications for statutory stare decisis are arguably stronger than for most statutes. As for congressional acquiescence, so many of the key judicial precedents interpreting the APA have been on the books for decades.<sup>171</sup> To be sure, one may be tempted to point to the fact that Congress has amended the APA fewer than two-dozen times since its enactment in 1946.<sup>172</sup> But that misses the mark. In 1946, the APA established the default rules for agency procedure and judicial review of agency actions; Congress has departed from those APA defaults in countless statutes governing hundreds of agencies in the federal bureaucracy.<sup>173</sup> For decades, Congress has been legislating against the backdrop of APA statutory precedents when it authorizes—and reauthorizes—the hundreds of statutes that govern federal agencies today. In that sense, Congress is reenacting the statutory scheme that the Supreme Court considered.<sup>174</sup>

The separation of powers concerns here are also quite pronounced. As noted at the outset of this Essay, the Supreme Court has long respected “the APA as a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished.”<sup>175</sup> In enacting the APA, Congress established the default ground rules for the relationships between the three branches of the federal government when it comes to federal agency actions. Settled statutory precedents interpreting that separation-of-powers framework statute should only be upset in extraordinary situations. This is particularly true as discarding settled APA statutory precedents would disrupt deep reliance interests—of the regulators and the regulated.<sup>176</sup> Disturbing such precedent, moreover,

---

171 See *supra* Part I (discussing many of these statutory precedents).

172 See Walker, *Modernizing the APA*, *supra* note 5, at 630 (“Westlaw reports that Congress has only amended the APA sixteen times in more than seven decades . . .”); *id.* at 633–35 (detailing statutory amendments to the APA over years).

173 In her contribution to this Symposium, Jill Family does a deep dive into how immigration law departs from the APA defaults. See Jill E. Family, *A Lack of Uniformity, Compounded*, in *Immigration Law*, 98 NOTRE DAME L. REV. 2115 (2023).

174 Cf. *Bank of Am. Corp. v. City of Mia.*, 137 S. Ct. 1296, 1305 (2017) (“Principles of *stare decisis* compel our adherence to those [statutory] precedents in this context. And principles of statutory interpretation require us to respect Congress’ decision to ratify those precedents when it reenacted the relevant statutory text.”).

175 Scalia, *supra* note 3, at 363.

176 See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800–01 (2014) (“Congress, we said . . . has the greater capacity ‘to weigh and accommodate the competing policy concerns and reliance interests’ involved in the issue.” (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998))); *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991) (“*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision . . .”). See generally RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 47–49, 116–18

would have downstream effects on the countless statutes that govern federal agencies in which Congress has incorporated or departed from the APA defaults—APA defaults that have been modified substantially by longstanding judicial precedents.

A couple of counterarguments merit a brief response here—and likely an extended analysis in subsequent work. First, one may be tempted to argue that many of these APA judicial interpretations are judge-made administrative common law, which should garner weaker *stare decisis* weight than conventional judicial statutory interpretations. The Supreme Court has squarely rejected that argument, holding that statutory *stare decisis* applies “even when a decision has announced a ‘judicially created doctrine’ designed to implement a federal statute.”<sup>177</sup> Second, and related, many of these statutory precedents may have been created using a methodology—purposivism, dynamic statutory interpretation, or administrative common lawmaking—that the current Supreme Court arguably no longer endorses. As one of us has observed elsewhere, statutory *stare decisis* controls “even if the statutory methodology used in resolving the now-decided case is suspect—otherwise, a great many cases may have to be revisited. In fact, courts often do not even ask—much less know—whether precedent is wrong.”<sup>178</sup> The Supreme Court has underscored that “[a]ll our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change.”<sup>179</sup>

In sum, when dealing with a framework statute like the APA, statutory *stare decisis* should almost always—if not always—compel the Supreme Court to adhere to its prior interpretations. In so doing, the judiciary respects the separation of powers and administrative law’s important rule-of-law values.

---

(2017) (detailing the Supreme Court’s decisions on the role of reliance interests in *stare decisis*).

177 *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014)). *But see* Lawrence B. Solum, *Disaggregating Chevron*, 82 OHIO ST. L.J. 249, 295 (2021) (“Legal norms found in the holdings of opinions that are not based on textualist reasoning (e.g., purposivist, intentionalist, and pragmatist opinions) are not entitled to *stare decisis* effect. Cases in which the holding is found in such opinions should be overruled in due course if the outcome of the case is inconsistent with the plain meaning of the statutory text.”).

