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## ARTICLE

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### DELEGATING FOR TRUST

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*Courts and legal observers have long been concerned by the scope of authority delegated to administrative agencies. The dominant explanation of delegated authority is that it is necessary to take advantage of administrative agencies' expertise and expansive rulemaking capacity. Though this explanation makes sense in many settings, it falters in many areas and has given rise to a number of longstanding puzzles, such as why Congress does not invest in its own institutional capacity.*

*Unrecognized in this debate over the puzzles of delegation is that Congress may delegate to take advantage of another distinctive attribute of administrative decisionmaking: the credible rationality and transparency afforded by administrative procedures. Drawing on positive political theory, this Article shows that Congress may delegate, not for expertise, but for public trust, which the legislature itself (appropriately) lacks due to concerns over the influence of special interest lucre, among other reasons. The procedural constraints that bind administrative agencies, as made credible by judicial review, encourage fairness and rationality and discourage the most egregious abuses of lawmaking authority. In delegating, Congress takes advantage of these credible constraints, which the institution cannot easily develop internally; and in relieving Members of Congress from public suspicion, it also advances their parochial electoral objectives.*

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*This vision of the administrative state accounts for a number of features of our legal and political system. It explains, for instance, why Congress has generally not invested in greater internal capacity—because trust, not capacity is the binding constraint; why, as a positive matter, fairness and transparency are essential to administrative procedures; and why, if those administrative procedures undergo erosion, as some suggest has occurred, anxiety about administrative lawmaking might arise. The Article concludes with a discussion of normative and doctrinal implications of this trust-based conception of administration, including a call for reorienting administrative procedures to more fully promote credible rationality.*

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## INTRODUCTION

The administrative state is an awkward creature in our constitutional system—in the eyes of many, an unseemly chimera that dangerously collapses the lawmaking institutions envisioned by the framers. For this reason, from the administrative state’s earliest days its supporters have felt the need to justify it. Looking to judicial opinions or academic writing, the dominant explanation of and justification for the administrative state is based on administrative agencies’ expertise and expansive rulemaking and adjudicatory capacities.<sup>1</sup> The administrative state, in this view, emerges from crippling congressional limitations: the institution has neither the time nor the information to resolve the problems that our complex society presents, so it creates and delegates authority to other entities that have the time and capacity to resolve them.

This common justification no doubt captures part of the truth.<sup>2</sup> Yet it also leaves us with a number of puzzles. Observers such as John Hart Ely have

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<sup>1</sup> For judicial thinking, see *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (discussing how Congress delegates authority to agencies, “those with great expertise”). For classic academic thinking, see JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23 (1938) (explaining the need for and the “advantages of specialization in the field of regulatory activity”), or, for an account of many of the conventional views on this topic, see generally John M. de Figueiredo & Edward H. Stiglitz, *Democratic Rulemaking*, in 3 *THE OXFORD HANDBOOK OF LAW AND ECONOMICS* 52 (Francesco Parisi ed., 2017) (examining four prominent views of administrative rulemaking: the unitary executive theory, the structure and process school of thought, the insulation perspective, and the deliberative perspective). See also WILLIAM N. ESKRIDGE & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 276 (2010). Part I of this Article discusses the conventional view at length.

<sup>2</sup> It is difficult to imagine, for instance, Congress somehow writing fine enough legislative standards to displace the roughly 1500 Administrative Law Judges who adjudicate Social Security claims. U.S. OFFICE OF PERS. MGMT., *FEDERAL ADMINISTRATIVE LAW JUDGES BY AGENCY AND LEVEL* (2016), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> [<https://perma.cc/PAF8-3DJU>]. There may likewise be other areas where the relevant expertise cannot be suitably internalized with the legislature: the policy question may be highly time sensitive, or it may be of an interstitial nature, better sorted by those with experience “on the ground.” A more difficult case is when knowledge acquired through enforcement or other “on the ground” experience interacts with and is complementary to rule-making activities. Sometimes that enforcement-derived information may plausibly be transferred to other entities, such as the legislature, and sometimes it may not be. For more strongly skeptical takes on the common expertise account, see Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1, 21-27 (1982) (arguing that “[c]onventional rationalizations for the delegation of legislative authority” do not “withstand close scrutiny”).

long wondered why Congress has not invested in its own institutional capacity.<sup>3</sup> If information and capacity are the binding constraints, why not expand the institution's ability to collect and process information? Similarly, if expertise is the limitation, agencies in much their current form might perform an advisory rather than lawmaking role,<sup>4</sup> with Congress itself making the laws.<sup>5</sup> But agencies of course issue thousands of rules that carry the force of law every year.<sup>6</sup> Also puzzling, the administrative state is more expert and able than at any time in history,<sup>7</sup> and its place in American society should be correspondingly secure under this standard justification. But instead, anxiety over the administrative state appears at a new height, with many calling for radical overhauls of it and renewed interest in the non-delegation doctrine seemingly on the rise in the Court.<sup>8</sup>

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<sup>3</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 133-34 (1980) (arguing, among other things, that Congress might massively expand its native capacities to overcome current limitations); see also LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 34 (2015) (arguing that congressional capacity is too limited "to develop meaningful policy expertise"). I owe a debt to Ely for the spirit of my title.

<sup>4</sup> Throughout this Article the term "lawmaking" is used in the sense of Justice Stevens's concurrence in *Whitman v. American Trucking Associations, Inc.*, which is to recognize agency rulemaking authority as "legislative" power. 531 U.S. 457, 487-89 (2001) (Stevens, J., concurring).

<sup>5</sup> E.g., ELY, *supra* note 3, at 133 (observing that Members of Congress "are [] entitled to the assistance of the executive departments' technical staffs"). Note that we might regard the congressional reference cases as a very embryonic institutional arrangement of this sort. See 28 U.S.C. §§ 1492, 2509 (2012) (establishing the procedure for congressional reference cases, in which Congress refers a bill to the U.S. Court of Federal Claims to resolve factual and legal questions on an advisory basis).

<sup>6</sup> See, e.g., de Figueiredo & Stiglitz, *supra* note 1, at 48 (noting that agencies promulgate "thousands" of rules "during an administration").

<sup>7</sup> See, e.g., GERALD MAYER, *CONG. RESEARCH SERV., SELECTED CHARACTERISTICS OF PRIVATE AND PUBLIC SECTOR WORKERS* 11-14 (2014) (showing a steady increase in the percentage of public sector workers with bachelors' degrees and advanced degrees).

<sup>8</sup> For a discussion of suggestive rumblings on the Supreme Court, see Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State* 33 (George Mason Legal Studies Research Paper No. LS 16-07) (2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2741208](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741208) [<https://perma.cc/9UJ2-QTQL>] ("Two separate opinions . . . by Justice Samuel Alito and Justice Clarence Thomas, suggested that at least two members of the Court were prepared to consider constitutional problems attending delegation of policy-making authority."). For the most notable congressional efforts, see Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (as passed by the House, Jan. 12, 2017) (attempting, in part "[t]o reform the process by which . . . agencies analyze and formulate new regulations"). For classic, as well as recent, academic critiques of the administrative state, see MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 67 (1977) ("Regulatory commissions protect the regulated and exploit the public."); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 386 (2014) (arguing that the concept of delegation suggests "that Congress cannot subdelegate its lawmaking power"); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 93 (1979) (claiming that "broad and unguided delegation of power is the weakest timber in the shaky structure of the new public philosophy."); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES PEOPLE THROUGH DELEGATION* 99

The standard account, moreover, arguably most falters on the most consequential rulemaking efforts by agencies—that is, on high-impact, non-time-sensitive rules. For example, many have questioned the widespread delegation of authority in the Dodd–Frank Act of 2010,<sup>9</sup> including the delegation of how to separate commercial and investment banking services.<sup>10</sup> Congress might instead have established the relevant rule itself, subjecting it to subsequent refinement by administrative agencies. Indeed, this is largely how Congress approached the question of separating commercial and investment banking services in the Banking Act of 1933.<sup>11</sup> Similarly, the Department of Labor’s rule laying out who is a fiduciary with respect to employee benefit plans might easily have been handled legislatively.<sup>12</sup> Much the same could be said of the Department of Transportation’s periodic regulations that set fuel economy standards for automobiles sold in the United States.<sup>13</sup> Expertise and capacity are but part of the story, and perhaps not the most important part of the story.

Unrecognized in this debate over the puzzles of delegation is that Congress may delegate to take advantage of another distinctive attribute of administrative decisionmaking: the credible rationality and transparency afforded by administrative procedures. Drawing on positive political theory,<sup>14</sup> this Article is the first to show that Congress may delegate, not for expertise, but for *public trust*. The core of the theory is straightforward: what limits Congress is not expertise, but public trust; what Congress gains from delegation is not expertise, as such, but instead public trust. The main task of this Article is to articulate why the public distrusts elected representatives,<sup>15</sup>

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(1993) (“When the elected lawmakers delegate, the people lose control over the laws that govern them.”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–49 (1994) (arguing that the administrative state is unconstitutional and contrary to the original meaning of the Constitution). A common sentiment in this strand of the literature, it seems, is that much would be resolved if we paid greater attention to Article I’s Vesting Clause and disallowed or sharply curtailed substantial lawmaking by administrative bodies. As becomes clear below, I depart from this view.

<sup>9</sup> See, e.g., Roberta Romano, *Regulating in the Dark*, in REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 90 (Cary Coglianese, ed., 2012) (questioning whether Congress delegated rulemaking authority to take advantage of agency expertise).

<sup>10</sup> Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301, 5481–603 (2012); 15 U.S.C. §§ 1601–02, 1631 (2012).

<sup>11</sup> Pub. L. No. 73–66, 48 Stat. 162 (1933).

<sup>12</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 29 C.F.R. § 2510.3–21 (2016).

<sup>13</sup> E.g., Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 40 C.F.R. § 86.1818–12 (2016).

<sup>14</sup> For recent notable positive efforts in other domains, see Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 665–67, 669–72 (2011) (applying positive political theory to the question of constitutional commitment, and describing the positive theory in this area).

<sup>15</sup> See *infra* Section II.A, Analytical Appendix.

why elected representatives cannot solve the problem of trust internally,<sup>16</sup> and under what conditions administrative lawmaking generates superior public trust.<sup>17</sup> As part of this exercise, the Article shows how Members of Congress delegate in *their own interest*—how, though administrative lawmaking may serve a public interest, legislators delegate authority for self-interested and parochial electoral reasons.<sup>18</sup>

This idea that legislative delegation and the much-maligned bureaucracy address problems of public trust likely seems absurd to many. The administrative state is the source of our ills, not of our relief. This reaction is understandable, particularly given the standard view that, if Congress had sufficient information and time, it would be better on democratic grounds for it to resolve questions rather than the administrative state. Even those who defend the administrative state tend to view it as a distinct second-best, a necessary concession to the complex demands that our society places on government.<sup>19</sup> But this is only the standard view because jurists and administrative law scholars have tended not to focus on the pathologies of other potential lawmaking bodies. Problems of distrust between the public and the elected come hand-in-glove with modern representative democracy.<sup>20</sup> Voters do not do particularly well by legislative lawmaking in complex societies, and by helping to resolve this distrust, the administrative state—at least with adequate safeguards—further rather than compromises democratic values.<sup>21</sup>

The administrative state offers advantages over the legislature in terms of the values of *transparency* and *fairness*.<sup>22</sup> These advantages do not emerge

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<sup>16</sup> See *infra* Section II.C, Analytical Appendix.

<sup>17</sup> See *infra* Section II.B, Analytical Appendix.

<sup>18</sup> See *infra* Analytical Appendix.

<sup>19</sup> See *infra* Part I.

<sup>20</sup> See *infra* Section II.A, Analytical Appendix Section A.

<sup>21</sup> See *infra* Part II, Analytical Appendix. Here, I conceive of “democratic values” as those that promote responsiveness to voter interests and preferences, in the way described in the Appendix. Naturally, if one formalistically defines “democratic values” to mean decisionmaking by democratically elected officials, decisionmaking by bureaucrats offers little hope of advancing those values.

<sup>22</sup> See, e.g., STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 134-42 (2008) (arguing that agencies are more likely than legislatures to consider a range of interests, not just those that are the most powerful, best represented, or submit the most information); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1948-79 (2008) (arguing that actions exhibit more transparency and deliberation than congressional actions); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515, 1541-42 (1992) (arguing that administrative lawmaking represents the “best hope” for realizing the values of deliberative democracy by ensuring informed—but politically insulated—decisionmaking); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61-64 (1985) (describing agencies' goal as “not merely respond[ing] to political pressure but . . . instead deliberating in order to identify and implement the public values that

simply by virtue of the fact that an agency is not the legislature, but instead from the fact that agencies operate under a set of constraints that do not apply to the legislature.<sup>23</sup> Under the Administrative Procedure Act (APA) and related administrative law doctrines,<sup>24</sup> agencies must follow certain procedures before issuing a valid order or rule: formal adjudication and rulemakings require proper notice and other procedural safeguards that approach the protections afforded at a court of law.<sup>25</sup> Even informal rulemakings require notice and, as glossed by courts, a notable degree of dialogue between agencies and regulated parties.<sup>26</sup> The APA's generic standards of review, likewise, demand from agencies a minimum of rationality in policymaking; the agency must provide reasons for its actions and justify its choices in light of statutory text and objectives.<sup>27</sup> This transparency is important because it allows the administrative state to act as a verification

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should control the controversy"); see also Norton E. Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV. 808, 814 (1952) (arguing that "[t]he capture of commissions . . . by the regulated interests has often been charged, not without persuasive evidence . . . . Yet however crassly one-sided an agency of government may become, few indeed will be found so completely under the dominance of a single interest as the subject matter committees of Congress"). The idea that transparency is in the interest of the government itself is very old. Nearly two hundred years ago, Jeremy Bentham wrote,

Suspicion always attaches to mystery. It thinks it sees a crime where it beholds an affectation of secre[c]y; and it is rarely deceived. For why should we hide ourselves if we do not dread being seen? . . . But in an open and free policy, what confidence and security—I do not say for the people, but for the governors themselves! Let it be impossible that any thing should be done which is unknown to the nation—prove to it that you neither intend to deceive nor to surprise—you take away all the weapons of discontent. The public will repay with usury the confidence you repose in it. Calumny will lose its force; it collects its venom in the caverns of obscurity, but it is destroyed by the light of day.

JEREMY BENTHAM, *Essay on Political Tactics*, in THE WORKS OF JEREMY BENTHAM 299, 310-11 (1962).

<sup>23</sup> See, e.g., SUSAN ROSE-ACKERMAN ET AL., *DUE PROCESS OF LAWMAKING: THE UNITED STATES, SOUTH AFRICA, AND THE EUROPEAN UNION* 31-103 (2015) (providing a comparative assessment of presidential and parliamentary regimes and describing the far more demanding judicial review of and procedural constraints on administrative lawmaking relative to legislative lawmaking in the United States).

<sup>24</sup> Important doctrines outside the APA in this respect include the "Arizona Grocery" or "Accardi" principle that agencies must follow their own rules, as well as the "Chenery" principle, which calls on courts to judge agency actions on the grounds "upon which the record discloses that its action was based." *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389 (1932); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

<sup>25</sup> 5 U.S.C. §§ 556-57 (2012) (allowing for depositions, oral and documentary evidence, cross-examination of witnesses, and the submission of proposed findings and conclusions, for example).

<sup>26</sup> § 553(c). The judicial gloss mainly arrives through arbitrariness review under § 706(2)(A) (directing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

<sup>27</sup> See 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

mechanism that constrains policymaking behavior and thereby fosters public trust in policy choices. Against the backdrop of administrative procedures and judicial review, it is relatively challenging to engage in at least the most obscene forms of misfeasance through administrative lawmaking.<sup>28</sup>

Notably, this type of trust cannot be achieved through direct legislation, which lacks a meaningful record, and is inevitably reviewed far more deferentially by courts, with little regard to rationality or to the nexus of stated objectives and chosen means.<sup>29</sup> Whereas courts have no problem reviewing and reprimanding administrative agencies—that is, constitutional *inferiors*—for procedural failures or flaws in reasoning, they cannot be expected to regularly do so with respect to the legislation produced by a coordinate branch of government.<sup>30</sup> In a complex society, the absence of meaningful judicial review—to say nothing of safeguards like those afforded by administrative procedures—in the legislative context implies that voters will often question the fidelity of legislation to their interests.<sup>31</sup> This public distrust represents a significant electoral risk for Members of Congress, leading them to favor administrative policymaking over direct legislation for self-interested reasons.<sup>32</sup> At its core, this theory contends that the modern administrative state ameliorates a problem of public distrust and legislative credibility: by delegating to a procedurally constrained, constitutional inferior, the legislature addresses a critical information problem between the public and legislators that naturally arises in complex representative democracies.

This theory of delegating for trust resolves a number of puzzles. First, it addresses John Hart Ely's question of why amplifying legislative capacity is not a tenable solution. Trust, not information, is the binding constraint on legislators' behavior, and it is comparatively difficult for the legislature to generate public trust internally. In this way, it also helps us to understand why we have prolific delegation in some areas, such as financial regulation,

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28 Although this Article is, to my knowledge, the first to ground concerns over capture in underlying problems of information and consequent voter distrust, and to indicate how the administrative state and procedures help resolve these information problems, the idea that insulation from politics might help to avoid problems of capture is not new. For a compelling recent entry, see Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19-26 (2010) (discussing the role of agency insulation in addressing regulatory capture). The present effort is sympathetic to these such efforts, but principally represents a positive theory of delegation, seeking to explain why delegation occurs.

29 See *infra* Section II.C.

30 *Id.* Reflecting this basic reality, even where the courts stand in the strongest position, on claims of constitutional violations, they have created an impressive array of justiciability doctrines to avoid deciding cases that implicate the operations of coordinate branches.

31 See *infra* Part II, Analytical Appendix.

32 See *infra* Section II.B, Analytical Appendix Section B.



where we have very good reasons to suspect that special interest groups would capture the legislative process, but less delegation in other areas, where trust is less of a concern.<sup>33</sup> Second, it provides a *positive* rather than normative rationale for valuing fairness and transparency in administrative procedures, restoring the centrality of these values to our understanding of procedures. This is a sharp departure from the dominant positive perspective on administrative procedures, which sees them as instruments of political control.<sup>34</sup> Fairness and transparency are important, in this theory, because they serve a political and electoral purpose for legislators: they foster public trust amid problems of incomplete information and allow legislators to delegate lawmaking authority.<sup>35</sup> Third, the theory suggests an explanation for the wave of anxiety sweeping academia and the courts regarding the administrative state. Trust accompanies administrative lawmaking only for highly contingent reasons: it is the credible procedural constraints that encourage fairness and transparency, allowing some assurance of rationality and of public interest in policymaking, that represents the administrative state's central virtue. The erosion of procedural norms and practices, therefore, strikes at the foundation of the rationale for the administrative state. In league with recent articles that point to a divergence between the assumptions of administrative law and administrative practices,<sup>36</sup> this theory

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<sup>33</sup> See *infra* Section III.C.

<sup>34</sup> Professors McCubbins, Noll, and Weingast, collectively known as "McNollGast," pioneered the positive study of administrative procedures in a series of seminal articles. See Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243, 248-53 (1987) [hereinafter McNollGast, *Administrative Procedures*] (developing a theory of administrative procedures, such as notice, as a set of techniques to exert political control over agencies); Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440-44 (1989) (further developing the theory of administrative procedures as a means of political control over agencies); see also Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 L. & CONTEMP. PROBS. 91, 106-10 (1994) (discussing the importance of learning an agency's "hidden knowledge" in holding agencies accountable to the legislature); Arthur Lupia & Mathew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J. L. ECON. & ORG. 96, 104-10 (1994) (identifying institutional features that enable legislators to learn from regulators and exert control over agencies); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93, 99-100 (1992) (arguing Congress's ability to structure an administrative agency is perhaps "the most powerful device available" to control agency policymaking); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165-71 (1984) (discussing Congress's preference for punishing agencies when they are detected violating legislative priorities as opposed to continuously monitoring them).

<sup>35</sup> It also addresses several puzzles that the political control perspective on administrative procedures leaves us with, for example, explaining the otherwise perplexing obsession of the framers of the APA with whether the public would perceive the procedures as fair. See *infra* Section III.A.

<sup>36</sup> See *infra* Section IV.A.

suggests that erosion may be a main contributor to anxiety over the administrative state.<sup>37</sup>

The theory further carries suggestions for a number of current doctrinal and policy debates. The theory suggests reorienting procedures and judicial review in various ways to promote public trust, for example by requiring Federal Register–like publication of guidance documents and encouraging agencies to engage in cost–benefit analysis.<sup>38</sup> It also indicates that calls for a more robust non-delegation doctrine fall off the mark. Proponents of the non-delegation doctrine fail to recognize the impetus for delegation in the first instance—the compromised nature of legislative lawmaking.<sup>39</sup>

This Article proceeds in five main parts. Part I discusses the conventional expertise rationale for the administrative state and doctrinal dependencies. Part II articulates the main theoretical contribution of this Article, introducing the problem of democratic distrust, and showing how procedurally constrained delegation to a constitutional inferior addresses the problem. Part III extends the theory by considering three important implications. Part IV questions whether the procedural regularity at the foundation of the administrative state’s functional role in our representative democracy is eroding, and probes this erosion as a possible explanation of the anxiety prevailing in some quarters. Part V discusses lessons of the theory for prevailing debates in administrative law.<sup>40</sup>

## I. THE CONVENTIONAL ACCOUNT AND DEPENDENCIES

### A. *The Conventional Account*

Over the years, scholars and jurists have advanced a wide range of views about delegation and the foundations of the administrative state. The most common view, however, is that the legislature delegates to administrative agencies for their expertise and expansive capacity to issue rules and adjudicate cases; i.e., that the administrative state exists due to various capacity constraints that the legislature suffers as a generalist body.<sup>41</sup> The

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<sup>37</sup> *Id.* Other plausible sources of anxiety include polarization of the Judiciary, such that judges cannot credibly enforce procedures.

<sup>38</sup> See *infra* Section V.A.

<sup>39</sup> See *infra* Section V.B.

<sup>40</sup> The Analytical Appendix contains a formalization of the Article’s main theoretical argument and contribution.

<sup>41</sup> See *infra* notes 42–48. Other minority views include the following: First, some argue that the administrative state represents a device for avoiding time-consistency problems. See, e.g., Kenneth Rogoff, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, 100 Q. J. ECON. 1169, 1180 (1985) (showing that delegation to a biased decisionmaker may address problems of commitment in the monetary context); see also Rui J. P. de Figueiredo, *Electoral Competition, Political*

*Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321, 322 (2002) (analyzing how electoral conditions influence the decision to insulate agencies against dynamics in legislative preferences); Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 506-07 (1989) (showing that enacting coalitions recognize time-consistency problems and create procedures to guard against shifts in legislative preferences); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93, 99 (1992) ("Agency structure and design perpetuate the power and legitimacy of certain groups and undermine the power and legitimacy of others, thereby leading to the reduction of coalitional drift by minimizing the chances that politicians' preferences over the relevant issues will change over time."). For a more recent take on this point, emphasizing endogenous information acquisition, see SEAN GAILMARD & JOHN W. PATTY, *LEARNING WHILE GOVERNING* 25 (2012) (describing how political and personnel management policies can incentivize agencies to acquire expertise); Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 886 (2007) (same); see also Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J. L. ECON. & ORG. 469, 485-88 (2007) (describing how Congress and courts influence how agencies acquire expertise). Along with coauthor John de Figueiredo, I examine the possibility of delegation to overcome problems of time-inconsistency in de Figueiredo & Stiglitz, *supra* note 1, but we note that it applies only in the limited places where time-consistency is an issue.

Second, another class of theories argues that the administrative state represents a cynical ruse perpetrated on voters by elected officials. See, e.g., ELY, *supra* note 3, at 132 (arguing that by delegating "our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic"); Peter H. Aranson et al., *supra* note 2, at 57-58 (arguing that delegation results in a "shift in responsibility" to agencies from legislators); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 233, 247 (1982) (observing that by delegating "legislators not only avoid the time and trouble of making specific decisions, they avoid or at least disguise their responsibility for the consequences of the decisions ultimately made."); see also MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 67 (2d. ed. 1989) (contending that "congressmen appropriate all the public credit generated in the system, while the bureaucracy absorbs all the costs"); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 110 (1993) (arguing that "[d]elegation allows legislators and the president to escape some of the blame for selfish government policies while still claiming much of the credit"). For a recent entry along these lines, see Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465, 1492 (2015) (arguing delegation "provides numerous benefits to legislators by allowing them to influence and control administration," which "undermines democratic accountability"). A challenge to this voter-as-dupe approach is that it assumes an unrealistic degree of voter stupidity. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 82 (1991) (observing that we "should be chary of the underlying assumptions of voter stupidity and entrepreneurial laxity" at the foundation of these cynical theories); see also ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* 78-79 (2007) (arguing citizens will hold Congress responsible for the act of delegation itself). It is also difficult to square with the design of many administrative procedures. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 51-52 (1998) (arguing that the cynical theories fit poorly with our understanding of administrative procedures). By comparison, the theory proposed in this Article features a rational voter acting in an environment of incomplete information, and fits cleanly with a traditional view of administrative procedures. In this sense, this Article provides a unified theory of delegation and administrative procedures.

Finally, another recent and provocative theory maintains that the administrative state exists to manage failures of interpersonal justice, in much the role we imagine private law. See Hanoch Dagan & Roy Kreitner, *The Bureaucrats of Private Law* 3 (Aug. 4, 2017) (unpublished manuscript) (on file with author).

solution to this difficulty, in the common view, is to establish institutions that have the time and expertise necessary to resolve the relevant problems, and for the legislature to delegate, in large measure, the responsibility of resolving the problems to these institutions. Collectively, we call these new information-privileged lawmaking institutions “the administrative state.”

This perspective on the administrative state so deeply pervades the scholarly literature that it is difficult to isolate highly relevant pieces. One foundational statement of this perspective, though, comes from the period following the New Deal and accompanying expansion of the administrative state. James M. Landis delivered the 1938 Storrs Lectures on Jurisprudence at Yale University, shortly after his tenure in both the Federal Trade Commission and the Securities and Exchange Commission (SEC). In the opening paragraphs of his lectures, Landis sets up the administrative state in classic fashion: “the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems.”<sup>42</sup> The administrative state, thus, emerges from the deficiencies of the legislature and traditional Madisonian institutional forms. The great advantage of administrative agencies, in his view, was specialization and expertise. “With the rise of regulation,” by which Landis meant the regulation of economic conduct,

the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operations, ability to shift requirements as condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.<sup>43</sup>

The inadequacy of Madison’s institutions, and the virtue of the administrative state, therefore, lies in expertise and superior information.

Hardly a relic of the New Deal–era, this remains the dominant view among scholars today. The academic legal literature, for example, tends to track much this line regarding expertise and delegation.<sup>44</sup> Other academic disciplines have the same tendency. The economics literature focuses on the

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<sup>42</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (Yale Univ. Press 1938).

<sup>43</sup> *Id.* at 23-24.

<sup>44</sup> See, e.g., Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 445 (2008) (cataloging conventional explanations of delegation to agencies, noting that “[o]ne of the most common defenses of delegation to agencies is that agencies possess technical expertise that Congress lacks”); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 100-01 (2000) (arguing delegation is consistent with Madisonian values).

ability of bureaucrats to render expert policies as a rationale for delegation.<sup>45</sup> The political science literature is much the same, characterizing the benefits of delegation in terms of enhanced information and expertise.<sup>46</sup> Most of the literature in this area is consumed by the question of how the legislature might obtain the information advantages of delegation without undue loss of control over policies to agencies.<sup>47</sup> Reflecting the common view across fields of academic inquiry, Professor Stephenson summarizes, “the delegation of substantial policymaking authority to administrative agencies is often both explained and justified by the belief that agencies have more accurate information about the actual impacts of different policy choices.”<sup>48</sup>

### B. Doctrinal and Normative Dependencies

Judicial views mirror those of academics. We see judicial understandings of the delegation question most clearly in the contexts of the non-delegation doctrine and of the level of deference that is afforded to agencies’ interpretations of statutes.

The non-delegation doctrine prohibits the legislature from delegating “legislative” power to other entities.<sup>49</sup> Though the Court has never disavowed this doctrine, the view of what constitutes an unconstitutional delegation of legislative power has changed over time. Under today’s conception, the legislature need only provide an “intelligible principle” in the statute to avoid

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<sup>45</sup> See, e.g., Alberto Alesina & Guido Tabellini, *Bureaucrats or Politicians? Part I: A Single Policy Task*, 97 AM. ECON. REV. 169, 177 (2007) (noting that complex and technical questions typically get delegated to bureaucrats).

<sup>46</sup> See, e.g., DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 7-8 (1999) (noting a tradeoff between information acquisition and loss of control over policy outcomes); JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* 2 (2002) (describing the tradeoff Congress faces between bureaucratic expertise in policy areas and the opportunity this provides bureaucrats to work against the interests of legislators); Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 62 (1995) (arguing that “[d]elegation allows better information to be obtained about the consequences of alternative policies,” and studying the tradeoff of this benefit against loss of control over outcomes).

<sup>47</sup> HUBER & SHIPAN, *supra* note 46; see also David Epstein & Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 697 (1994) (discussing the tradeoff involved when Congress directly limits agency discretion).

<sup>48</sup> Stephenson, *supra* note 41, at 469 (arguing that agency expertise is not a given and instead arises endogenously, if at all).

<sup>49</sup> E.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (denying Congress the ability to “abdicate or to transfer to others the essential legislative functions with which it is thus vested”). For a recent empirical analysis of the non-delegation doctrine, see Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 33 J. L. ECON. & ORG. (forthcoming 2018) (on file with author).

an unconstitutional delegation,<sup>50</sup> and “intelligible” has come to have a loose meaning over time. For example, the “public interest” standard is satisfactory under current doctrine.<sup>51</sup> This looseness has led many to regard the doctrine as essentially spent, though lower courts and scholars routinely attempt to bring new life to the idea.<sup>52</sup>

But what drove the non-delegation doctrine to this “moribund” status?<sup>53</sup> Much at play seems to be the judicial recognition that over time Congress has increasingly required expertise to draft laws. For example, in *Mistretta v. United States*, the Court countered a non-delegation challenge by noting the difficulty that Congress would face in developing prison sentencing guidelines; that, Justice Blackmun wrote, “is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.”<sup>54</sup> In another case, Justice White likewise noted that “to refrain from delegating” would leave Congress “with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape.”<sup>55</sup> This respect for expertise leads courts to defer to Congress as to when the “inherent necessities”<sup>56</sup> of government operations demand legislative delegation of authority—as Justice Scalia put it, “it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>57</sup> The dominant expertise and capacity rationale for delegation, in this way, has nearly led to the interment of the non-delegation doctrine.<sup>58</sup>

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50 *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

51 *E.g.*, *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216-17 (1943) (describing how the public interest standard suitably limits delegation to the Federal Communications Commission).

52 For a recent lower court decision relying on the doctrine, see *Association of American Railroads v. U.S. Department of Transportation*, 721 F.3d 666, 677 (D.C. Cir. 2013) (holding the delegation of authority to Amtrak, deemed a private corporation, was unconstitutional), *vacated and remanded*, 135 S. Ct. 1225 (2015). For recent instances of scholarly calls, see Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J. L. & PUB. POL’Y 55, 61-66 (2010) (arguing Congress unconstitutionally delegated to the Treasury Department in the Troubled Assets Relief Program (TARP)), and HAMBURGER, *supra* note 8.

53 *Nat’l. Cable Television Ass’n, Inc. v. United States*, 415 U.S. 336, 353 (1974) (Marshall, J., dissenting) (referring to the non-delegation doctrine as “surely as moribund as the substantive due process approach of the same era—for which the Court is fond of writing an obituary—if not more so”).

54 *Mistretta v. United States*, 488 U.S. 361, 379 (1989).

55 *INS v. Chadha*, 462 U.S. 919, 968 (1983) (White, J., dissenting).

56 *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928).

57 *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

58 See generally Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1753-54 (2002).

In similar manner, the common capacity rationale drives judicial deference to agency interpretations of statutes. In the landmark *Chevron*, the Court motivated deference to agency interpretations of law, in part, on an understanding of Congress's intent to delegate to an expert agency.<sup>59</sup> There, the Court observed the "technical and complex" nature of the regulatory program,<sup>60</sup> and noted that Congress itself did not resolve the relevant legal question in the statute. The Court then speculated that, "[p]erhaps [Congress] consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so."<sup>61</sup> Thus, under this reasoning, the Court defers to the agency based on a theory of congressional motivation for delegation. This doctrinal position rests on an understanding that Congress delegates to avail itself of agency expertise, and judicial deference to the agency effectuates congressional intent.<sup>62</sup>

The prevailing understandings in two major doctrinal areas, therefore, build out from the expertise theory of delegation. The loose conception of the non-delegation doctrine emanates from a judicial sense that Congress must delegate out of necessity due to its institutional limitations; and deference is afforded to agency interpretations of law on much the same basis, that is, on the theory that Congress delegated to agencies so that an expert may implement and interpret the law, waving off interventions by generalist judges.

### C. *The Democratic Price*

What is equally clear, however, is that courts reach these doctrinal positions reluctantly—the permissive stances on delegation and deference represent concessions rather than ideal positions. Absent the need of expertise or information, courts would turn a far more skeptical eye towards delegations of lawmaking authority. The reason for the reluctance, and the underlying rationale for the non-delegation doctrine, is that in common telling delegation implies a loss of democratic control over public policy. As Justice Scalia puts it, "It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of

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<sup>59</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (noting that because "[j]udges are not experts in the field" courts should defer to agency interpretations of statutes because of their putative expertise).

<sup>60</sup> *Id.* at 865.

<sup>61</sup> *Id.*

<sup>62</sup> Notice that this *Chevron* reasoning builds on an earlier line of cases in which courts justified deference to agency interpretations based on expertise, but did so without the overlay of congressional intent. See Ronald J. Krotoszynski, Jr., *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735 (2002) (discussing the evolving rationales for judicial deference to agency interpretations of statutes).

unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature.”<sup>63</sup>

Indeed, reflecting this unease, courts sometimes—and perhaps increasingly—balk when it comes to legislative delegations on important policy questions that do not plainly require non-legislative expertise. Despite clear statutory text to this effect, for instance, the Court denied the FDA the authority to regulate tobacco, reasoning that “[g]iven the economic and political significance of the tobacco industry at the time [of passage], it is extremely unlikely that Congress could have intended to place tobacco within the ambit” of the statute.<sup>64</sup>

This judicial understanding reflects, or is reflected by, the academic understanding. In the standard academic telling, too, the cost of this expertise is the loss of democratic legitimacy. As their officers are not elected, agencies do not have the democratic legitimacy that Congress does. This indeed leads to near obsession in the administrative law literature with somehow reconciling the fact that agencies issue rules with the force of law with fundamental democratic commitments. Scholars advance various “solutions” to this legitimacy problem, but with little enduring success—it is “[l]ike an intriguing but awkward family heirloom . . . handed down from generation to generation of administrative law scholars.”<sup>65</sup> But for almost all scholars, absent the need for expertise, it would be superior to have the legislature make the laws, as that is the branch with democratic legitimacy. If Congress had the necessary expertise and capacity, scarcely any would venture to support administrative lawmaking. Thus, scholars, too, only reluctantly embrace administrative lawmaking.

This gnawing, seemingly irreducible democratic price of delegated authority explains a number of features in our doctrinal and academic debates. It explains, most prominently, the persistence of the non-delegation doctrine as, at the very least, an aspirational ideal; why we refuse to inter it, once and for all. It also explains the unease that many have with deference that courts afford to agency interpretations of law. On the academic front, it accounts for the obsessive quality evident in efforts to square administrative

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<sup>63</sup> *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). One may find similar if less sharply expressed views in the majority opinion by Justice Blackmun. *Id.* at 362.

<sup>64</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000). Other cases in this line, which develop the so-called “major questions” doctrine, include *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), and *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001). Most recently, the doctrine made an appearance in *King v. Burwell*, where the Court used the doctrine to deny the agency interpretive authority under *Chevron*, but not to deny the agency substantive regulatory authority. 135 S. Ct. 2480 (2015).

<sup>65</sup> Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1996).



lawmaking with democratic commitments. It also explains the critical position of John Hart Ely, who famously wondered, if information is what Congress lacked, what is to stop it from adapting to acquire more information?<sup>66</sup> There is, after all, no constitutional limit on how Congress might expand its own capacity to collect and process information, so long as they do not wander into “executive” functions. Nor do they face much of a practical limit on their ability to build out institutional capacity: to start it, Members simply need to add a few lines to the relevant appropriations bill.<sup>67</sup> As will become clear, this theory’s answer to Ely’s question is that Congress’s binding limitation is not information. It is trust.

## II. THE PROBLEM OF TRUST AND LEGISLATIVE DELEGATIONS

At root a belief that, expertise aside, legislative lawmaking is superior to administrative lawmaking explains much in our academic and doctrinal debates. Drawing on the methods of positive political theory, I argue that this belief is misplaced. In a complex society, with swirling currents of special interest group influence and consequent problems of trust, voters do not do very well by legislative lawmaking, questioning that form of lawmaking’s privileged status in our debates. Our political system has adapted to this problem of distrust, I argue, by building out administrative lawmaking capacity, which unlike legislative lawmaking, can be subject to demanding procedural constraints made credible by judicial enforcement. This analysis builds toward the implication that administrative lawmaking, if properly constrained, is paradoxically superior on *democratic* grounds to legislative lawmaking—in the sense that it produces a healthier polity and is more responsive to public interests.

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<sup>66</sup> ELY, *supra* note 3, at 132-33.

<sup>67</sup> Of course, they still must comply with the Constitution’s Article I, section 7 provisions for lawmaking, but Presidents have difficulty vetoing appropriations bills as they invariably contain many provisions that he (or she) much favors. *See, e.g.*, D. Roderick Kiewiet & Mathew D. McCubbins, *Presidential Influence on Congressional Appropriations Decisions*, 32 AM. J. POL. SCI. 713, 714 (1988) (noting that “[e]ven under circumstances favorable to the president . . . his influence over final spending figures will be limited.”). More fully developed congressional capacity would also have overcome problems of collective action. Most plausibly, those would be overcome through extensive delegation to smaller groups of legislators who would be responsible for some relatively well-defined jurisdiction, along with norms of deference to those individuals. This is indeed not far from how the U.S. Congress (partially) solves problems of collectivity through the committee system; parliamentary systems, where the government is formed from parliamentary membership, might be seen as a radical extension of this same principle.

### A. *The Problem of Trust*

A fundamental problem of trust infects modern representative democracies. The problem is rooted in information: the public has poor information about at least two critical aspects of the political environment in virtually any complex democracy.<sup>68</sup> First, the public does not know for certain whether its representative is “loyal” or “faithful” to their interests. The ways in which a representative may be unfaithful are manifold, but include prominently the possibility that the representative is corrupt, or captured by special interests, as well as the possibility that the representative is ideologically impure or inconsistent. Second, between various policy options, the public does not know for certain which is in their best interest. Although the first element of information (faithfulness) is likely an issue in any representative democracy, the absence of the second element of information only becomes acute in complex societies, in which the relationship between policies and material outcomes is often not clear to the public. Together, these factors produce distrust between the public and elected representatives. When voters observe a legislative policy choice, they wonder, “Did my representative act faithfully? Is this policy in my best interest?” This distrust may be greater or lesser in one environment or another, or one time or another, but it is sown deeply into the fabric of modern representative institutions.

The first element of the problem relates to the characteristics of the representative himself. For example, the public often cannot be sure whether their representatives “truly” share their policy or ideological commitments. In recent years, Republican voters have been most questioning of the loyalty of their representatives,<sup>69</sup> though Democrats also show early signs of the same dynamic.<sup>70</sup> The public often also questions the connections between elected representatives and special interest groups.<sup>71</sup> The public knows that special interest groups operate aggressively in the legislative arena—suggesting that they have *some* purchase on policy—but the public does not know if the representative rebuffed them or instead made an under-the-table deal with

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<sup>68</sup> See *infra* Analytical Appendix.

<sup>69</sup> Edward Ashbee, *Bewitched—The Tea Party Movement: Ideas, Interests and Institutions*, 82 POL. Q. 157, 162 (2011) (describing, for example, efforts to install “purity” tests for candidates).

<sup>70</sup> E.g., Rebecca Savransky, *Protesters Gather Outside Schumer’s Apartment, Urge Resistance to Trump Nominees*, THEHILL (Feb. 1, 2017), <http://thehill.com/homenews/administration/317272-protesters-gather-outside-schumers-apartment-urge-him-to-resist-trump> [<https://perma.cc/MG7C-W6UT>] (reporting that protesters gathered outside Senator Schumer’s apartment because they were skeptical he would resist President Trump’s cabinet picks).

<sup>71</sup> According to one recent survey, eighty-five percent of people believe that Members of Congress are more interested in serving special interest groups than the electorate. *Americans on Domestic Policy*, N.Y. TIMES | CBS NEWS POLL (May 1, 2013), <http://www.nytimes.com/interactive/2013/05/01/us/domestic-poll-graphic.html> [<https://perma.cc/U2RA-SA7Y>].

them. Some types of legislators would rebuff the special interests; but many others would publicly declare themselves un-buyable just as they are being privately bought.<sup>72</sup> In most cases, just as it is unclear whether a member was bought, it is impossible for the public to come to any clear view on such questions of the politician's internal motivation or commitment to policy principles.