178 Nielson & Walker, *supra* note 161, at 1856–57 (footnote omitted).

179 *Kimble*, 135 S. Ct. at 2409. Randy Kozel has argued elsewhere that there should be no difference between constitutional and statutory *stare decisis* and that the *stare decisis* analysis may be more complicated when it comes to cross-cutting doctrines like administrative law’s judicial deference doctrines. *See* Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125 (2019); *see also* Randy J. Kozel, *Retheorizing Precedent*, 70 DUKE L.J. 1025 (2021). Responding to these arguments exceeds the scope of this Essay.



We conclude this Section with one final observation, concerning the weight the Supreme Court should give to settled interpretations of the APA in the circuit courts. The role of circuit court precedents in Supreme Court statutory interpretation has received little attention in the scholarly literature. In *Statutory Stare Decisis*, then-Professor Barrett considers the issue, arguing as a general matter against statutory stare decisis for circuit court statutory precedents.<sup>180</sup> Among other reasons, she is skeptical that Congress is generally aware of circuit-level statutory interpretation, and when aware might view such precedents as tentative, particularly if there is a circuit split or other cases in other circuits' pipelines.<sup>181</sup> That said, she recognizes that Congress may have a unique incentive to act when the D.C. Circuit speaks on administrative law.<sup>182</sup>

When it comes to framework statutes like the APA, we suggest that the Supreme Court should hesitate to upset lower-court precedents interpreting the APA when there is a settled consensus among the circuit courts on the issue.<sup>183</sup> In other words, when the Court considers APA statutory interpretation questions that the lower courts have already answered, it should consider the reliance interests engendered by those lower-court statutory precedents—in terms of congressional acquiescence but also settled expectations of the regulators and the regulated. In at least some respects, we agree with Professor Strauss that “whenever the Supreme Court is considering a return to original understandings it should accord substantial weight to contemporary consensus the profession and lower courts have been able to develop in interpreting law.”<sup>184</sup>

To be sure, this sort of reliance consideration does not carry the same force as statutory stare decisis. And how much weight to afford we do not attempt to determine in this Essay. But the issue deserves much more doctrinal, theoretical, and empirical attention. After oral argument in *Texas v. United States* last year, we would not at all be surprised if such attention arrives soon. After all, in response to the Solicitor General arguing that the Supreme Court should ignore the longstanding approach among the circuit courts of vacating rules under the APA, the Justices expressed great skepticism. At one point,

---

180 Barrett, *supra* note 166, at 318.

181 *Id.* at 331–36; see also Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653 (1992).

182 Barrett, *supra* note 166, at 345.

183 A recent student note explores and advances this argument in much greater detail. See Deborah A. Sparks, Note, “Let Sleeping Legal Dogs Lie”: Decoding the Supreme Court’s Treatment of Circuit Court Consensus About Federal Statutory Meaning, 123 COLUM. L. REV. 1091 (2023).

184 Strauss, *supra* note 23, at 768.

Justice Kavanaugh seemed to assume that the Court's silence on universal vacatur constituted an adoption of D.C. Circuit law.<sup>185</sup> And, as noted in Section I.D, Chief Justice Roberts called the position "fairly radical and inconsistent with . . . those of us who were on the D.C. Circuit"; the D.C. Circuit, under the APA, would universally vacate an agency rule "five times before breakfast."<sup>186</sup>

### CONCLUSION

This review of the literature and caselaw has identified four broad, competing theories to interpret the APA that have developed over the decades: APA pragmatism; administrative common lawmaking; APA textualism; and APA originalism. Administrative common lawmaking seems to have evolved from a more textually constrained purposivism or pragmatism, and then APA textualism was a direct response to the emergence of administrative common law. In more recent years, APA originalism has arrived, as a purported improvement to APA textualism. And yet among judges and scholars, all four competing theories are alive and well—including in the various contributions to this Symposium on the history of the APA and judicial review.

In this Essay, we have embraced a middle-ground approach: the Supreme Court (and lower courts) should answer open statutory questions based on the text, structure, context, and original understanding of the APA. But when it comes to interpretive questions courts have already answered, the pull of statutory *stare decisis* should be quite strong. The Supreme Court should even give at least some weight to settled precedents among the lower courts. In other words, when APA interpretations are settled among the federal courts, reform should be left largely to Congress. A form of APA originalism that adheres to statutory *stare decisis* best advances administrative law's rule-of-law values such as predictability, reliance, stability, and the separation of powers.

---

185 Transcript of Oral Argument, *supra* note 148, at 54–55 (Kavanaugh, J.) ("I'm just going to push back pretty strongly on the . . . just toss[ing] out decades of—of this Court's law, of circuit law.").

186 *Id.* at 35 (Roberts, C.J.).