The public, of course, attempts to sort out these difficult-to-observe characteristics of their elected representatives in a variety of ways. Classically, the media may be able to unearth information relevant to the legislator's faithfulness, showing disturbing patterns of favor-giving by special interests, for example.<sup>73</sup> Public interest groups, or the opposing campaign, might perform much the same role.<sup>74</sup> The public readily assimilates such information.<sup>75</sup> Voters also make inferences about unobservable characteristics based on observable behavior of politicians. Why do voters appear to place so much weight on the perceived "authenticity" of candidates? Why does it matter whether a politician received a DUI ten years ago? Or how much he spent on a haircut? Unlike questions of candidate health, for example, almost all such questions have virtually no direct bearing on the qualities of the candidate relevant to duties in office. But such questions nevertheless hold great interest because we use them to infer characteristics we cannot observe: an authentic candidate is less likely to flip flop or change ideological tunes; a DUI suggests that the candidate may be reckless or not care much about shared norms; a taste for expensive haircuts or clothes suggests that the candidate may be pliable by special interest lucre. But though such techniques have value, they also incompletely assuage public fears, in part because candidates manicure their histories and public performances in full knowledge of how voters make inferences based on them.

The second element of information relates to the complexity of a society. In a complex society, the public will often not know with certainty whether a given policy is in its interest. This might also be true at times in less complex

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<sup>72</sup> Only eight percent of the public, for instance, rates Members of Congress as being "high" or "very high" in honesty and ethical standards, the lowest of any surveyed profession. *Americans Rate Healthcare Providers High on Honesty, Ethics*, GALLUP (Dec. 19, 2016), <http://news.gallup.com/poll/200057/americans-rate-healthcare-providers-high-honesty-ethics.aspx> [https://perma.cc/Q26J-A6VF].

<sup>73</sup> Classically, the muckraking journalists performed this role at the turn of the (last) century. See, e.g., LOUIS FILLER, *THE MUCKRAKERS* 9-10 (1976) (noting that muckrakers "savagely exposed grafting politicians," and that for the "common people" this writing was "as gripping as it was educational"). Recently, a large literature has arisen studying the relationship between information provided in newspapers and political outcomes. See, e.g., Matthew Gentzkow et al., *The Rise of the Fourth Estate: How Newspapers Became Informative and Why it Mattered*, in *CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 187, 203-06* (Edward L. Glaeser & Claudia Goldin eds., 2007).

<sup>74</sup> E.g., Lupia, *infra* note 79.

<sup>75</sup> *Id.*

societies, but it has been an acute problem in the United States since roughly the late nineteenth century.<sup>76</sup> Then, the problem largely centered on managing novel economic interdependencies and corporate forms.<sup>77</sup> For example, to achieve a fluid railroad network, what subsidies or legal concessions must we give to the railroads? If the legislature sets a railroad rate, is the rate too high? Too low? The responses to such questions depend on information that voters cannot easily obtain: e.g., candid testimony from railroads about their cost structure and business constraints. Today we have many similar questions about legislative choices: Should pharmaceutical drug X be regarded as safe and effective? What should the capital and margin requirements for financial institutions be? How do we evaluate the tradeoff of the social costs of pollution with the benefits of more affordable energy? Despite inevitable reassurances from decisionmakers that the decision is in the public's best interest, the public appropriately discounts these declarations. Indeed, the answers to these questions also depend on information that is exceptionally challenging for voters to obtain. As such, at least in any complex democracy, when the public observes some legislative policy choice—for example, a legal concession to a developer, a bailout to a bank, or some form of financial regulation—it will often be unclear if the policy serves some defensible notion of the public interest, or instead the interests of a railroad, a bank, or some other narrow concern.

As with the problem of faithfulness, voters attempt to determine the answer to the pressing questions via the usual sources: newspapers,<sup>78</sup> trusted interest groups,<sup>79</sup> and so on. But even with this help, the public cannot resolve much of the uncertainty that surrounds the policies in question.

Thus, information is a critical problem in modern representative democracies: the public cannot be sure that its representatives are faithful, and they cannot independently assess if the policy in question serves their interest. In the first instance, this is a problem for voters. But voters can fire the legislator. And this in turn makes public distrust a problem for the legislator. If a voter does not trust the incumbent given these information problems, she may come to the view that she is better off electing a challenger who she believes has a greater likelihood of being faithful to her interests. This belief may turn out to be false, but that is not the important point for

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<sup>76</sup> See Stiglitz, *infra* note 131.

<sup>77</sup> See, e.g., CHARLES POSTEL, *THE POPULIST VISION* 146 (2007) (“To stimulate railroad expansion . . . town and county officials, state legislatures, and the U.S. Congress authorized untold millions of dollars in subsidies, bonds, and grants to the corporations.”).

<sup>78</sup> E.g., FILLER, *supra* note 73.

<sup>79</sup> Cf., Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 69-72 (1994) (analyzing information shortcuts that voters use to confront complex problems).

the incumbent, for by the time that comes to light the incumbent will be out of office. The incumbent recognizes this electoral risk and, therefore, has an incentive to find a method of reducing public distrust.<sup>80</sup>

### B. Legislative Delegations

Delegation of lawmaking authority to constitutional inferiors, subject to specified procedures and judicial review, resolves much of this problem of distrust.<sup>81</sup> Delegations of this nature serve as a verification mechanism: the legislature states the statutory objective, and an administrative agency effectuates the objective by setting policy.<sup>82</sup> But critically, the way in which the agency sets the policy is highly constrained and subject to scrutiny by external reviewers. These constraints and scrutiny allow the public a window into policymaking that is not possible in the pure legislative context, providing some faith that the policy serves its interests. Moreover, it is often in the elected representative's interest to delegate to administrative agencies. The representative's interest in doing so lies not necessarily in the "public good" but rather in the desire to be reelected.<sup>83</sup> That is, public distrust is harmful to the representative because it increases the likelihood that the voters throw him out of office, and methods of reducing this distrust, such as delegation, help his reelection chances.

That is the essence of the theory. Now consider in more detail how delegation might ameliorate voter distrust. With delegation, instead of directly legislating a policy outcome—say, approving a railroad rate, or a radio broadcasting license, or a pharmaceutical product—the legislature declares some *outcome* of interest and invests another entity, an administrative agency, with the authority to effectuate that outcome. For example, the legislature might tell an administrative agency to set railroad rates at a "fair and reasonable" level,<sup>84</sup> or to approve "safe" and "effective" drugs,<sup>85</sup> or to grant

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<sup>80</sup> See *infra* Analytical Appendix.

<sup>81</sup> See *infra* Analytical Appendix.

<sup>82</sup> This understanding of agencies pursuing statutory objectives aligns well with Stack's compelling purposivist theory of agency statutory interpretation. Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 894-96 (2015).

<sup>83</sup> This point marks a radical departure from other theories that admit the possibility of public interest regulation. In the present analysis, legislators nakedly seek self-preservation, not the public good. For other theories, see ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* 132 (1938) (calling for the regulation of externalities when the "self-interest" of private actors fails to maximize public interests); CROLEY, *supra* note 22, at 153 (positing that legislators are "motivated at least in part to advance general interests"); Edward L. Glaeser & Andrei Schleifer, *The Rise of the Regulatory State*, 41 J. ECON. LIT. 401, 417 (2003) (generating a public interest theory of regulation that explains the inadequacy of court-based approaches). See *infra* Analytical Appendix.

<sup>84</sup> Hepburn Act of 1906, Pub. L. No. 59-337, Ch. 3591, 34 Stat. 584, 589 (1906).

<sup>85</sup> 1938 Food, Drug, and Cosmetic Act, 21 U.S.C. § 393 (2012).

radio licenses in the public interest.<sup>86</sup> The legislative action, therefore, is oriented towards abstract objectives rather than particularities of means. Many observers have criticized Congress for legislating by setting objectives rather than grappling with the particulars of policy,<sup>87</sup> reflecting an “abdication” of legislative responsibility,<sup>88</sup> but beyond being helpful politically to Members of Congress, this objectives-oriented style of legislating is in the voters’ interests.

This follows from the critical fact that—unlike the legislature—the administrative agency sets the particularities of the policy in highly constrained ways. Agencies operate under the constraints of administrative procedures. When an agency wishes to issue a rule or order, it must follow specific procedures before doing so. Even if issuing an informal rule, the agency must give adequate notice of its intentions to issue a rule, along with an opportunity for the public to comment on the proposed rulemaking.<sup>89</sup> Under the APA, the procedures that apply to formal adjudications and rulemakings constrain further, requiring notice, but also for agencies to make a decision on the record, after a hearing that approximates that of a civil trial.<sup>90</sup> Compelling agencies to follow such procedures encourages transparent and reason-based decisionmaking.<sup>91</sup> An agency decision that seriously fails in its transparency or reason-giving—by failing to give adequate notice of the proposed rule, or by wholly ignoring one side of an argument or important pieces of evidence, respectively—is likely to be set aside on review. These procedural safeguards make it difficult for agencies to obscenely favor one side over the other, thereby reducing the odds of bald, wholesale corruption, and relieving public distrust in policymaking.

The tempting rejoinder to this argument is that agency lawmaking falters both in its transparency and in its reason-based deliberative value. Much research, indeed, suggests that agencies strategically adapt their behavior to reduce transparency, for example, by shifting to one procedural form or another, as calculated to reduce judicial or public oversight.<sup>92</sup> At least in the

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<sup>86</sup> 47 U.S.C. § 309 (2012).

<sup>87</sup> See, e.g., SCHOENBROD, *supra* note 8, at 100 (arguing that delegation to administrative agencies allows Congress to both “state its goals” and “avoid the hard choices” in generating policy).

<sup>88</sup> See also Mathew D. McCubbins, *Abdication or Delegation? Congress, the Bureaucracy, and the Delegation Dilemma*, 22 REG. 30, 37 (1999) (questioning the equivalence of delegation and abdication).

<sup>89</sup> See 5 U.S.C. § 553 (2012).

<sup>90</sup> §§ 556–57.

<sup>91</sup> See also, e.g., Galle & Seidenfeld, *supra* note 22, at 1948–79 (noting the transparency and deliberative potential of the administrative state, as facilitated by procedures).

<sup>92</sup> See, e.g., Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. REG. 257, 273–74 (1987) (arguing that the National Highway Traffic Safety Administration shifted from rulemaking to regulation via recall orders due to the challenges of

context of informal rulemakings—the subject of most recent scholarly attention—much research also suggests that the level of engagement with the public is limited. A common and perhaps dominant view among administrative law scholars, for instance, is that a rule is complete or nearly so by the time the agency issues its notice of proposed rulemaking.<sup>93</sup> The supposed “deliberation” therefore that occurs following notice is largely for show. Similarly, even if a rule is set aside because an agency failed to acknowledge some point, the agency can often repair the rule by making superficial changes in the rule preamble, without substantive revision.<sup>94</sup>

This is all true, so far as it goes. The transparency of agency decisionmaking is surely incomplete, and the level of explanation and deliberation in agency decisions is often wanting, and it seems increasingly so.<sup>95</sup> But this rejoinder neglects two related points.

First, agency decisionmaking is incomplete and wanting in these respects only within bounds. The ability of the agency to paper over substantive points of disagreement, for example, is limited. This much is suggested by the fact that agencies regularly withdraw rules after receiving adverse public comments,<sup>96</sup> or issue multiple notices of proposed rulemaking in a single

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judicial review); Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 765-69 (2016) (finding that agencies decrease the rate at which they report proposed rules to the Unified Agenda during times of divided government). Courts often attempt to curb such behavior, but whether they are, or can be, successful is an open question. *See, e.g.*, *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (chastising the agency for articulating one rule and applying another against regulated entities). For a more general discussion, see Section III.A.

<sup>93</sup> *See, e.g.*, E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1495 (1992) (explaining that the “dialogue in which minds (and rules) are really changed” occurs “well in advance of a notice of proposed rulemaking appearing in the *Federal Register*”); Nou & Stiglitz, *supra* note 92, at 743-44 (collecting references which propose that agencies have already resolved the crucial policy questions underlying rules before issuing notices of proposed rulemaking); *see also* Wendy Wagner, et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99, 110 (2011) (“Indeed, the courts have made it painfully clear that if a rule is to survive judicial review, it must be essentially in final form at the proposed rule stage.”). For a counterview, see Cass Sunstein, *The Future of E-rulemaking: Promoting Public Participation and Efficiency: Keynote Address at the Brookings Institute* (Nov. 30, 2010), <https://www.brookings.edu/events/the-future-of-e-rulemaking-promoting-public-participation-and-efficiency/> [<https://perma.cc/LN49-RC9X>] (“Proposed rules are a way of obtaining comments on rules and the comments are taken exceedingly seriously.”).

<sup>94</sup> *See, e.g.*, William S. Jordan, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?* 94 NW. U. L. REV. 393, 396 (2000) (observing that “[w]hen rules were remanded, agencies tended to recover fairly quickly when recovery was necessary”).

<sup>95</sup> *See* Section IV.A (arguing that diminished transparency is the result of agencies shifting from adjudicatory activity to informal rulemaking).

<sup>96</sup> *See, e.g.*, *Withdrawal of Notice of Proposed Rulemaking, Hazardous Materials: Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquids*, 80 Fed. Reg. 81,501, 81,502 (Dec. 30, 2015).

rulemaking effort. If an agency issues a rule entirely without giving its reasons for doing so, it is almost sure to be set aside on review; if an agency changes its story and gives different reasons for a regulatory decision on review than it gave at the agency level, the agency action is also likely to be set aside;<sup>97</sup> if an agency avoids the notice and comment process of informal rulemaking by saying that it is merely offering “guidance,” it may likewise be set aside, and if it attempts to rely on this guidance as the basis for a decision in subsequent enforcement proceedings it is all the more likely to be set aside.<sup>98</sup> All of this is to say that, true, agencies have discretion, and they surely often use this discretion to their own ideological or institutional ends, but also that they operate under constraints that bind in a meaningful way. Whatever discretion agencies have is limited.

Now compare this to the baseline of transparency and reason-giving of the legislature. Congress does not need to give notice of intended legislation. It may hold a hearing prior to voting on a bill, or it may not, and any hearing is likely to be engineered for partisan or ideological rather than informational purposes.<sup>99</sup> No individual or regulated party has a “right” to a meeting with Members or a committee. The equivalent of the legislative “record”—floor statements, the bill preamble, and the legislative reports—likewise reflect partisan engineering instead of the factual basis for legislation.<sup>100</sup> And in any event, the validity of any legislation does not generally turn on the adequacy of the “record” or of the nexus between the stated objectives of legislation and chosen means.<sup>101</sup> Under the highly deferential standard of review most

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<sup>97</sup> See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 92 (1943) (refusing to sustain a SEC order after noting that “the considerations urged here in support of the commission’s order were not those upon which its action was based”).

<sup>98</sup> See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987) (invalidating FDA “action levels” that were accorded “substantive significance” in enforcement proceedings and were not generated pursuant to the notice and comment process).

<sup>99</sup> See, e.g., Tevi Troy, *Congressional Hearings Aren’t What They Used to Be. Here’s How to Make Them Better*, WASH. POST: POSTEVERYTHING (Oct. 21, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/10/21/congressional-hearings-arent-what-they-used-to-be-heres-how-to-make-them-better/> [https://perma.cc/K427-SZ3R] (“These days, hearings tend to be seen as partisan affairs, and coverage is often limited to C-SPAN and select cable news channels.”).

<sup>100</sup> See, e.g., Mathew D. McCubbins, et al., *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 8 (1994) (noting that “[p]robably the most persuasive argument against using legislative history in statutory interpretation is that politicians sometimes misrepresent their actual policy preferences”).

<sup>101</sup> On review of an equal protection claim, for example, absent a suspect classification or fundamental right, courts generically apply the rational basis standard, which is exceptionally deferential, and requires only that the law serve some conceivable rational purpose—what the legislature actually thought it was doing is largely beside the point. See, e.g., *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (“Where . . . there are plausible reasons for Congress’ action, our inquiry is at an end.”); see also *id.* at 180 (Stevens, J., concurring) (deriding the “conceivable basis” formulation, arguing that the “Constitution requires something more than merely a ‘conceivable’ or ‘plausible’ explanation for the unequal treatment”). Now compare that standard of review to the



commonly applied to legislation, legislation will be upheld if supported by *any* conceivable rational basis that a court might later conjure—there need be no evidence that the legislature actually contemplated any rationale for the legislation.<sup>102</sup> In short, even if the transparency and deliberation required of agencies is not complete, the requirement is virtually absent for legislatures.<sup>103</sup>

Legislative adherents do not deny that the legislature is subject to fewer procedural constraints than agencies. The conventional normative basis for legislative decisions is—rather than procedural integrity—the superior democratic foundations of the legislature. Yet just as the procedural safeguards of the APA remain incomplete, the democratic credentials of the legislature also remain incomplete. Notably, voters suffer from important information problems in a modern representative democracy—voters cannot be sure that the people they have elected represent their interests rather than the interests of some narrow, possibly opposed concern. The main contention of this Article, indeed, is that the transparency and deliberation fostered by the superior procedural credentials of administrative agencies helps to resolve the information problems—the democratic deficit—that inhere to modern representative legislatures.

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generic standard that courts apply to administrative actions, the arbitrary and capricious standard, which, if anything, scholars criticize for being overly harsh and searching. *See, e.g.*, Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1014 (2000) (“[J]udicial review ineluctably produces pathological consequences.”).

<sup>102</sup> *See* Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1849 (2015) (observing that values such as reason-giving are “almost entirely eschewed [by courts] on the legislation side,” but given considerable attention on questions of administrative lawmaking); Jerry L. Mashaw, *Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 19 (2001) (“We have in crucial ways given up on the project of rationality as applied to legislative action. As a constitutional matter we do not require that the legislature have a ‘rational basis’ for its actions, only that we could imagine one.”); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 967-70 (2007) (observing a “judicial reluctance to impose an uphold-only-for-reasons-given requirement” with respect to legislation, and noting the complications for the separation of powers that that form of review would imply). *See generally* *Fritz*, 449 U.S. 166.

<sup>103</sup> Some scholars have called for courts to try to enforce forms of legislative due process. *See, e.g.*, Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1971 (2011) (arguing that courts should review legislative process); Gluck et al., *supra* note 102, at 1858 (noting that “courts are capable of, and sometimes interested in, engaging more with the lawmaking process,” but have historically avoided the question of whether Congress engaged in legislative due process); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222 (1976) (explaining that judicial review of legislative due process would mean “that a judge is to assess the challenged law in relation to actual, not merely conjectural, purposes, and that he is similarly to gauge the reasonableness of doubtful means by realistic materials in the record and not by hypothetical rationalizations”). I agree that moves of this sort would likely be beneficial; however, for the reasons discussed in Section II.C, I am skeptical that courts can credibly police legislative procedures in a way similar to the way they police administrative procedures.

### C. Judicial Review: Credibility and Constitutional Inferiors

At this point it is natural to ask—why does the legislature not procedurally constrain *itself*? That is, why do we not have a Legislative Procedure Act? The act would specify procedures for legislative actions that inspire trust: for example, requiring the legislature to develop a record before making a decision, requiring some limited form of rationality, establishing formalized hearings and perhaps barring *ex parte* meetings between special interest groups and legislators. Continuing the administrative analogy, it would also invest courts with the ability to review legislative actions for rationality and procedural irregularities. That scenario would seem to constitute an indomitable fusion of democratic legitimacy and procedural legitimacy.

Of course, we have nothing of the sort. The legislature, as I suggest, is essentially free to do as it wishes. The Houses of Congress have procedural rules, as permitted by the Constitution,<sup>104</sup> but they are both self-generated and, for reasons discussed below, almost entirely self-enforced. Moreover, there is no requirement for rationality from outside or inside of Congress. One, indeed, need not look further than the titles of legislation to observe the complete vacuum of any norm, much less enforceable requirement, for rationality in the legislature. Here, outlandish exaggeration is the norm,<sup>105</sup> absurdity not uncommon.<sup>106</sup>

The key to understanding why no Legislative Procedure Act exists—and to understanding the unlikely virtue of administrative lawmaking—is enforceability. What would happen if Members violated a procedural rule? If a leading Member had *ex parte* contacts with special interest groups, for example? How would the rule be enforced?

One possibility is that the legislature would enforce its own rules. But the history on this front, even on charges far more serious than disallowed *ex parte* contacts, is not encouraging. Consider the history of the U.S. Senate. Since the founding, the Senate has formally expelled fifteen Members, but the body did so only in truly extraordinary circumstances: one case of treason shortly after independence, and fourteen cases of support for the Confederate

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<sup>104</sup> U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

<sup>105</sup> Richard Simon, *Congress Turns Bill Titles into Acts of Exaggeration*, L.A. TIMES (June 19, 2011), <http://articles.latimes.com/2011/jun/19/nation/la-na-0620-titles-20110620> [<https://perma.cc/6PKY-8AK2>] (noting an Affordable Care Act repeal bill entitled “Revoke Excessive Policies that Encroach on American Liberties Act”).

<sup>106</sup> *E.g.*, Federal Water Quality Protection Act, S. 1140, 114th Cong. (as introduced in Senate, Apr. 30, 2015), in fact was designed to “cripple” an EPA rule that expanded the reach of the Clean Water Act. *See generally* Editorial, *G.O.P. Assault on Environmental Laws*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/08/opinion/gop-assault-on-environmental-laws.html> [<https://perma.cc/85LU-ZPDF>].

rebellion during the Civil War.<sup>107</sup> Facing charges, a number of senators resigned from office, but even this has occurred only five times since the founding: three cases of corruption, two of those after criminal convictions; one case of alleged election fraud; and one case consisting of equal parts favor peddling and lurid sexual misconduct.<sup>108</sup> All in all, the Senate does not seem particularly active in self-policing. Incredibly, the U.S. House of Representatives is even less assiduous. It has expelled only five Members in its history: three for support of the South during the Civil War, and two bribery-related charges.<sup>109</sup> Thus, cases of congressional self-policing are rare and tend to involve highly visible and obvious violations of rules. The idea that the legislature would self-police with respect to ex parte contacts, much less to undue laxity in ends-means rationality strains belief.

For this reason, credible enforcement in this area must come externally.<sup>110</sup> The problem is that the most natural external enforcer, the Judiciary, cannot itself credibly enforce procedures or standards of rationality against the legislature. It is indeed only a modest stretch to say that the courts' justiciability doctrines exist precisely to permit courts respectably to avoid deciding such questions.

It is important not to overstate the firmness or completeness of this point—the Court is not consistent in applying justiciability doctrines,<sup>111</sup> as many have observed.<sup>112</sup> And individual doctrines ebb and flow in influence.<sup>113</sup> But they also all serve essentially the same objective of providing the option of face-saving abstention,<sup>114</sup> and so even if one doctrine or another falls from

<sup>107</sup> U.S. Senate: Expulsion and Censure, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/briefing/Expulsion\\_Censure.htm](https://www.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm) [<https://perma.cc/8UHG-CVSA>].

<sup>108</sup> *Id.*

<sup>109</sup> JACK MASKELL, CONG. RESEARCH. SERV., RL31382, EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES 21 (2016).

<sup>110</sup> For a sympathetic take, see Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 808 (2010) (arguing that Members of Congress face few incentives to self-police or follow rules).

<sup>111</sup> See, e.g., Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341, 1345, 1348-53 (1990).

<sup>112</sup> See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (noting that standing has long been regarded as "incoherent" and "permeated with sophistry" (citation omitted)).

<sup>113</sup> See generally Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (tracing the rise of the political question doctrine in its constitutional and prudential forms, and arguing that it is much diminished as a result of rising judicial supremacy).

<sup>114</sup> See, e.g., *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring) (observing that, "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.").

favor, or if the facts of a given case fit oddly with precedent on that or another doctrine, the likelihood is high that courts can avail themselves of *some* route to avoid a decision on the merits. When it comes to a question of the internal operations of the legislative branch that the courts wish to sidestep, what today, on these facts, is decided on the basis of the political question doctrine,<sup>115</sup> tomorrow, on those facts, might be decided on the basis of legislator or generic standing.<sup>116</sup>

And though it is important not to overstate the completeness of judicial abstention, it is also important not to understate what judicial enforcement of any Legislative Procedure Act would entail. It would mean judicial entries into the legislative process, not just in the occasional *Powell* or *Nixon*,<sup>117</sup> but instead a regular, near-constant involvement of the courts in the legislative process, much as we have with respect to the administrative process. Someone will always be aggrieved by a legislative action, and they will challenge on procedural or substantive grounds, arguing that the legislation fails a rationality test. It is not credible that courts would be able to engage in this type of oversight for a period of any length. Occasionally, courts may challenge and police the political branches, but their ability to do so on a continued basis is sharply limited;<sup>118</sup> the few instances in which courts have

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<sup>115</sup> *E.g.*, *Nixon v. United States*, 506 U.S. 224, 228-29 (1993) (finding the political question doctrine to apply to the manner in which the Senate “try” an impeachment); *see also* Stack, *supra* note 102, at 967-70 (discussing the difficulty of judicial review of the legislative process).

<sup>116</sup> *E.g.*, *Raines v. Byrd*, 521 U.S. 811, 815-18 (1997) (finding that Members of Congress did not have standing to challenge the constitutional status of the Line Item Veto Act, despite the fact that the Act authorized such suits); *Common Cause v. Biden*, 909 F. Supp. 2d 9, 12 (D.D.C. 2012) (holding that plaintiffs, including both Members of Congress and private citizens, did not have standing to challenge the constitutional status of the filibuster); *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011) (holding that plaintiffs did not have standing either as Members of Congress or as taxpayers to sue the President for violating the War Powers Resolution).

<sup>117</sup> *See Nixon*, 506 U.S. at 226 (holding that the procedures of a Senate impeachment trial represent a nonjusticiable political question); *Powell v. McCormack*, 395 U.S. 486, 489, 550 (1969) (overcoming the political question doctrine and issuing a declaratory judgment that the plaintiff had been unlawfully excluded from a House seat to which he had been elected).

<sup>118</sup> This, of course, is an old idea. As Alexander Hamilton wrote in the *Federalist Papers*,

[T]he judiciary, from the nature of its functions, will always be the least dangerous [branch] . . . . The executive not only dispenses the honors, but holds the sword of the community. The legislat[ur]e not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

THE FEDERALIST NO. 78, at 291 (Alexander Hamilton) (J. & A. McLean ed. 1788).

forgotten this lesson and aggressively countered the political branches have led to near-disasters for the Judiciary.<sup>119</sup>

Among other things, this means that it is highly unlikely that courts will enforce procedural rules that apply within Congress.<sup>120</sup> An indispensable corollary of this point is that distrust in direct legislative lawmaking is essentially irreducible, as the dominant verification mechanism—procedures and at least minimal substantive rationality, supported by judicial review—is not meaningfully available in that context.

With all of this in mind, now consider administrative agencies. The great virtue of administrative agencies is that—unlike the legislature—a credible means of procedural enforcement exists. Indeed, the very fact that administrative agencies represent constitutionally awkward, distinctly lesser entities that scholars and jurists regard with natural suspicion is, paradoxically, a boon to their credibility as policymakers. The very fact that they create a fundamental tension with our self-conception as a democracy,<sup>121</sup> that they combine constitutional functions more typically separated, or at least more typically combined less obviously, in other words, is important to their success.<sup>122</sup>

Those awkward features assist because courts cannot help but be offended by them—they invite judicial scrutiny and willingness to meddle. As such, if an agency skips a procedural step, courts have no problem remanding the rule or order so that the agency may comply with the procedure; if the agency fails to explain itself, or behaves irrationally or arbitrarily, courts have no trouble

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<sup>119</sup> See generally William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 (1966) (chronicling the history of the Court's challenges to New Deal programs, and President Roosevelt's evolving plans for curbing the Judiciary); see also TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 108-09 (Cambridge Univ. Press ed. 2011) (demonstrating that congressional court curbing proposals increase in times of public opposition to the Court, inducing self-restraint by the Court.); Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 973 (2009) (arguing that the Court exercises self-restraint in the face of an adversarial Congress, fearing loss of public support and legitimacy).

<sup>120</sup> See, e.g., *Nixon*, 506 U.S. at 226 (refusing to resolve a claim involving the Senate's procedural rules).

<sup>121</sup> See, e.g., Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997) (observing that, "Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars").

<sup>122</sup> See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 530-31 (2015) (noting that agencies combine powers of the three branches, and that this induces concern among many observers). See generally Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009) (analyzing the relationship between the separation of powers generally and separations "internal" to administrative agencies).

vacating and remanding the action.<sup>123</sup> This is all possible because agencies are regarded as awkward, suspected, constitutional inferiors with no inherent legitimacy.

In this way, whereas meaningful judicial review is repelled in the legislative context,<sup>124</sup> it flows naturally, some indeed argue too naturally,<sup>125</sup> in the administrative context. Of course, review of agency actions is not costless for any party, and its implications are far-reaching and complex,<sup>126</sup> but one underappreciated benefit of review—the central one in this account—is that it supports credibility in administrative procedures and at least a “thin” form of rationality in administrative lawmaking that is all but impossible to achieve in legislative lawmaking.<sup>127</sup>

Thus, for delegation to serve its function of ameliorating public distrust, it is important for administrative agencies to represent constitutional *inferiors* that courts may police without fearing for their own status in our constitutional system. The manner of congressional delegations, along with administrative procedures, makes this relationship clear. It is well understood in our system that agencies have no inherent authority and that any authority they have derives from statute.<sup>128</sup> Moreover, the political branches have clearly subordinated administrative agencies through the judicial review provisions of the APA, notably giving a cause of action to anyone aggrieved by agency action.<sup>129</sup> Those provisions open the door to review and call on courts, for example, to set aside any agency action that is arbitrary and capricious.<sup>130</sup>

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123 Kevin Stack provides a nice illustration of this point, explaining how the agency reasoning that courts require via *Chenery* roots in constitutional concerns over non-delegation. Stack, *supra* note 102, at 967-70.

124 As one court put it, “The agencies certainly have a good deal of discretion in expressing the basis of a rule, but the agencies do not have quite the prerogative of obscurantism reserved to legislatures.” *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

125 See, e.g., Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1244 (1999) (arguing that “[a]lthough a call for abolishing judicial review of rulemaking may be a new one, the case has a strong analytical pedigree”).

126 See, e.g., Mashaw & Harfst, *supra* note 92; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) (arguing that “the judicial branch is responsible for most of the ossification of the rulemaking process”).

127 On this notion of “thin” rationality, see Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016).

128 See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099 (2004).

129 5 U.S.C. § 702 (2012).

130 § 706(2)(A).

### III. IMPLICATIONS AND COMPLICATIONS

The theory may explain a great deal, but it also raises some questions and carries implications that call out to be examined. In a separate effort, I address the historical aspects of this theory, using it to understand progressive era delegations of authority;<sup>131</sup> the project also entails an empirical component.<sup>132</sup> This Article is not the place for those exercises. Here, I wish to develop three implications of the theory: two related to the nature of administrative procedures, and one related to the areas in which we observe more or less delegated authority.

#### A. *Fairness and Administrative Procedures*

A central dividend of this theory of the administrative state is that it provides a foundation for an answer to another major question: why do we have administrative procedures? Scholars have advanced two basic types of theories for administrative procedures: a traditional normative school of thought, which argues they exist to ensure fairness and promote the legitimacy of the administrative state;<sup>133</sup> and a positive theory school of thought, which argues that they exist as tools by which Congress might exercise control over agencies through decentralized monitoring.<sup>134</sup> This idea of public distrust refashions our understanding by suggesting a *positive* rather than normative rationale for fairness and legitimacy in our understanding of procedures.

Recent historical research has emphasized that the objectives of fairness and legitimacy were central to those crafting administrative procedures.<sup>135</sup> A central concern of the drafters of the APA, indeed, was fairness,<sup>136</sup> a fact

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<sup>131</sup> Edward H. Stiglitz, *Administrative Origins in Democratic Distrust* (unpublished manuscript) (on file with author).

<sup>132</sup> For the first published empirical paper in this project, see Edward H. Stiglitz, *Cost-Benefit Analysis and Public Sector Trust*, SUP. CT. ECON. REV. (forthcoming 2018) (manuscript at 5) (on file with author) (providing an empirical analysis substantiating the “connection between cost-benefit analysis and public sector trust”).

<sup>133</sup> JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 67 (2012) (noting that the Attorney General’s Committee, which heavily influenced the APA, “offered recommendations intended not to strictly limit the agencies but to help them improve their overall operations and gain legitimacy in the public’s eyes”).

<sup>134</sup> E.g., McNollGast, *Administrative Procedures*, *supra* note 34, at 342 (discussing how political concerns influence administrative processes and guide “agencies to make decisions that are consistent with the previous legislative coalition”).

<sup>135</sup> GRISINGER, *supra* note 133, at 5-6 (providing a “political history of administrative law,” and observing that “[l]egalism and fairness were tightly linked, and parties inside and outside the government turned to administrative rules and procedures to ensure that administrators acted fairly.”).

<sup>136</sup> *Id.* at 60 (noting that the APA’s “drafters consistently argued that the APA was a significant reform that would improve the fairness of administrative governance”).

reflected in the preamble of the APA itself.<sup>137</sup> Some decades later, even as administrative procedures had evolved considerably since Congress passed the APA, Professor Stewart argued in his magisterial article that “the function of administrative law is . . . the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.”<sup>138</sup> Before the APA, in the APA itself, and in its subsequent evolution, a focus on fairness has been a constant in administrative procedures.

Legitimacy, likewise, tends to go in hand with discussions of procedures and fairness. It is indeed notable that the drafters of the APA and cognate systems of administrative procedures not only cared about fairness, but critically that the public *perceives* procedures as fair, thus feeding the legitimacy of administrative decisionmaking. Agencies crafted their pre-APA, self-generated rules of procedure, for instance, with an eye towards the public’s view of their fairness.<sup>139</sup> The Attorney General’s 1941 report on procedures, an important influence on the subsequent APA, similarly reflected pervasive concern with public perceptions.<sup>140</sup>

In this way, the observation that procedures support fairness and legitimacy is far from novel, but often unanswered is why fairness and legitimacy matter. Most often, scholars either take it as self-evident that they matter, or equivalently regard them as normative ideals in themselves. In other words, fairness and legitimacy matter, because we care about fairness and legitimacy. Thus, as McNollGast offer their seminal positive analysis of administrative procedures, they put to the side the traditional view of procedures as “a means of assuring fairness and legitimacy in decisions by administrators . . . protect[ing] against autocratic and capricious decisions by government officials.”<sup>141</sup> For most positive theorists, if fairness and legitimacy

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<sup>137</sup> Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (providing in its full title, “An act to improve the administration of justice by prescribing fair administrative procedure”).

<sup>138</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975).

<sup>139</sup> See, e.g., GRISINGER, *supra* note 133, at 76 (quoting from a study of the ICC that “a regulatory body must be especially solicitous that the public should believe it to be competent, careful, and fair, and if this end can be furthered by procedural concessions which to some extent lower efficiency the gain may well be worth the price” (citation omitted)); see also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462-63 (2003) (arguing that preventing arbitrariness is central to the legitimacy of the administrative state). For a more recent example of this sort, see Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside Out*, 37 HARV. ENVTL. L. REV. 313, 330 (2013) (discussing the “inside-out” efforts of the U.S. Environmental Protection Agency to promote legitimacy and check arbitrariness).

<sup>140</sup> GRISINGER, *supra* note 133, at 67 (noting that the Attorney General’s Committee report “offered recommendations intended . . . to help [agencies] . . . gain legitimacy in the public’s eyes”).

<sup>141</sup> McNollGast, *Administrative Procedures*, *supra* note 34, at 244.



reflect anything of substance in our understanding of administrative procedures—rather than a distraction—they do so by rootless normative appeal.

The trust-based theory of delegation in this Article maps a positive understanding of why fairness and legitimacy matter in administrative procedures. In particular, this analysis indicates how fairness and legitimacy matter in procedures, not as normative ideals, but as critical accompaniments of delegated authority, designed to ameliorate distrust between voters and elected representatives. Procedures of fairness and transparency constrain administrative decisionmaking and endow it with verifiability that, though incomplete, far surpasses what might credibly be achieved through direct legislation. Fairness and legitimacy, in other words, are indispensable to the legislature's (self-interested) efforts to escape the problem of public distrust that arises in modern representative democracies.

Administrative procedures surely represent a complex body of rules,<sup>142</sup> and inevitably those who supported the passage of the APA did so for a variety of reasons. Unease with unchecked bureaucratic power was, and is, widespread, and administrative procedures undoubtedly have roots in political control, as in the dominant understanding among positive scholars.<sup>143</sup> But it is a mistake to regard fairness and legitimacy as empty rhetorical flourishes, or as reflecting free-floating normative ideals. They instead represent essential features of procedures that enhance the fates of voter and politician alike, and without which delegations of lawmaking authority would be politically impossible or have far less value.

### B. *Historical Sequencing and Procedures*

Congress passed the Administrative Procedure Act in 1946, well after the massive administrative transformation of the New Deal, and decades following the important progressive era delegations. This sequence seemingly raises a challenge for the theory of this Article. After all, delegations serve a political purpose, in this account, precisely because they offer credible procedural regularity that cannot be achieved in the legislative context. What, then, to think of the fact that the APA came after, not before, so many major delegations of lawmaking authority?

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<sup>142</sup> *E.g.*, ESKRIDGE & FEREJOHN, *supra* note 1, at 10-11 (arguing that “[t]he framework for understanding most national lawmaking and much national adjudication in this country is no longer Article I, Section 7, of the Constitution, but is instead the Administrative Procedure Act of 1946, which codified the new public order.”).

<sup>143</sup> For example, consistent with this view, Mills Logan said of the Walter–Logan bill, a failed predecessor of the APA, that it would stop “the entire subordination of both the legislative and judicial branches of the Federal Government to the executive branch.” DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* 133 (2014).

It is important to note three points. First, though Congress passed the APA in 1946, it is error to suggest that Congress first then contemplated procedures. Indeed, far from it. Though the solution of delegation to the problem of distrust no doubt came haltingly and only half-knowingly, as an evolution rather than as engineered, many of the initial delegations of authority came with agency-specific procedures that represented early prototypes of what eventually became the APA. Consider, for instance, the Steamboat Safety Act of 1852, which Professor Mashaw carefully details in his recent entry on early “administrative law.”<sup>144</sup> This Act, which pre-dated the APA by nearly a century, delegated authority to a board to inspect and license steamboats for safety<sup>145</sup>—during this period, steamboats, a major form of public transportation, had the unfortunate tendency to explode.<sup>146</sup> However, with the delegation of authority came administrative procedures. The statute called on inspectors to certify vessels for seaworthiness, signing a statement if approving the boat, and in the event of a denial, the inspectors were required to “state, in writing, and sign the same, their reasons for their disapproval.”<sup>147</sup> The statute, further, provided for an appeals process, allowing for a supervisor to consider the case “anew” if the party appealed within thirty days of the initial decision and submitted the inspector’s written reasons.<sup>148</sup>

By the turn of the century, it seems it was fairly standard for Congress to accompany delegations with procedures. The Hepburn Act of 1906, for instance, which dramatically expanded the Interstate Commerce Commission’s (ICC) authority, including, for the first time, unambiguous ratemaking authority,<sup>149</sup> featured an impressive suite of procedural

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<sup>144</sup> See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION 187-208* (2012); see also John G. Burke, *Bursting Boilers and the Federal Power*, 7 *TECH. & CULTURE* 1, 3 (1966) (arguing that, in response to the dangers of steamboat engines, “Congress passed the first positive regulatory legislation and created the first agency empowered to supervise and direct the internal affairs of a sector of private enterprise in detail,” a trend that led to the growth of federal power and other agencies, such as the Interstate Commerce Commission). For another excellent entry on pre-twentieth century regulation, see generally WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (discussing nineteenth-century developments in agency procedures from fire safety regulations to free market regulations).

<sup>145</sup> See MASHAW, *supra* note 144.

<sup>146</sup> For several hundred pages of gruesome—one hopes sensationalized—accounts of many steamboat disasters, see JAMES T. LLOYD, *LLOYD’S STEAMBOAT DIRECTORY, AND DISASTERS ON THE WESTERN WATERS 225-27* (1856) (describing, for example, the explosion of the Louisiana in 1849 near New Orleans, observing that, though many died “hideous[ly]” in the explosion, “the fate of many who still lived was more shocking and distressing than the ghastly and disfigured corpses of those whose sufferings were terminated by death”).

<sup>147</sup> Regulation of Steamboats, ch. 106, 10 Stat. 66 (1852); see also MASHAW, *supra* note 144, at 195 (“So far as I have been able to ascertain, this is the first statute at the national level to require written reasons for an administrative decision”).

<sup>148</sup> Ch. 106, 10 Stat. at 67.

<sup>149</sup> Interstate Commerce Regulations, ch. 3591, 34 Stat. 589 (1906).

requirements. In the event of a complaint against a carrier, the ICC must “make a report in writing,” and in the event of a damages awards, “shall include the findings of fact on which the award is made.”<sup>150</sup> The report “shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.”<sup>151</sup> The Act further provided for a “full hearing,”<sup>152</sup> and though that term was not well-defined in the statute, its meaning was clear enough to courts. Such a hearing, the Court declared in *ICC v. Louisville & Nashville Railroad Co.*, “conferred the privilege of introducing testimony, and at the same time imposed the duty [on the ICC] of deciding in accordance with the facts proved.”<sup>153</sup> And though the statute likewise did not establish a generic standard of review,<sup>154</sup> Congress plainly provided avenues for judicial review of Commission orders. The keystone standard of review that emerged from this judicial review, the substantial evidence standard,<sup>155</sup> was conceived as somewhat more deferential than the “weight of the evidence” standard,<sup>156</sup> but certainly constituted more than a free pass for agencies.<sup>157</sup> With some modification, this standard of review later made its way into the APA.<sup>158</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> 227 U.S. 88, 91 (1913).

<sup>154</sup> On orders calling for damages, the Hepburn Act provided that “the findings and order of the Commission shall be prima facie evidence of the facts therein stated.” Ch. 3591, 34 Stat. 589, 590 (1906). The prima facie standard is itself not self-explanatory, but it appears not to require much deference from courts. See *Louisville & Nashville R.R. Co.*, 227 U.S. at 90 (noting a government argument that the 1887 Act that established the ICC rendered its orders “only *prima facie* correct,” and that the Hepburn Act, which did not apply that standard to orders not dealing with damages, therefore envisioned a more deferential standard of review on such matters.). For other types of orders, Congress was even less clear. If a carrier refused to obey an ICC order, the Commission or an injured party may seek enforcement in a circuit court. Ch. 3591, 34 Stat. at 591 (“If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process . . .”).

<sup>155</sup> See, e.g., E. Blythe Stason, “*Substantial Evidence*” in *Administrative Law*, 89 U. PA. L. REV. 1026, 1029-30 (1941) (noting that “the substantial evidence rule is today gradually being accepted by the courts as a controlling guide,” and that that standard emerged from ICC cases in which the statute provided no clear standard of review of facts).

<sup>156</sup> See, e.g., ERNST, *supra* note 143, at 4.

<sup>157</sup> See, e.g., *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (noting that “[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”); *Louisville*, 227 U.S. at 91, 98-100.

<sup>158</sup> See 5 U.S.C. § 706(2)(E) (2012). The APA requires the court to review the “whole record,” seemingly calling for a more searching review than courts had at times applied previously. § 706. On the modification, see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (observing that “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in [the APA] that courts consider the whole record.”). But opposing the notion that the “whole record” requirement added much, see

A second critical observation is that agencies themselves generate a substantial body of procedures.<sup>159</sup> This was true, as Professor Mashaw notes, even before the APA provided scaffolding for additional self-generated procedures. The reason that agencies develop these procedures—that is, that they constrain themselves—is not entirely clear. Perhaps agencies have some self-conception of how administration “should” occur.<sup>160</sup> Perhaps, as agencies grow in size, they must develop procedures more for reasons of internal self-control and self-governance.<sup>161</sup> Or perhaps they develop procedures in attempts to forestall the external imposition of procedures by courts or Congress that they feel might be ill-fitting or unduly onerous.<sup>162</sup> The motivation of self-generated procedures is indeed of great interest, yet what matters most is that self-generated procedures exist in substance and quantity, and effectuate many of the values associated with the APA. Indeed, Professor Mashaw observes that, due to these self-generated rules of procedure, “the modern administrative lawyer would find little surprising in the administrative adjudicatory process utilized in the late nineteenth century.”<sup>163</sup>

The third observation builds on the first two. To a substantial degree, the APA, as passed, represented a codification of the practices and procedures that already existed in agencies, largely either by virtue of their self-constraint, their organic statutes, or judicial influence.<sup>164</sup> The APA’s procedures for formal adjudications, then the dominant channel of agency activity, largely resemble those of a civil trial, and were clearly presaged by the notice and “full hearing” requirements of the Hepburn Act and other

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Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 589 (1951) (concluding that the substantial evidence standard of review “is but little more than a codification of the *Consolidated Edison* case”); see also *supra* note 157.

<sup>159</sup> For an important statement of this point, see Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860 (2009) (observing that, “Strangely absent from [standard] accounts is a ubiquitous phenomenon: administrative agencies routinely ‘self-regulate’ . . . They voluntarily constrain their discretion”), and MASHAW, *supra* note 144, at 277-82 (discussing self-generated “internal administrative law”).

<sup>160</sup> See, e.g., MASHAW, *supra* note 144, at 112 (“Administrators, because of the imperatives of responsible administration, shrink from unconstrained discretion vested in themselves and fear the centrifugal effects of discretion vested in subordinates.”); see also Hammond & Markell, *supra* note 139 (exploring the features of the EPA that create “inside-out” legitimacy as an alternative to judicial review).

<sup>161</sup> See generally MASHAW, *supra* note 144.

<sup>162</sup> See, e.g., GRISINGER *supra* note 133, at 76 (noting that by the time of the APA, “Most agencies and commissions already adhered to judicially defined standards of due process and employed quasi-judicial procedures in their work, a result of agencies scrambling to satisfy reviewing courts and prove their lawfulness to the public in previous years”).

<sup>163</sup> MASHAW, *supra* note 144, at 254.

<sup>164</sup> See, e.g., GRISINGER, *supra* note 133, at 77 (observing that the APA standards “came largely from the existing practices of the agencies and from the doctrines of administrative law created and articulated by the courts over the past six decades, rather than the [APA] itself”).

congressional actions.<sup>165</sup> Much the same holds for the review provisions in the APA. I have already noted one important area where this is the case: the standard that courts apply to agency findings of fact, a standard that largely developed in the courts as they reviewed ICC orders without clear guidance from Congress on the appropriate standard of review.<sup>166</sup> Naturally, this point on the continuity of the APA can be overstated. The APA introduced procedures and requirements in a number of important areas,<sup>167</sup> and even under this continuity thesis, the APA brought the laggard agencies into line with the more procedurally conscious agencies.<sup>168</sup> But it is perhaps easier still to overstate the significance of the innovations brought about by the APA. Congress was not drafting against a status quo in which agency officials exercised freewheeling, unconstrained discretion. Congress, instead, was drafting against a backdrop of administrative procedures and standards of review that had developed organically and piecemeal for many years, and intensively so for roughly half a century.<sup>169</sup>

All of this indicates that the cornerstones of procedures and judicial review existed, or were under active development, by the time of the first major progressive era delegations. It took time to work out the elaborate structure of the APA; but long before the APA, Congress, along with agencies themselves, began to spin out an intuition of the procedures and styles of review that profitably accompany delegations of lawmaking authority.

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<sup>165</sup> See *supra* notes 149-53 and accompanying text.

<sup>166</sup> The central question during this period seems to have been how courts would review findings of fact rather than law. Fact finding was then seen as a critical area of agency discretion. Justice Hughes famously wrote as a warning, "Let me find the facts for the people of my country, and I care little who lays down the general principles." Charles Evan Hughes, *Important Work of Uncle Sam's Lawyers*, 17 AM. B. ASS'N J. 237, 238 (1931). At the same time, it seems that it was generally assumed that courts would review questions of law at this point. In his magisterial entry on review of administrative action, Louis L. Jaffe observes a trend of judicial deference from the 1870s, followed by a "sudden and dramatic turn" in the 1902 case of *School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), establishing a sort of presumption of reviewability. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 339 (1965). This presumption "was reinforced in the Twenties and Thirties by a judicial zeal, often excessive, to contain administrative action." *Id.* at 342-43; see also MASHAW, *supra* note 144, at 248 (noting that, under Jaffe's account, there was "something like a general presumption of the reviewability of administrative action for legal error" by the early 1900s.).

<sup>167</sup> See, e.g., Parker, *supra* note 158, at 590 (lauding, for instance, the requirement of independent trial examiners in certain contexts).

<sup>168</sup> E.g., GRISINGER, *supra* note 133, at 77 (noting that the APA was a "statement of best practices").

<sup>169</sup> Indeed, one observer writing shortly after Congress passed the APA leavened his assessment of the Act by saying, "Of course, it would be an exaggeration to say that the APA is altogether useless." Parker, *supra* note 158, at 590.

### C. *Heterogeneous Policies: Tax and Financial Regulation*

Congress delegates lawmaking authority to administrative agencies far more in some areas than in others. Observers commonly note, for instance, that Congress rarely delegates fundamental lawmaking authority in tax policy.<sup>170</sup> Much the same might be said of fiscal policy more generally.<sup>171</sup> By comparison, observers marvel at the high level of delegation in other policy areas, questioning why Congress needed to delegate matters that might have been resolved within the institution. For instance, many have questioned why the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank) called on financial regulatory agencies to issue some 400 rulemakings.<sup>172</sup>

The theory of this Article suggests answers to these questions. There is relatively little delegation in the fiscal realm because the public trusts Congress in this area, *at least in the politically relevant sense*.<sup>173</sup> That is, voters can generally determine whether a given fiscal policy is in their interest or not. They ask: Does my tax rate increase? Am I paying more now than I used to? Am I receiving more transfers than I used to? Am I receiving more now than I used to? For better or worse, these questions largely motivate voter judgments in fiscal policy,<sup>174</sup> and hence dictate fiscal policy. That voters can

<sup>170</sup> See, e.g., James R. Hines, Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 248 (2015) (noting that “[i]t is commonly understood that U.S. tax policy is, to a remarkable (and unusual) extent, determined by Congress not only in its broad outlines but also in its details”).

<sup>171</sup> E.g., Lars Calmfors, *Fiscal Policy to Stabilise the Domestic Economy in the EMU: What Can We Learn from Monetary Policy?*, 49 CESIFO ECON. STUD. 319, 334 (2003) (noting that the delegation of fiscal policy would be a “very far-reaching institutional reform”).

<sup>172</sup> Dodd–Frank Progress Report, DAVIS POLK (Sept. 2014), [https://www.davispolk.com/files/September2014\\_Dodd.Frank\\_Progress.Report.pdf](https://www.davispolk.com/files/September2014_Dodd.Frank_Progress.Report.pdf) [<https://perma.cc/JQ5B-EW4B>] (noting “398 total rulemaking requirements” in Dodd–Frank). For a thoughtful assessment of this issue, see Roberta Romano, *Regulating in the Dark*, in REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 86, 90 (Cary Coglianese ed., 2012) (doubting the conventional information rationale for delegation in the context of Dodd–Frank).

<sup>173</sup> The Appropriations Clause provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law,” Art. I, § 9, cl. 7, and that provision might be read to limit Congress’s constitutional authority to delegate fiscal policy. Kate Stith, *Congress’ Power of the Purse*, 97 YALE L. J. 1343, 1383 (1988) (arguing that the Clause imposes a duty on Congress to identify the object of the funding and limit funding in time and amount). Even if the Appropriations Clause implies these requirements, however, they would not plainly rule out fiscal delegation, except in the most open-ended formats (e.g., without limits on time, objects, or amount).

<sup>174</sup> This idea has a long history. For early and influential works analyzing this trend, see V.O. KEY, JR., *THE RESPONSIBLE ELECTORATE: RATIONALITY IN PRESIDENTIAL VOTING* 61 (1966) (developing a theory of retrospective voting), and MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* 179 (1981) (concluding that “it is clear that changes in financial situation had the expected effect on the vote” in the 1974 congressional elections). For a recent effort that largely corroborates these earlier perspectives on so-called “pocketbook” voting, see Andrew J. Healy et al., *Digging into the Pocketbook: Evidence on Economic Voting from Income Registry Data Matched to a Voter Survey* (Oct. 13, 2016) (unpublished manuscript) (on file

answer them natively means that there is little distrust and little need for delegation. Much the same might be said for other areas where we see virtually no delegation to agencies—gun control policy, for instance.

By comparison, voters have tremendous distrust of the legislature when it comes to financial regulation.<sup>175</sup> And for good reason. It is not easy to determine whether financial policy A or financial policy B is better for us—this is true even for relatively attentive citizens. Moreover, the immense resources of the financial sector suggest the ability to ply legislators. Voters, thus, do not know if policy A or policy B is in their best interest, but they have a natural and justified suspicion of the legislative process. Fearing for their jobs, legislators come to see delegation as a convenient path forward. They set the objective legislatively, and the agency then matches facts to objectives,<sup>176</sup> constrained by administrative procedures and judicial review.<sup>177</sup>

Notice that although the problem that delegation solves is not necessarily one of expertise, this is not to say that expertise is irrelevant to policymaking, even where Congress does not delegate. Indeed, the classic example of non-delegation, fiscal policy, undoubtedly involves the application of expertise. The difference is that Congress can solve the expertise problem internally with respect to fiscal policy—because of voters’ ability to evaluate the policy’s implications for their own welfare—whereas it cannot for many other areas of policy, such as financial regulation. This explains why Congress has, in fact, invested heavily in developing native expertise for fiscal policy. It is one of the few areas, indeed, where Congress has created precisely the type of advisory agency that Ely and followers have urged upon the institution. In 1974, Congress created the Congressional Budget Office (CBO), which

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with author) (finding, against strands of earlier literature, that pocketbook conditions are equally important to behavior as sociotropic conditions).

<sup>175</sup> For instance, only twenty-three percent of Americans say they trust Wall Street to do what is best for the economy. CNN ORC POLL (Oct. 24, 2011), <http://i2.cdn.turner.com/cnn/2011/images/10/24/rel17e.pdf> [<https://perma.cc/S9CF-A7KA>].

<sup>176</sup> See Stack, *supra* note 82, at 895 (describing the obligation of the agency as a mandate to “conform its conduct in accordance with the purposes Congress has established”).

<sup>177</sup> Naturally, this is not to say that financial interests are not active in the rulemaking process. For accounts of such influence, see Kimberly D. Krawiec, *Don’t “Screw Joe the Plummer”: The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 79 (2013) (analyzing the involvement of various groups in the development of the Volcker Rule and noting that “there were 351 financial institution meetings with federal regulators . . . [amounting to] 78% of all such meetings”), and Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1687 (2012) (describing combat over the implementation of the Durbin amendment and the overwhelming activity of the banking industry and its lobbying groups in the rulemaking debate). Rather, the point is that agencies’ capacity to capitulate to these pressures—pressures equally, if not more present in the legislative context—is constrained. Though the administrative process offers advantages over the legislative process, see Part IV for a discussion of possible slippage in the former.

“produce[s] independent analyses of budgetary and economic issues to support the congressional budget process.”<sup>178</sup>

Much the same story exists at the level of congressional committee. Consider, for instance, the resources of various U.S. House committees. The Committee on Appropriations, which bears primary responsibility for setting spending levels for federal programs, spent approximately \$21 million on salaries in 2015.<sup>179</sup> The House Budget Committee, which establishes the resolution setting the overall funding level that the Appropriations Committee works with, had salaries of about \$4.1 million in that same year.<sup>180</sup> Meanwhile, the House Ways and Means Committee, which is responsible for tax policy,<sup>181</sup> spent roughly \$7.6 million on salaries.<sup>182</sup> Thus, even ignoring the Joint Committee on Taxation and the CBO,<sup>183</sup> not to mention the U.S. Senate committee structure, the House spends over \$32 million per year on salaries for those working on fiscal policy. By comparison, the House spends relatively little developing expertise on financial regulation. In 2015, the House spent about \$6.4 million on salaries for the House Financial Services Committee, the principal committee with jurisdiction in that area.<sup>184</sup>

The problem that delegation solves, therefore, is not expertise as such, but instead distrust. Where voters can evaluate policy and expertise is required, Congress invests in native expertise. This explains why Congress has built out fiscal committees and created highly respected and professionalized advisory agencies, the CBO and the Joint Committee on Taxation. But where distrust prevails, as prominently is the case for financial regulation, Congress delegates to administrative agencies and constrains their decisionmaking with administrative procedures and judicial review.

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<sup>178</sup> *Introduction to CBO*, CONG. BUDGET OFF., <https://www.cbo.gov/about/overview> [<https://perma.cc/6AJ9-9BDP>].

<sup>179</sup> *House Appropriations Committee Staff Salaries*, LEGISTORM, [https://www.legistorm.com/office/House\\_Appropriations\\_Committee/1533.html](https://www.legistorm.com/office/House_Appropriations_Committee/1533.html) [<https://perma.cc/UYK8-UP62>].

<sup>180</sup> *House Budget Committee Staff Salaries*, LEGISTORM, [https://www.legistorm.com/office/House\\_Budget\\_Committee/1534.html](https://www.legistorm.com/office/House_Budget_Committee/1534.html) [<https://perma.cc/E6G8-DJZP>].

<sup>181</sup> *About*, COMMITTEE ON WAYS AND MEANS, <https://waysandmeans.house.gov/about/> [<https://perma.cc/FV5S-2T67>] (observing that the committee is the “chief tax-writing committee in the House of Representatives”).

<sup>182</sup> *House Ways and Means Committee Staff Salaries*, LEGISTORM, [https://www.legistorm.com/office/House\\_Ways\\_and\\_Means\\_Committee/1438.html](https://www.legistorm.com/office/House_Ways_and_Means_Committee/1438.html) [<https://perma.cc/BK8Z-ALAY>].

<sup>183</sup> For a history of the Joint Committee on Taxation, see George K. Yin, *James Couzens, Andrew Mellon, the “Greatest Tax Suit in the History of the World,” and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787, 849 (2013) (quoting one member of Congress involved with its creation as saying the committee “should be composed of experts, and . . . ought to be made up in such fashion that it can not [sic] be said that it is a whitewashing committee or anything of that sort; not to be subject to any such criticism as that”).

<sup>184</sup> *House Financial Services Committee Staff Salaries*, LEGISTORM, [https://www.legistorm.com/office/House\\_Financial\\_Services\\_Committee/1200.html](https://www.legistorm.com/office/House_Financial_Services_Committee/1200.html) [<https://perma.cc/XWN5-Z2TG>].



## IV. EROSION AND ANXIETY?

That is the theory. What then of the growing anxiety over the administrative state? If procedurally constrained administrative lawmaking largely addresses the problem of trust, why might observers no longer trust administrative lawmaking?

The answer to this question undoubtedly has several parts. The simplest response is likely at least partially correct: as the government, and hence the administrative state, has done more, there has been more to disagree with. This disagreement manifests in various forms of anxiety. But other sources also likely exist. For instance, trust in the Judiciary is at a low,<sup>185</sup> possibly due to the polarization and perceived politicization of that organ of government.<sup>186</sup> To the extent courts behave in an overtly political way, they may undermine the credibility of *administrative* transparency and trustworthiness. With a polarized Judiciary, the information value of judicial decisions is threatened: if a court upholds an agency action against a procedural challenge, the public may view the decision as following from political alignment; conversely, if a court sets aside an action, that may be due to procedural defect, or to political malalignment. This development potentially threatens the credibility of administrative procedures.

Even as such factors may also play a role, here I wish to pursue another explanation of the prevailing anxiety that centers on procedural erosion. A core tenet of this theory is that legislative delegation combined with administrative law ameliorates problems of distrust through procedural constraints that encourage transparency, fairness, and deliberation, and thereby credibly discourage the most egregious forms of abusive lawmaking. Yet even if this theory aptly describes much of the history of the administrative state, it is reasonable to question whether it describes the administrative state as it currently exists. As Professors Farber and O'Connell have recently and effectively argued,<sup>187</sup> there has indeed been much erosion in administrative procedures in recent decades.<sup>188</sup> This theory suggests that such erosion may contribute meaningfully to the current anxiety over government and the administrative state in particular.

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<sup>185</sup> See Jeffrey M. Jones, *Trust in U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP (Sept. 18, 2015), <http://www.gallup.com/poll/185528/trust-judicial-branch-sinks-new-low.aspx> [<https://perma.cc/9UYB-C638>].

<sup>186</sup> See John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41, 63-64 (2002) (describing ways in which “judicialization” of politics tends to produce the politicization of courts”).

<sup>187</sup> See Farber & O'Connell, *infra* note 195, at 1140 (arguing that “the actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed”).

<sup>188</sup> For an argument that the APA is wholesale off-square and maladapted to the administrative state, and has been so since its inception, see Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 96 (2003).

### A. Procedural Erosion and Distrust

Without belaboring points ably made by other scholars—notably Professor Rubin and, most aligned, Professors Farber and O’Connell<sup>189</sup>—the ambition of this Section is to focus on the broader historical contours of procedural erosion, with ties to the trust-based theory of delegation.

The fount of procedural erosion was the rise of informal rulemaking starting in the 1960s.<sup>190</sup> For most of the early history of the administrative state, agency activity *was* overwhelmingly adjudicatory activity, with little rulemaking.<sup>191</sup> This changed in a dramatic and well-documented fashion in the 1960s. Between 1960 and 1974, the annual number of informal rulemakings increased from roughly 500 to over 2,000.<sup>192</sup> Reflecting this fact, the D.C. Circuit heard very few cases involving informal rulemaking in the first decades following the passage of the APA. In the first two decades of the APA, for instance, the court heard a total of thirteen cases that cited the rulemaking provisions of the APA.<sup>193</sup> Over the next twenty years, however, between 1967 and 1987, the number of such cases increased to 291, an over twenty-fold increase in volume.<sup>194</sup> Similarly revealing, early administrative law casebooks contained virtually no discussion of informal rulemaking,<sup>195</sup> now perhaps the dominant topic in casebooks.

This shift to rulemaking had far-reaching consequences for our administrative system that we continue to struggle with today. The most obvious, and in many ways root, problem with the shift is that, though the APA contained provisions for informal rulemaking,<sup>196</sup> they were extremely

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<sup>189</sup> See *supra* notes 186-87.

<sup>190</sup> I reserve the question of why informal rulemaking increased in the 1960s for another effort. For other accounts, see Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L. J. 185, 188-91 (1996), positing that scholarly arguments regarding the comparative advantages of rulemaking and broader statutory mandates for agencies led to the increase of rulemaking. See also Schiller, *infra* note 191, at 1148-49 (arguing that increased workloads and obligations to regulate broader areas of activity drove the increase in rulemaking).

<sup>191</sup> See, e.g., Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145-47 (2011) (describing how adjudication was the dominant mode of agency action before and, initially, after the New Deal).

<sup>192</sup> See *id.* at 1147 (discussing the monthly rate of informal rulemaking between 1960 and 1974); see also Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 162-65 (2000) (documenting the shift to rulemaking and identifying congressional action and the Supreme Court’s opinion in *Florida East Coast Railway Co.* as the driving factors behind the shift).

<sup>193</sup> This figure comes from a search of Google Scholar, using the string “5 U.S.C. § 553” for the years 1946–1967.

<sup>194</sup> This figure comes from the same methodology, but applying to the years 1967–1987.

<sup>195</sup> See, e.g., Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1144 (2014) (noting, for example, that Kenneth Culp Davis’ 1951 casebook contained “only three pages” on informal rulemaking).

<sup>196</sup> 5 U.S.C. § 553 (2012).

sparse relative to those for formal adjudications.<sup>197</sup> According to the text of the APA, an agency must take only a few steps to issue an informal rule: provide notice of the proposed rule in the Federal Register;<sup>198</sup> accept public comments on the proposed rule;<sup>199</sup> and “[a]fter consideration of the relevant matter presented,” include with the final rule a “concise general statement” of basis and purpose.<sup>200</sup> This means that the center of the administrative mass—a rapidly increasing mass—was moving to a policymaking form that had sharply limited hardwired procedural regularity. The procedures that had assured fairness, transparency, and deliberation prior to the 1960s became increasingly irrelevant.

The consequences of this shift have, I submit, largely unfolded in two phases. The first phase consisted of various external actors in administrative law attempting to “fix” the new administrative form, either to cope with, or to preserve the viability and legitimacy of the form by saving it from its obvious procedural inadequacies. All three branches of government contributed in this effort.

The courts tend to receive the most attention; in any event, they perhaps moved the most quickly. The lean statutory instructions in section 553 of the APA contain incredible ambiguity. For adequate notice, what exactly must the notice contain? How detailed does the proposed rule have to be? Does the agency have to report in the proposal any studies that it relied on in formulating it?<sup>201</sup> What if the agency changes its mind after issuing the proposed rule, how much can the final rule differ from the proposed rule? Can the agency have *ex parte* contacts during the rulemaking process? Does the agency have to respond to all of the comments, or just give them “consideration”? How detailed must the agency’s response to comments be? To a large extent, the story of modern administrative case law is one of judicial efforts to address these and similar questions, reflected in the figures above on the D.C. Circuit’s caseload. The trend of judicial decisions was to inject adjudicatory elements into the informal rulemaking process—to make informal rulemakings somewhat more like formal adjudications.<sup>202</sup> Much of

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<sup>197</sup> §§ 556–57.

<sup>198</sup> § 553(b).

<sup>199</sup> § 553(c).

<sup>200</sup> *Id.*

<sup>201</sup> *See, e.g.,* Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (holding that the EPA was required to disclose the bases on which it promulgated its regulation).

<sup>202</sup> *E.g.,* Farber & O’Connell, *supra* note 195, at 1144 (noting that “[w]hen courts started to pay more attention to informal rulemaking, they tended to respond by pushing it in the direction of adjudication through creation of a ‘paper hearing’ requirement”).

this judicial work occurred in the D.C. Circuit, and largely during the 1970s.<sup>203</sup>

Around the same time, the executive branch was developing its own responses to the rise of this new procedural form. Starting with President Johnson,<sup>204</sup> and maturing with President Reagan, the executive response was to centralize control over agencies and the rulemaking process. For these purposes, the Office of Information and Regulatory Affairs (OIRA) is the most significant institution.<sup>205</sup> The President uses this office to screen agency rulemaking efforts: at least for the most important rules—before an agency publishes a Notice of Proposed Rulemaking, as required by the APA—the agency must first notify OIRA of the proposed rule.<sup>206</sup> OIRA may then approve the rule, reject it, or ask for changes.<sup>207</sup> This centralized review process had, as I suggest, largely matured by the early 1980s, with every President since continuing and refining it.

Congress, too, adapted to the new regulatory landscape, though as noted below ultimately in less effective and sometimes counterproductive ways. One congressional move was to graft additional procedures onto the APA. For example, Congress attempted to shed some light on administrative agencies by passing the Freedom of Information Act (FOIA) in 1966,<sup>208</sup> and the Government in the Sunshine Act (GSA) in 1976.<sup>209</sup> Another major congressional response was to increase the oversight capacity and tools of the legislature, by reorganizing committees and endowing them with additional resources.<sup>210</sup> During this same period, Congress likewise used the legislative

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<sup>203</sup> See, e.g., Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L. J. 2599, 2599 (2002) (arguing that extensive procedural requirements imposed on agencies during this period “were a product of the individual visions of judges” predominantly on the D.C. Circuit).

<sup>204</sup> See, e.g., Jim Tozzi, *OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding*, 63 ADMIN. L. REV. 37, 40-41 (2011) (noting that “the Johnson Administration developed the blueprint for centralized regulatory review”).

<sup>205</sup> See, e.g., Nicholas Bagley & Richard L. Revesz, 106 COLUM. L. REV. 1260, 1263 (2006) (observing that shortly after his inauguration, President Reagan “promulgated Executive Order 12,291 and asserted an unprecedented level of control over the administrative apparatus” (footnote omitted)).

<sup>206</sup> See, e.g., Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1767-70 (2013) (describing the OIRA review process as called for by the relevant executive orders).

<sup>207</sup> See, e.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 CHI. L. REV. 821, 846-49 (2003) (documenting the number of agency rules reviewed and the percentage of rules changed by OIRA between 1981 and 2000).

<sup>208</sup> 5 U.S.C. § 552 (2012).

<sup>209</sup> § 552b.

<sup>210</sup> See, e.g., JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 367-414 (1981) (describing how congressional leaders reorganized power structures and increased institutional resources during the 1970s).

veto more commonly,<sup>211</sup> a powerful tool of legislative control. In response to the shift to rulemaking and increase in its volume, Congress attempted to revise administrative procedures, in a fashion as with the courts, and also to enhance control over agencies, in a fashion as with the executive.

All three branches, therefore, adapted to the massive shift to an otherwise essentially unconstrained and unproceduralized form of agency activity. The courts attempted to re-proceduralize rulemaking, to make it into a form of activity more like the adjudications that they understood; the executive attempted to gain more control over agency discretion; and the Congress adopted something of a mix between the two approaches.

In the relevant sense, however, all of these external adaptations substantially failed. Part of the reason for the failure is that many of them were not, in fact, designed to be responsive to the problems opened by procedural erosion. Perhaps the most successful adaptation—successful, that is, on its *own* terms—was centralized review through OIRA. By most accounts, the executive exerts enormous influence over executive agencies through centralized review.<sup>212</sup> However, even as this form of control responded to the President's objectives, it did nothing to restore trust in administrative lawmaking. Indeed many observers believe that centralized review deepens problems of distrust. The public cannot easily determine what changes in rules OIRA required; it is likewise unclear why OIRA asks for changes in some contexts and not others; or who officers of the agency meet with and what is said in the meetings.<sup>213</sup> In this way, OIRA injected a shadowy and powerful force into the administrative state. Congressional efforts to enhance control over the administrative state might be similarly characterized—recall that legislative control itself is a root of distrust—though they generally were both less effective and less secretive.<sup>214</sup> For example, the institution lost perhaps its most potent tool of control, the legislative veto, due to an adverse Supreme Court ruling.<sup>215</sup>

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<sup>211</sup> *Id.* at 350 (noting that, “After 1973, the [legislative veto] was proposed almost routinely whenever the Congress found itself forced to delegate some new, broad authority to the executive branch”).

<sup>212</sup> See, e.g., Stuart Shapiro, *OIRA Inside and Out*, 63 ADMIN. L. REV. 135, 140 (2011) (summarizing the academic literature on OIRA as “giv[ing] the agency credit for a great deal of power”).

<sup>213</sup> See, e.g., RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT 2 (2011) (explaining that OIRA “operates as a free-ranging squad that pulls an astounding number of draft regulatory actions . . . into a dragnet that operates behind closed doors”).

<sup>214</sup> See William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 172, 183-97 (2009) (discussing “failed” congressional efforts to increase transparency in the rulemaking process).

<sup>215</sup> See *INS v. Chadha*, 462 U.S. 919, 959 (1983).

The other part of the reason that these external efforts failed is that agencies themselves learned and adapted to these novel external procedural impositions. These agency adaptations represent the second phase of procedural erosion, a phase that partially overlaps with the first and has been underway in earnest for roughly three decades, seemingly gathering force all along the way. The agency adaptations consist essentially of a variety of efforts to evade the burdens of procedural regularity. It is not easy to comprehensively catalogue the methods of evasion; a great multiplicity of approaches exists. It is less easy still to systematically quantify the extent of evasion, in no small way because many of the methods of evasion operate, in part, precisely by virtue of skirting publication requirements. Nevertheless, a sizable strand of literature on administrative law consists of studying the various ways in which agencies engage in this evasive behavior.<sup>216</sup>

For example, the APA's informal rulemaking provisions contain a "good cause" exemption,<sup>217</sup> allowing agencies to opt out of notice and comment in many circumstances. All of the evidence suggests that agencies have used this provision extensively. A prominent Government Accountability Office study, for example, found that agencies failed to provide for notice and comment in roughly thirty-five percent of "major" rules,<sup>218</sup> and forty-four percent of non-major rules issued between 2003 and 2010.<sup>219</sup> The solid majority of these procedural shortcuts were associated with the good cause exemption.<sup>220</sup> According to another recent study by Professor Raso, which uses different data, agencies exempted roughly half of all rules from notice and comment.<sup>221</sup> This same study indicates that courts do not police the good cause exemption evenly or assiduously.<sup>222</sup> Thus, even when agencies stay within the terms of the APA's informal rulemaking provisions, they have of late heavily weighted the exemptions. Judging by these studies, indeed, the exemption has nearly engulfed ordinary notice and comment rulemaking.

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<sup>216</sup> See, e.g., *supra* note 92. Another evasive pattern involves privatization of government activity. For an excellent account of this trend, and the problems it entails, see Michaels, *supra* note 122, at 571 ("Agency leaders are employing various privatization practices that have the effect of co-opting select public participants and defanging civil servants.").

<sup>217</sup> 5 U.S.C. § 553(b)(3)(B) (2012) (exempting the agency from notice and comment procedures "when the agency for good cause finds [and incorporates the finding and a brief statement of reasons therefor in the rules issued] that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

<sup>218</sup> "Major" is a statutorily defined term, referring to rules that, among other things, are likely to have an effect of \$100 million or more annually on the economy. 5 U.S.C. § 804(2)(A) (2012).

<sup>219</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 36 (2012).

<sup>220</sup> See *id.* at 15.

<sup>221</sup> See Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 69 (2015).

<sup>222</sup> See *id.* at 68.

In like vein, agencies have opted to regulate through “guidances” rather than through “legislative rules” in many cases.<sup>223</sup> Procedurally, these guidances, too, do not need to run through notice and comment under the APA.<sup>224</sup> Moreover, unlike rules subject to the good cause exemption, guidances also often cannot be directly challenged and reviewed in court due to the jurisdictional limitations of standing and finality.<sup>225</sup> The line between “legislative rules” and “interpretative rules,” or guidances generally, is not well defined, and has long confounded courts and scholars.<sup>226</sup> In principle, the distinction between the two sets of rules is that legislative rules create new legal obligations, whereas interpretive rules and guidances “merely” interpret and clarify existing obligations. Yet it is often not clear when a rule develops new obligations and when it instead clarifies an existing source of obligations. The attraction of guidances to the agency is obvious: they can control primary behavior often nearly as well as an ordinary legislative rule, yet they can be issued without notice and comment, and indeed, perhaps without direct subsequent judicial review. Many observers conclude that agencies have increasingly relied on guidance documents to regulate,<sup>227</sup> and

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<sup>223</sup> “Guidance” refers generally to non-legislative rules that agencies issue. The APA does not refer to “guidances,” but does include “interpretative rules” and “general statements of policy,” for which the term guidances represents a sort of generic stand-in. See 5 U.S.C. § 553(b)(3)(A) (2012).

<sup>224</sup> See *id.*

<sup>225</sup> See Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for De Novo Review*, 8 J. LEGAL ANALYSIS 47, 82-90 (2016) (explaining that courts are reluctant to intervene when agencies issue guidance because they view the guidance as an intermediate measure); see also James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 L. & CONTEMP. PROBS. 111, 127 (1994) (demonstrating how the EPA substituted guidance documents for informal rulemakings); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1748 (2007) (showing widespread evasion of rulemaking procedures in the context of the Department of the Treasury); Rakoff, *supra* note 192, at 165-66 (“[T]here is a trend toward setting regulatory policy in less formal ways.”).

<sup>226</sup> For an excellent account of these troubles, as well as a proposed solution to them, see generally Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705 (2007).

<sup>227</sup> Historically, there has been no general requirement to publish guidances, much less to do so in the Federal Register, or any other centralized outlet. And though, as of late, some important guidances must now be placed on agencies’ websites, there remains no requirement to publish them in a centralized outlet. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007) (revoked by Executive Order 13,497, Revocation of Certain Executive Orders Concerning Regulatory Planning and Review (Jan. 30, 2009)); Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 24, 2007). One consequence of the fact that agencies have generally not archived guidance documents in any reliable way is that it is challenging to track how this form of agency activity has changed over time.

moreover that they have done so in response to the procedural burdens associated with informal rulemaking.<sup>228</sup>

The rise of informal rulemaking, therefore, heralded the deproceduralization of administrative lawmaking in substantial measure. Courts and political overseers attempted to patch the procedures—to graft legitimating aspects of adjudication on to the skeletal form of the informal rulemaking. But in large part these efforts either failed or, where successful, drove agencies to adopt even less proceduralized forms of administrative action.

### B. *Tentative Empirical Assessment*

This sequence of developments may shed some light on the prevailing anxiety over our public institutions. We have no direct data on trust in the administrative state, but at least judging by scholarly attention, the administrative state is in something of a legitimacy crisis.<sup>229</sup> The question therefore presses—does administrative anxiety follow deproceduralization? It is not feasible to test this hypothesis in any rigorous way—even aside from data limitations, if only because we have but a single federal government to consider. Yet suggestively consider the following metrics and patterns.

To measure scholarly anxiety more systematically, I determine the number of scholarly articles that touch on the “legitimacy” of administrative agencies. I then normalize these figures by the number of articles touching on administrative law.<sup>230</sup> This analysis is itself of interest, and reveals a striking pattern of increase in concern over the legitimacy of the administrative state starting around 1970: between 1940 and 1960, the normalized count was about 0.1. By 1970, it had doubled to 0.2, and by 2010 it had tripled from its 1940s origin to roughly 0.3. One shorthand way to think about these figures is that approximately thirty percent of administrative law articles currently concern the legitimacy of the administrative state—up from about ten percent in 1940.

This measure of *scholarly* distrust closely mirrors a plausible indicator of *public* distrust based on *New York Times* stories. I calculate the number of *Times* stories about federal agencies that relate to unfairness, capture, or corruption. I then again normalize the counts, but now by the number of

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<sup>228</sup> See, e.g., Epstein, *supra* note 225, at 61 (observing that the “tough standards that the courts have imposed on notice and comment proceedings have induced administrative agencies to take . . . evasive steps,” prominently including a transition to guidance documents).

<sup>229</sup> See *supra* note 8 (referencing numerous works that have questioned whether the administrative state is constitutional).

<sup>230</sup> To recover the numerator, I search Google Scholar using the following string: administrative agency legitimacy. To recover the denominator, I search Google Scholar using the following string: administrative law. I limit the searches to specific years to produce a series of the intensity of scholarly interest in the legitimacy of the administrative state.



stories regarding administrative agencies.<sup>231</sup> I do this in bins of decades, from 1940 to 2010. This metric provides a plausible indicator of what informed citizens thought of the administrative state over time. The two series correlate strongly—indeed, the correlation between these two metrics is almost unity, 0.95, and is statistically significant at any conventional level.<sup>232</sup> This high correlation suggests that the metric of scholarly distrust captures an element of wider public distrust and disquiet, at least among informed people, rather than merely the idiosyncratic hand-wringing of obsessive academics.

Continuing then with this measure of scholarly distrust, what is even more notable is that it correlates highly with a plausible measure of deproceduralization. There, again, is no ready-made measure of the extent to which agency actions follow rigorous and transparent procedures. But following the narrative above, consider the number of pages in the Federal Register.<sup>233</sup> Agencies must publish rules in the Federal Register for them to have legal effect, meaning that almost all rules appear in that publication.<sup>234</sup> For this reason, scholars often use the number of pages as a proxy for the number of rules that agencies produce in a given period.<sup>235</sup> Also critical for present purposes, agencies need not, and generally do not, publish adjudicatory orders in the Federal Register. This means that the number of pages in the Federal Register in a year provides a rough approximation of rulemaking but not adjudicatory activity, a useful feature of the series given that informal rulemaking is associated with the deproceduralization of the administrative state. As shown in Figure 1, the correlation between the extent of informal rulemaking and distrust is positive and strong, at 0.94.<sup>236</sup>

Plainly, we cannot rule out the possibility that this relationship is spurious—some third force may be causing both series to move together. As noted above, for instance, distrust may accompany the growth of government, apart from or in addition to deproceduralization. Using observational data, it is likely impossible to sort out such questions credibly, and this remains a

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<sup>231</sup> To recover the numerator, I search the Proquest *New York Times* archive using the following string: federal and (commission or bureau or department or agency) and (corrupt! or capture! or unfair or illegitimate or “special interests”). To recover the denominator, I search the same for: federal and (commission or bureau or department or agency). I calculate this normalized count for each decade starting in 1940.

<sup>232</sup> The relevant p-value is 0.0003.

<sup>233</sup> The Federal Register maintains a database of historical statistics. See *Federal Register Statistics*, FEDERAL REGISTER, <https://www.federalregister.gov/reader-aids/understanding-the-federal-register/federal-register-statistics> [<https://perma.cc/RK3M-PB2T>].

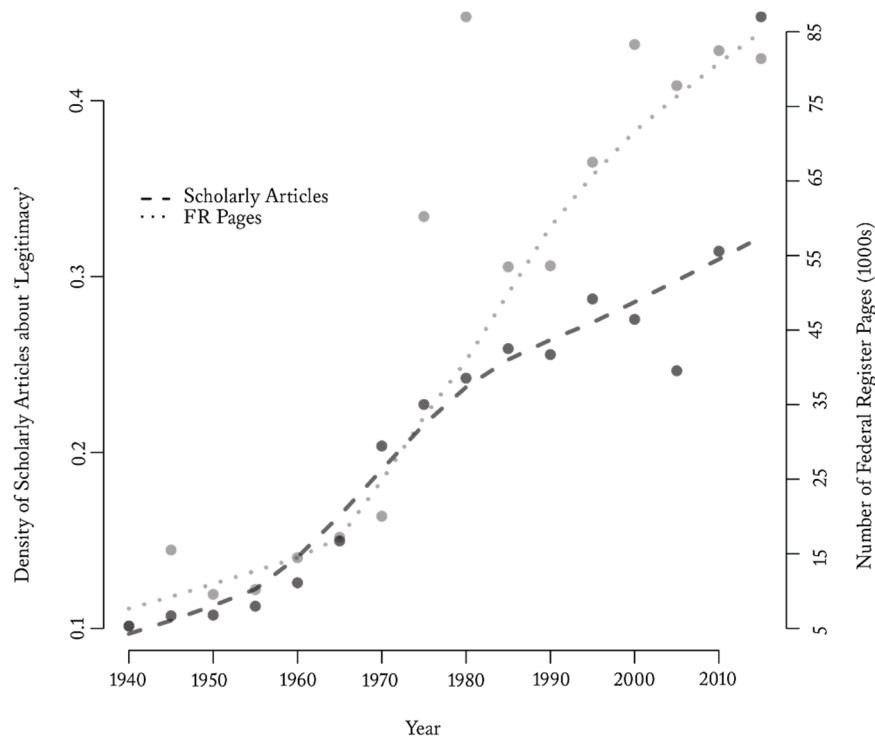
<sup>234</sup> A caveat to this statement concerns guidances, discussed above. See *supra* notes 222-27 and accompanying text.

<sup>235</sup> See, e.g., Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 166 (2009) (noting that a scholar used the count of Federal Register pages as “a proxy for regulatory activity”).

<sup>236</sup> This, too, is statistically significant at any conventional level ( $p = 0.0004$ ).

suggestive exercise.<sup>237</sup> Still, the pattern is striking: during the first three decades after the APA, the density of articles contending with the legitimacy of the administrative state hovered around 0.1. Precisely as agencies started to adopt informal rules in the 1960s, essentially unscripted by the APA, distrust in agencies accelerated, as reflected in scholarly works and in public accounts.

FIGURE 1. PROCEDURAL EROSION AND DISTRUST



<sup>237</sup> That said, it seems unlikely that distrust increased in response to an increase in adjudicatory policymaking. This follows from the fact that, even as rulemaking ascended, adjudicatory policymaking appears not to have increased in similarly dramatic fashion. Though statutory definitions change over time, making intertemporal comparisons difficult, consider that in 1958, the Securities and Exchange Commission, the Federal Trade Commission, the Federal Communications Commission, and the National Labor Relations Board collectively employed some seventy-four Administrative Law Judges (ALJs) to make initial or recommended decisions in adjudications. 1958 OFFICE OF ADMIN. PROC., ANN. REP. 110-11. By 1980, these same agencies employed 132 ALJs. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS: STATISTICAL REPORT FOR 1976-1978 21 (1980). By 2017, they apparently employed forty-one ALJs. *Administrative Law Judges*, OFF. OF PERS. MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> [<https://perma.cc/5DKZ-XDU8>]. By comparison, the number of pages in the Federal Register—a measure of informal rulemaking—increased six-fold between 1960 and 1980.

## V. LESSONS: PROCEDURAL REFORM AND VESTIGIAL DOCTRINES

This trust-based conception carries lessons for a number of enduring debates in administrative law. Here, I consider two areas of current debate. First, I consider regulatory reform, and in particular the reform of administrative procedures. Second, I consider the status of the non-delegation doctrine and of deference regimes.

### A. *Trust-Building Procedures*

The traditional battle in administrative procedures pits a concern over “efficiency” against a concern over “rule of law.”<sup>238</sup> More stringent procedures generally ensure a fairer, more transparent administrative process that promotes rule of law values, but they also often slow down administrative decisionmaking and make it more difficult to effectuate statutory objectives.

The trust-based theory of this Article suggests a different framing on this old debate. It locates a foundational rationale for administrative decisionmaking precisely in the credible fairness and transparency that administrative procedures afford. In this light, excessive laxity in procedures promises, not an increase in efficiency, but instead a collapse in the legitimacy and political value of administrative lawmaking. Robbed of its political value, the response to this collapse may be to reign in, unreasonably constrain, or otherwise diminish the ability of the administrative state to solve pressing public problems. One view of the Regulatory Accountability Act of 2017,<sup>239</sup> recently passed by the House, is that it is one such over-correction.

But if this account is correct, some sort of correction may be in order. Rather than undertake a comprehensive assessment of how procedural erosion might be arrested, here I simply want to suggest an orientation toward ensuring fairness and transparency in administrative procedures, with the goal of ends-means rationality in policymaking. The theory offers guidance on at least three issues of current debate.

#### 1. Procedural Formality and Transparency

Some reforms would, it seems, be relatively painless. For instance, it would cost little to standardize and publish agency guidances in a centralized outlet, such as the Federal Register or a companion volume. It would likewise

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<sup>238</sup> This is a recurrent theme in debates over procedural reform. For a discussion of the APA's passage and the debate that went into that legislation, see George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996) (arguing that the “the APA helped to resolve the conflict between bureaucratic efficiency and the rule of law”).

<sup>239</sup> H.R. 5, 115th Cong. (as passed by the House, Jan. 12, 2017).

cost little to require agencies to give notice of impending guidances, beyond what is currently required through presidential directive.<sup>240</sup> More costly, but also perhaps more beneficial, agencies might be encouraged to take greater advantage of declaratory orders, as Professor Bremmer has urged.<sup>241</sup> The APA envisions agencies issuing declaratory orders,<sup>242</sup> but agencies rarely do so, as they prefer the more informal practice of issuing guidances. Other procedural reforms worth considering include requiring agencies to run through ordinary notice and comment, at least for major rules. This would eliminate the most troubling aspects of notice-less rules and the over-use of the good cause exemption.

Following their assessment of the growing “mismatch” between the assumptions and realities of administrative law, Professors Farber and O’Connell likewise offer a series of possible executive or legislative reforms worth considering: for example, statutory provisions that mitigate OIRA influence<sup>243</sup> and greater OIRA transparency.<sup>244</sup> Such reforms seem to hold merit, as they generally recognize and grapple with the problems of non-technocratic control over agencies.

## 2. Cost–Benefit Analysis

Many have called for agencies to engage in greater cost–benefit analysis, wherein agencies estimate the costs (e.g., the compliance costs) and benefits (e.g., reductions in illness from pollution) of a proposed regulation before issuing it.<sup>245</sup> With good estimates of these quantities, an agency can determine whether a regulation will enhance social welfare, the dominant justification for engaging in this form of analysis. The current debate over cost–benefit analysis largely concerns, first, whether agencies can

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<sup>240</sup> See *supra* note 227 (requiring agencies to list guidances on their respective websites).

<sup>241</sup> For an excellent account of declaratory orders, and a call for their greater use, see Emily S. Bremer, *The Agency Declaratory Judgment*, 78 OHIO ST. L.J. (forthcoming 2018) (advocating for increased use of declaratory orders).

<sup>242</sup> 5 U.S.C. § 554(e) (2012) (“The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”).

<sup>243</sup> Farber & O’Connell, *supra* note 195, at 1181–83.

<sup>244</sup> *Id.* at 1184 (advocating for formalization of the OIRA process to quicken turnaround and manage expectations).

<sup>245</sup> E.g., MATTHEW D. ADLER & ERIC POSNER, *NEW FOUNDATIONS OF COST BENEFIT ANALYSIS* 5–6 (2006) (arguing in favor of cost–benefit analysis when it measures the overall wellbeing of the public rather than focusing on the Pareto principle); CASS R. SUNSTEIN, *THE COST BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* 137 (2002) (arguing cost–benefit analysis helps agencies understand consequences, identify tools, and save both lives and money).

competently estimate the quantities of interest,<sup>246</sup> and, second, what role courts should play in reviewing cost–benefit analysis.<sup>247</sup>

The trust-based theory of this Article posits another rationale for engaging in cost–benefit analysis.<sup>248</sup> In forcing agencies to make their assumptions explicit, it compels a form of transparency that may be important to building trust in administrative decisionmaking. If done competently, cost–benefit analysis similarly acts as a constraint on administrative decisionmaking—one of course entirely absent from the legislative arena—that prevents agencies from abusing their lawmaking authorities. With this analysis, it would be more challenging, for instance, to issue a rule that granted favors to special interests at the greater expense of society broadly.

Of course, this presumes that cost–benefit analysis is done competently. There may well be policy domains where agencies cannot competently estimate the costs or, more likely, benefits of a proposed regulation. Human dignity, classically, may be something that we value greatly, but we cannot easily quantify, leading cost–benefit analysis astray.<sup>249</sup> Likewise, some policy questions may be so complex or large-scale that it is impossible to competently forecast the costs or benefits of a proposed regulation.<sup>250</sup> But if it can be done well, cost–benefit analysis would seem to have many benefits for developing public trust in administrative lawmaking, a proposition I find empirical support for in an initial experiment.<sup>251</sup>

The theory, likewise, suggests that courts play an important role in making cost–benefit analysis credible. After *Business Roundtable v. SEC*,<sup>252</sup> wherein the court faulted the SEC for not adequately quantifying costs associated with its proxy access rule and vacated it on that basis under arbitrariness review, a debate arose over how courts should interface with agencies’ cost–benefit analyses. Some took the view that, at least for financial regulation, courts should tread lightly when reviewing cost–benefit

<sup>246</sup> *E.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS 8 (2004) (arguing that cost–benefit analysis often leads to incorrect assessments because “human life, health, and nature cannot be described meaningfully in monetary terms; they are priceless”).

<sup>247</sup> See *infra* note 253 and text accompanying note 252.

<sup>248</sup> I examine this view empirically elsewhere. See Stiglitz, *supra* note 132.

<sup>249</sup> See generally ACKERMAN & HEINZERLING, *supra* note 246.

<sup>250</sup> *E.g.*, A.R. Prest & R. Turvey, *Cost–Benefit Analysis: A Survey*, 75 *ECON. J.* 683, 685 (1965) (noting that cost–benefit analyses “are least relevant and serviceable for what one might call large-size investment decisions,” which plausibly “alter the constellation of relative outputs and prices over the whole economy,” and that in such cases “nothing less than some sort of general equilibrium approach would suffice”); see also Susan Rose-Ackerman, *Putting Cost–Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 *U. MIAMI L. REV.* 335 (2011).

<sup>251</sup> Stiglitz, *supra* note 132.

<sup>252</sup> 647 F.3d 1144, 1149 (D.C. Cir. 2011).

analyses.<sup>253</sup> Others were more open to the idea of courts questioning how or whether an agency engaged in cost–benefit analysis.<sup>254</sup> Without endorsing the aggressive calls for quantification in *Business Roundtable*, this analysis points to the benefits of having courts question cost–benefit analyses, and of compelling agencies to explain their analyses.<sup>255</sup> Here, as in many areas, agency freedom—in the form of trust and delegated authority—may arrive paradoxically through constraint.

### 3. Arbitrariness Review

This last point feeds into a broader question of how courts should review agency actions for arbitrariness, that is, the APA’s command that courts set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>256</sup> Judges and the wider academic community debated what this provision meant for much of the 1970s, largely in response to the rise of informal rulemaking and the meager structure that the APA gives to that form of policymaking.<sup>257</sup> The essential contours of the debate involved Judge Bazelon arguing for greater procedural rigor, under the view that generalist judges have a poor read of the complex substance of agency regulations, but that procedural integrity forces a degree of rationality and reliability, exposes flaws in agency reasoning, and can be competently

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<sup>253</sup> See generally John C. Coates IV, *Cost–Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 887 (2015) (examining cost–benefit analysis through a series of case studies and concluding, in part, that the results “call into question simplistic efforts to mandate CBA—particularly quantified CBA, and particularly when enforced through judicial review by generalist courts . . .”). See also ADRIAN VERMEULE, *LAW’S ABNEGATION* 170–83 (2016) (adopting a more globally negative view of judicial review of agencies’ cost–benefit analyses).

<sup>254</sup> See, e.g., Cass R. Sunstein, *Cost–Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 7 (2017) (“[W]here a reasonable objection is made to a regulation, suggesting that it would do more harm than good, courts legitimately demand some kind of justification. In some cases, that justification requires numbers.”); Richard L. Revesz, *Cost–Benefit Analysis and the Structure of the Administrative State*, 34 YALE J. REG. 545, 594–98 (2017) (defending judicial review of agency cost–benefit analysis under the arbitrary and capricious standard); see also Stiglitz, *supra* note 132 (reviewing the literature and studying the relationship between trust, judicial review, and cost–benefit analysis).

<sup>255</sup> I find support for this view in an initial experiment. See Stiglitz, *supra* note 132.

<sup>256</sup> 5 U.S.C. § 706(2)(A)(2012). Although we now connect arbitrariness review with this APA provision, early cases often did so less clearly. For instance, many of the early “hard look” review cases in the D.C. Circuit did not even cite that statutory provision. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (1970); *Pikes Peak Broad. Co. v. FCC*, 422 F.2d 671 (1969); *WAIT Radio v. FCC*, 418 F.2d 1153 (1969).

<sup>257</sup> See Ronald J. Krotoszynski, Jr., “History Belongs to the Winners”: *The Bazelon–Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 999–1006 (2006) (supplying an excellent review of the debate, and pointing to its current importance).

enforced by courts.<sup>258</sup> Judge Leventhal, by contrast, called on judges to grapple with the substance of the agency decision, a task that “requires enough steeping in technical matters to determine whether the agency has exercised a reasoned discretion.”<sup>259</sup> Though by common understanding *Vermont Yankee* laid to rest the more aggressive forms of Judge Bazelon’s procedure-encouraging review,<sup>260</sup> the questions of what substantive review means, and of what substantive review might indirectly imply for agency procedure, remain contested.<sup>261</sup> On this point, the theory of this Article suggests that substantive review, as well as interpretation of the native APA procedures,<sup>262</sup> ought to be used to excite agencies to adopt processes that promote transparency, deliberation, and reasoned agency decisionmaking, even if at the cost of speed and efficiency.<sup>263</sup>

### B. Vestigial Doctrines and the Democratic Price

The non-delegation doctrine and the idea of de novo review of questions of law appear at first to be vestigial doctrines: intellectual attachments formed for a much earlier time, enduring for idiosyncratic reasons, yet wholly unsuited to the present and perhaps even dangerous under current

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<sup>258</sup> For a nice example of this position, see *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650-53 (Bazelon, J., concurring) (arguing for more process, and against judicial review of substance, noting that, “Socrates said that wisdom is the recognition of how much one does not know. I may be wise if that is wisdom, because I recognize that I do not know enough about dynamometer extrapolations, deterioration factor adjustments, and the like to decide whether or not the government’s approach to these matters was statistically valid.”). See also Krotoszynski, *supra* note 257, at 999-1002 (discussing Judge Bazelon’s “Judicial Incompetence” argument).

<sup>259</sup> *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973) (internal quotation marks omitted); see also Krotoszynski, *supra* note 257, at 1002-04.

<sup>260</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 520, 524 (1978) (holding that “reviewing courts are generally not free to impose” procedural rights on agencies).

<sup>261</sup> For a seminal piece in this line, see generally Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418 (1981) (discussing the questions left unanswered by *Vermont Yankee* regarding the proper scope of judicial review of rulemaking and calling for a second decision clarifying these issues). For a more recent evolution of this debate, see generally Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856 (2007) (examining previous calls for *Vermont Yankee II* and explaining why certain regulations of rulemakings and applications of requirements violate the holding of *Vermont Yankee*), and Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902 (2007) (responding to claims that versions of *Vermont Yankee II* do not “follow logically” from *Vermont Yankee* and to “arguments that the court should issue opinions in *Vermont Yankee III, IV, and V*”).

<sup>262</sup> See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249-53 (2d Cir. 1977) (elaborating procedural requirements on the basis of the APA’s sparse informal rulemaking provisions).

<sup>263</sup> One might achieve much the same result, too, by denying deference to agency actions involving statutory interpretation that fall short in these respects. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (denying Chevron deference to agency “procedurally defective” action that failed to provide “reasoned explanation” for policy change).

conditions. That may be the case, but we should also credit the idea that these doctrinal positions reflect a commitment to democratic ideals. The non-delegation doctrine is commonly viewed as a way to encourage Congress to make decisions itself.<sup>264</sup> Part of the impetus for pursuing de novo review may similarly be to encourage Congress to resolve ambiguities in chamber.<sup>265</sup>

One overarching lesson to draw from the theory of this Article is that particularistic legislative lawmaking is highly problematic due to information problems, and therefore that “democracy-forcing” doctrines may be misdirected. The choice to delegate, indeed, is itself a democratic choice,<sup>266</sup> one that does well by the public under appropriate procedural constraints on agencies. This observation has plain implications for the idea that we should have a more robust non-delegation doctrine. That idea works in precisely the wrong direction by channeling decisionmaking into a body that is poorly suited to resolving particularistic policy questions in the public interest. Moreover, for this reason, interring the non-delegation doctrine carries little in the way of a democratic price. If anything, the burial comes with a democratic dividend, as it removes a cloud from delegated authority, and thereby allows Congress to pursue public objectives by delegating to procedurally constrained agencies.

The argument for de novo review is closer. The theory of this Article places a premium on the rationality of decisionmaking, that is, on the connection between statutory objectives and chosen means, with less direct implications for how to interpret the scope of delegated authority.

Still, several considerations press us toward deference and away from de novo review. First, though the theory of this Article elevates judicial review, it does not suppose that courts can resolve true ambiguities in statutes more ably than agencies. It seems likely, indeed, that forcing generalist judges to find a statutory answer where one does not exist<sup>267</sup> will harm the sought-after

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<sup>264</sup> See *supra* Part I.

<sup>265</sup> *Id.*

<sup>266</sup> On constitutional grounds, this again resembles Justice Stevens' view in *Whitman v. American Trucking Associations, Inc.* 531 U.S. 457, 487-88 (2001) (Stevens, J., concurring). See *supra* note 4 and accompanying text.

<sup>267</sup> Notice that this position casts into relief the critical question of when an ambiguity exists. To answer this question, one must adopt a theory of statutory interpretation. The debate between textualists and purposivists fills countless volumes. For prominent examples of purposivist scholarship, see William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 623-25 (1990) (critiquing the “new textualism” advocated by Justice Scalia), and ROBERT A. KATZMANN, *JUDGING STATUTES* 9 (2014) (arguing for purposivism based on the realities of congressional drafting practices, and also providing an excellent overview of the long-running debate between textualists and purposivists). For prominent textualist works, see generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) (explaining principles of constitutional, statutory, and contractual interpretation), and John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006) (arguing that textualism “remains



goals of rationality and fairness.<sup>268</sup> A second challenge with de novo review is that the Judiciary is a “they, not an it,”<sup>269</sup> meaning that judges will interpret ambiguous statutory terms in varied and often unpredictable ways, inevitably blundering along the way. This adds noise to the system and undermines legislative objectives. Of course, under *Chevron* the agency must still adopt a permissible interpretation of the statute, but among permissible interpretations submitting to the agency’s view rather than to the multitudinous views of judges offers many advantages, most obviously a unitary interpretation that is informed by agency experience.<sup>270</sup> Finally, to the extent one favors dethroning *Chevron* for democracy-forcing reasons, the same considerations relevant to the non-delegation doctrine apply.

### CONCLUSION

Legislative lawmaking, this Article suggests, is compromised by favor-giving and the influence of special interest lucre, leading the public to distrust the institution. This Article has articulated a novel theory of how the administrative state, if suitably constrained, can generate superior public trust

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distinctive because it [still] gives priority to semantic text” despite its use of contextual evidence). See also John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) (examining the extent to which textualists may value legislative intent). This Article plainly weighs on the side of purposivism, for the simple reason that if we seek ends–means rationality, it makes good sense to consider the ends explicitly. It is heartening, therefore, that the Court seems to be inching in this direction. In *King v. Burwell*, for instance, the Court refused to apply *Chevron* deference, instead consulting the “context” of the statute in question, the Affordable Care Act (ACA), and construing specific terms “with a view to their place in the overall statutory scheme.” 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted). In dissent, Justice Scalia criticized this approach as focusing on the “design and purposes” of the ACA rather than a narrower reading of the text of the relevant terms. *Id.* at 2502 (Scalia, J., dissenting). But from the perspective of fairness and ends–means rationality, there is little doubt that the majority’s approach far more respected the relevant ends, as the dissenting interpretation would have seriously undermined the policy scheme erected by the statute. Indeed, leading up to the Supreme Court’s consideration of the case, many wrote warnings of the dire negative policy consequences that would flow from the position that Justice Scalia eventually adopted. See, e.g., Jonathan Cohn, *Here’s What the Supreme Court Could Do to Insurance Premiums in Your State*, NEW REPUBLIC (Nov. 11, 2014), <https://newrepublic.com/article/120233/king-v-burwell-how-supreme-court-could-wreck-obamacare-states> [<http://perma.cc/3MHP-7VGL>].

<sup>268</sup> Here, I seem to depart from Professors Farber and O’Connell, who suggest they might be open to downgrading *Chevron* deference in favor of *Skidmore* deference. See Farber & O’Connell, *supra* note 195, at 1186.

<sup>269</sup> Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 550 (2005).

<sup>270</sup> The importance of this point is diminished but not eliminated by the fact that the D.C. Circuit hears many of the challenges to agency rules, and that the Circuit has a strong norm of following the Circuit precedents, even absent en banc hearings. The D.C. Circuit is preeminent in administrative law largely due to congressional designation. E.g., Gillian E. Metzger, *The Story of Vermont Yankee*, in ADMINISTRATIVE LAW STORIES 143–44 (Peter Strauss ed., 2005).

in its decisionmaking, an attribute that leads Members of Congress to delegate authority to administrative agencies.

Once we abandon the myth that legislative lawmaking necessarily possesses democratic legitimacy, in the sense that it serves a plausible notion of the public interest, it refocuses and clarifies our normative and doctrinal debates. Those debates have been hung up on the fact that administrative lawmaking invests unelected officials with discretion, thereby giving life to the ill-advised (and unenforceable) non-delegation doctrine,<sup>271</sup> and drawing scholars into abortive efforts to find “democracy” somewhere in administrative agencies. But the elevation of the legislature is misplaced, as that institution often disserves the public interest; neither is a robust non-delegation doctrine likely to effectuate democratic values, nor should scholars attempt to find democracy in administrative lawmaking. The objectives of administrative law should, instead, be to design meaningful constraints that effectuate statutory designs and promote rationality and transparency in public policymaking. In so doing, administrative lawmaking is likely to better serve the public’s interest and, paradoxically, live out democratic values than the legislature itself.

#### ANALYTICAL APPENDIX

##### A. Legislation

###### 1. Preliminaries

This Appendix articulates a formal theoretical model that motivates much of the analysis in the body of this Article. The objective of the model is to capture the relevant legislative dynamics in the simplest possible form. To begin with, suppose that the legislature cannot delegate authority to an agency. For example, suppose we had a strong (and enforceable) non-delegation doctrine that effectively forced the legislature to make policy decisions itself.

The policy choice in question is between two alternatives,  $p \in \{0,1\}$ . For example, between high and low railroad rates, or a bailout and no bailout, or strong and weak restrictions on proprietary trading. The legislature may either be faithful to the voter or not. For the purposes of this exercise, I remain deliberately agnostic about the way in which the legislature may not be faithful. For example, the legislature may be corrupt or captured, or it may be ideologically impure. Let  $\tau = f$  denote a legislator who is faithful to the

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<sup>271</sup> See also Stiglitz, *supra* note 49, at 2-3.

voter, and  $\tau = c$  denote a legislator who is not aligned with the voter on the relevant dimension. The probability that the legislator is aligned is  $\pi$ .

Let the voter's payoffs over policies depend only on the state of the world,  $\omega \in \{0, 1\}$ , such that,

$$u_v = \begin{cases} 1 & \text{if } p = \omega \\ 0 & \text{o/w} \end{cases}$$

The voter, therefore, wants to see the policy set equal to the state of the world. For example, suppose that a high railroad rate is required in some public sense in state  $\omega = 1$  but not  $\omega = 0$ ; the voter then wants  $p = 1$  if  $\omega = 1$ , and  $p = 0$  if  $\omega = 0$ . The legislator observes  $\omega$  but the voter does not. Let  $p(\omega = 1) = \gamma$ .

Legislators differ in the payoffs they assign to policies. If the legislator is faithful ( $\tau = f$ ), he shares the voter's payoffs, as above. However, if the legislator is not aligned ( $\tau = c$ ), his payoffs instead run as follows,

$$u_c = \begin{cases} 1 & \text{if } p = 1 \\ 0 & \text{o/w} \end{cases}$$

This means that the non-aligned legislator does best when  $p = 1$  regardless of the state of the world,  $\omega$ . For example, even if the railroad survives without the increase, or the rate increase is otherwise unnecessary for systemic reasons, the legislator still prefers to increase the rate.

A legislator potentially gains both from policy and reelection. Let  $\rho > 1$  denote the value that the legislator attaches to continuing in office. This might reflect the value placed on ego rents, the perks of office, or the like, and reflects the present discounted stream of benefits that the legislator would receive from winning reelection.

The trouble for the voter is that, though she sees whether the legislature sets  $p = 1$  or  $p = 0$ , she does not observe either  $\tau$  or  $\omega$ . That is, in the language of the Article, she does not know if the legislator is faithful ( $\tau = f$ ) and, because she does not observe  $\omega$ , she does not know if the chosen policy is in her best interest. If the voter knew that the legislator was faithful, she would not care about not being able to observe  $\omega$ , as she would trust that the faithful legislator resolved matters in her interest. And, so long as the legislator sufficiently values his seat,<sup>272</sup> if she observed  $\omega$  she would not care about not being able to observe  $\tau$ , as she would be able to punish the legislator for going against her interests and deter him from engaging in that deviant behavior. But she observes neither  $\omega$  or  $\tau$ , which poses a considerable problem for the voter.

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<sup>272</sup> This is satisfied by assuming that  $\rho > 1$ .

I assume that reelection is a function of the voter's beliefs about the probability that the legislator is faithful. In particular, let  $\mu(p)$  denote the voter's beliefs about the legislator's faithfulness after observing  $p$ . The probability that the legislator is reelected is  $F(\mu(p))$ , where  $F$  is strictly increasing in  $\mu(p)$ , and  $F(0) = 0$  and  $F(1) = 1$ . This approach to modeling the political environment and reelection essentially follows earlier modeling efforts by Professors Fox and Jordan.<sup>273</sup>

To summarize and clarify, then, the sequence of the interaction is as follows: (1) nature determines the state of the world,  $\omega \in \{0, 1\}$ , and whether the legislator is faithful,  $\tau \in \{f, c\}$ . The legislator observes both values, but the voter observes neither: (2) the legislature sets  $p \in \{0, 1\}$ ; and (3) the voter updates beliefs about the likelihood that the legislator is faithful, and reelects him on the basis of those beliefs. All actors receive payoffs. I seek to characterize salient perfect Bayesian equilibria.<sup>274</sup>

## 2. Equilibria

A number of salient equilibria exist in this setting. A first equilibrium to consider involves the legislators playing their types. In particular, the f-type legislator sets  $p = \omega$ , and the c-type legislator sets  $p = 1$ . Under these strategies, if the voter observes  $p = 1$ , she is unsure if the legislator is of type f or c. Bayes's rule implies that her belief that he is of type f is

$$\mu(1) = \frac{\gamma\pi}{1 - \pi(1 - \gamma)}$$

By comparison, if the voter observes  $p = 0$ , she knows with certainty that the legislator is of type f, i.e.,  $\mu(0) = 1$ , generating relatively favorable reelection prospects for that legislator. This fosters an electoral incentive for the legislators of both types to deviate by setting  $p = 0$ . For example, the f-type legislator may observe  $\omega = 1$ , yet set  $p = 0$  for electoral reasons. Likewise, the c-type legislator may set  $p = 0$  in some state of the world. Comparing the equilibrium payoffs to the deviation payoffs indicates that the equilibrium is sustained against this reelection interest when

$$\rho \leq \frac{1}{1 - F(\mu(1))}$$

Another equilibrium involves the legislator following prior beliefs of the voter about the best policy. Under the assumption that

$$\gamma < \frac{1}{2}$$

<sup>273</sup> See generally Justin Fox & Stuart V. Jordan, *Delegation and Accountability*, 73 J. POL. 831 (2011).

<sup>274</sup> For this intuition-building exercise, I limit attention to pure strategies.

the voter believes that  $p = 0$  is generally the most appropriate policy.<sup>275</sup>

The strategies in this equilibrium simply involve both types of legislators setting  $p = 0$ , following the voter's uninformed belief about the best policy. Because both types select  $p = 0$  regardless of the state of the world, the voter cannot update beliefs about the type of the legislator if she observes  $p = 0$ , meaning that  $\mu(0) = \pi$ . If she observes  $p = 1$ , she needs some off-the-path beliefs, and under a standard refinement,<sup>276</sup> she assumes that the type of the legislator is c, as statistically he is most likely to benefit from the deviation. This implies that this equilibrium survives when  $\rho \geq \frac{1}{F(\pi)}$ .

### 3. Commentary

The analysis above makes it plain that the faithful legislator is electorally harmed by the presence of the captured legislator. Most notably, in the equilibrium in which the legislators play to type—i.e., the faithful legislator sets  $p = \omega$  and the captured legislature always sets  $p = 1$ —the voter cannot be sure if the legislator is faithful or captured if the observed policy is  $p = 1$ . Upon seeing  $p = 1$ , in fact, the voter downgrades her assessment of the legislator's faithfulness relative to prior beliefs:

$$\pi > \frac{\gamma\pi}{1 - \pi(1 - \gamma)}$$

This translates directly into a reduced chance of reelection for the faithful legislator.

Much the same can be said of the pooling equilibrium. There, the fact that the voter confuses the faithful legislator with the captured legislature induces the faithful legislator to select the policy that the voter *a priori* believes to be most appropriate—i.e.,  $p = 0$ , even when the legislator knows that he and the voter would be best off with  $p = 1$ . This equilibrium is not particularly attractive on policy terms. Further, as above, the incumbent faithful legislator faces lower reelection chances as a result of the captured legislator. That is, the voter cannot update beliefs about the legislator as a result of the pooling

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<sup>275</sup> It can be shown that the other candidate pooling equilibrium—with  $\gamma > \frac{1}{2}$  and both types of legislators therefore selecting  $p = 1$ —does not exist, at least under reasonable off-the-path beliefs. Such beliefs would entail that a deviation to  $p = 0$  leads the voter to believe the legislator is of type f. See by analogy the reasoning of *supra* note 272. This would mean that any time  $\omega = 0$ , the f-type legislator would face unambiguous incentives to deviate to  $p = 0$ .

<sup>276</sup> Under the refinement, the voter, upon observing a deviation to  $p = 1$ , believes that the legislator is type c based on the fact that statistically the c-type legislator is more likely to benefit from that policy. This resembles the Criterion D1 refinement. See In-Koo Cho & David M. Kreps, *Signaling Games and Stable Equilibria*, 102 Q. J. ECON. 179 (1987) (addressing the effect of restrictions on out-of-equilibrium beliefs). For a similar approach to beliefs in a similar context, see Justin Fox & Stuart V. Jordan, *supra* note 273, at 831 (exploring a “model of electoral agency in which legislators can either determine policy directly or delegate policymaking authority to an expert bureaucrat”).

strategies, meaning that the probability of reelection is  $F(\pi)$ , some quantity less than one.

## B. *Delegation and Administrative Procedures*

### 1. Preliminaries

Now suppose that, instead of setting the policy choice, the legislature may delegate the policymaking to an administrative agency. The agency, as the legislature, observes  $\omega$ , and the motivation for delegation does not come from the superior expertise of the agency. The agency is, instead, distinguished by the fact that it operates under a set of constraints, in particular administrative procedures and judicial review.

If the legislature delegates, the statute takes the form of state-contingent instructions to the agency: for example, “if  $\omega = x$ , set  $p = y$ ,” where  $x, y \in \{0, 1\}$ . Let  $s = p_0 p_1$  denote the statute, where  $p_x$  is the instructed policy when  $\omega = x$ . For instance,  $s = 01$  is equivalent to, “set  $p = \omega$ ,” and might be thought of as saying, “set policy in the public interest.”

Administrative procedures represent a complex body of rules that undoubtedly serve multiple interests in our political system. To date, most positive scholars have focused on how procedures allow the legislature to “control” administrative agencies, that is, to attenuate the familiar problem of agency costs.<sup>277</sup> I wish to consider an alternative analytical root for administrative procedures, and so I eliminate agency costs (as between the legislature and administrative agency) by assuming that the administrative agency is of the same type as the legislature. As above, let  $\tau \in \{f, c\}$  denote agency types, with payoffs also following from above.

As an alternative positive rationale for procedures, let us take seriously the notion that they exist to promote fairness, transparency, and legitimacy. For maximal simplicity, suppose the legislature faces a choice between imposing procedures and judicial review on the agency or not. If the legislature imposes procedures, the agency reveals its read of the world,  $\omega$ , to the public, and is subjected to judicial review;<sup>278</sup> if the legislature does not impose procedures, it is not required to do so. We might imagine richer procedural choices involving other tradeoffs. For example, stricter procedures and review might probabilistically force the agency to reveal its read of the world, and might further implicate some tradeoff in agency effectiveness—that is, stricter procedure and review might implicate some probability that

<sup>277</sup> See McNollGast, *Administrative Procedures*, *supra* note 34, at 244 (discussing the principal-agent problem, and arguing that administrative procedures diminish agency costs).

<sup>278</sup> For a doctrinal analog, see, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 385 (D.C. Cir. 1973) (holding that a federal agency must disclose the data on which it relies in promulgating a rule).

the agency fails to issue a policy altogether. Such considerations would clearly influence the nature of procedures that the legislature imposes on the agency, but the way in which they would influence this choice would depend heavily on assumptions about the correspondences between procedural rigor and the outcomes of interest—fairness and transparency, on one hand, and on the other administrative effectiveness. Given such tradeoffs, it is unlikely that the legislature would opt for complete procedural fairness or transparency, but beyond earning this modest observation the payoff of modeling more complex procedures is unclear, particularly as we do not have any empirical guidance on the relevant correspondences.

Much as in McNollGast, administrative procedures have consequences because the courts enforce them. Here, courts set aside agency actions that violate administrative procedures, such that if the agency fails to reveal the state, or if  $s = 0$ , and the agency sets  $p = 1$  despite  $\omega = 0$ , the court sets aside the agency action. This form of judicial review approximates that notion under the APA wherein courts set aside agency actions, for example, that fail to divulge the evidence that the agency relies on,<sup>279</sup> or more generally exhibit inadequate connection between evidence and reasoning and stated agency or statutory objectives.<sup>280</sup> If the court sets aside the agency action, all players receive a payoff of zero. To be clear, the judicial system is not a strategic actor in this model.

So amended, the sequence of the interaction is as follows: (1) nature determines the state of the world,  $\omega \in \{0, 1\}$ , and whether the legislator and the agency are faithful,  $\tau \in \{f, c\}$  (the legislator observes both values, but the voter observes neither); (2) the legislature decides whether to write a delegating statute,  $s$ , or set policy directly through legislation,  $p$ , and if the former whether to impose procedures on the agency; (3) if the legislature delegates to the agency with procedures and review, the agency sets policy, and the court reviews it for consistency with procedural requirements and the statute; if the legislature delegates without procedures and review, the agency sets the policy; and (4) the voters observe the choices of whether to delegate and to do so with procedures and review, update beliefs about the likelihood that the legislator is faithful, and reelect him on the basis of those beliefs. All actors receive payoffs. As above, I seek to characterize salient perfect Bayesian equilibria.

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<sup>279</sup> *Id.*

<sup>280</sup> *See, e.g.,* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30 (1983) (holding that an agency must explain the evidence underlying its rule in relation to relevant alternatives).

## 2. Equilibria

The possibility of delegation with administrative procedures dramatically alters legislative behavior. This follows from the fact that it is almost always in equilibrium for the faithful legislator to delegate with the statute  $s=0$ , and to impose procedures on the administrative agency.<sup>281</sup> These strategies always result in  $p = \omega$ , as the policy preferred by the legislator, and further maximizes his reelection prospects. That  $p = \omega$  comes from the fact that, under the assumption of an aligned agency, the agency is also faithful, and therefore faces no incentive to set  $p \neq \omega$  if delegated authority from the legislature. On the question of reelection, if the captured legislator's strategies call for him to either not delegate, or to delegate without procedures, this produces a separating equilibrium—if the equilibrium exists—and therefore results in reelection of the faithful legislator with probability one. If on the other hand the captured legislator delegates with procedures, pooling with the faithful legislator, one of two scenarios unfolds, depending on agency behavior. If the agency's strategy involves setting  $p \neq \omega$  then voters observe the mismatch by virtue of procedures and judicial review, allowing voters to update beliefs about the legislator, effectively producing a separating equilibrium. If the agency's strategy is to set  $p = \omega$ , the voter cannot update beliefs, but under any reasonable refinement, a deviation from the delegation with procedures strategy compels the voter to regard the deviating legislator as captured, implying that the faithful legislator cannot increase his reelection odds by so deviating.<sup>282</sup> These considerations indicate that, under reasonable off-the-path beliefs, it is always in equilibrium for the faithful legislator to delegate with procedures in place.

If the faithful legislator adopts this strategy, the captured legislator must often consider a policy, reelection tradeoff. Note that if  $\omega = 1$ , the legislator faces no tradeoff, as delegating with procedures maximizes both quantities; so let  $\omega = 0$ . In this case, directly legislating allows the legislator to set  $p = 1$ , producing a policy payoff of 1, but at the cost of any hope of reelection. By comparison, deviating to  $s=0$  with procedures, and assuming that the agency follows the statute,<sup>283</sup> produces a payoff of  $F(\pi)\rho$  (that is, no policy payoff, plus pooling reelection odds). Thus, as long as

$$\rho > \frac{1}{F(\pi)}$$

direct legislation is not in equilibrium for the captured legislator. The same is true of delegating without procedures and judicial review: the agency now

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281 Under reasonable off-the-path beliefs, it is always in equilibrium, as discussed below.

282 Again, the refinement above, *supra* note 272, would imply this of the voters' beliefs.

283 This agency behavior is in equilibrium, as deviating produces no policy benefit for the agency following judicial review.



sets the policy, but the voter infers the same information from the lack of procedures as she does from direct legislation.

We can go further to state that, under reasonable off-the-path beliefs, it is never in equilibrium for the faithful legislator to directly legislate. To see this, suppose that the faithful legislator's strategies call on him to directly legislate. If the strategies of the captured legislator call on her to delegate, then it is in the captured legislator's interest to deviate to direct legislation any time the state of the world is against her interest, as doing so increases both electoral odds and policy payoffs. If instead the captured legislature directly legislates, the faithful legislator faces an incentive to deviate and delegate with procedures; under reasonable off-the-path beliefs, the voter updates to believe that the legislator is faithful, and this also maximizes his policy payoffs.

### 3. Commentary

It is clear from this analysis that the faithful legislator is almost always better off with a system of delegation and fair, transparent procedures than with direct legislation. This device of delegation with safeguards greatly reduces the electoral risks inherent in direct legislation, wherein the voter often cannot tell whether the legislator is faithful or not. Indeed, unlike direct legislation, the worst that the faithful legislator can do with respect to reelection is face odds based on the voters' prior beliefs.

#### *C. Thoughts on Transitions*

A natural question is why we might move from a world of direct legislation to one largely of delegation. That is, if delegation is superior for all of the electoral reasons highlighted in Section B of this Appendix, why did we have some approximation of direct legislation for much of our history, as modeled in Section A? The simple models above suggest answers to this question.

Policy complexity is a first pre-condition for distrust to exist in serious measure. That is, when voters see one policy rather than another, they must face considerable uncertainty about whether it is in their best interest. Although this kind of uncertainty almost surely existed throughout our country's history in some way, it also undoubtedly has increased as the economy has grown more complex and the government's relationship with businesses has become more involved. This suggests that we might expect to see fundamental transitions following periods of rapid economic growth,

particularly if growth is intertwined with state activity. That feature characterizes much of the half century following the Civil War.<sup>284</sup>

Closely related, we might expect to see a striking transition if people's *perceptions* of corruption change. In the terms of the model, this perception is reflected in  $\pi$ , voters' prior beliefs that the politician is faithful. A sharp reduction in  $\pi$  implies that the electoral costs of distrust increase dramatically for the faithful legislator, providing him an incentive to develop alternative lawmaking means. The rise of muckraking journalism around the turn of the century, for example, plausibly had a marked effect on  $\pi$ .<sup>285</sup> It may therefore be no accident that a characteristic of the roughly co-incident progressive era involves the delegation of authority from legislatures to various lawmaking commissions,<sup>286</sup> subject to judicial review.

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<sup>284</sup> See generally ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* (2016).

<sup>285</sup> E.g., LOUIS FILLER, *THE MUCKRAKERS* 9 (1968) (observing of muckraker journalism, "Now, suddenly, there appeared . . . a new, moral, radical type of writing . . . [that] savagely exposed grafting politicians").

<sup>286</sup> E.g., RICHARD L. MCCORMICK, *THE PARTY PERIOD AND PUBLIC POLICY: AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA* 319 (1986) (noting that "the brief period from 1904 to 1908 saw a remarkably compressed political transformation. During these years the regulatory revolution peaked; new and powerful agencies of government came into being everywhere").