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A Trip to the Border: Legal History and APA Originalism

Reuel E. Schiller
UC Law SF, schiller@uclawsf.edu

A TRIP TO THE BORDER: LEGAL HISTORY AND APA ORIGINALISM

REUEL SCHILLER*

This article examines originalist interpretations of the Administrative Procedure Act (APA) from the perspective of a legal historian. After examining two pieces of originalist scholarship, it concludes that the historical record may not produce narratives of enough specificity or coherence to assist the originalist project. Nonetheless, it highlights three under-examined subjects of historical inquiry that have the most potential to aid APA originalists: the nature of administrative procedure during the first three decades of the twentieth century when the modern "appellate model" of judicial review emerged; the actual practice of administrative law during the New Deal, both within agencies and in the courts; and the historiographical dispute as to whether the APA intended to codify existing practices, or shift them in a more conservative direction.

In 1986, writing on the occasion of the fortieth anniversary of the Administrative Procedure Act, the U.C. Berkeley law professor and political scientist Martin Shapiro described an experience he had while grading an administrative law exam. A student had spent six pages of his blue book parsing the case law when he abruptly stopped writing. Then came this: "(My God, I just actually read part of the APA. Please ignore all I've written so far.)" "I've never been sure that reading the APA really did help the poor soul," Shapiro remarked. "It often doesn't help me very much."[1] Shapiro's point was well made, but hardly original: federal courts have taken an active role in shaping administrative procedure since the passage of the APA in 1946. Often times, it seems like they have simply abandoned the statute to manufacture a changing common law of administrative procedure. Many would agree with Gillian Metzger and Kathryn Kovacs that much of contemporary administrative law is based on "judicial pro-

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

nouncements that 'venture too far afield from statutory text or discernible legislative purpose [of the APA] to count simply as statutory interpretation.'"[2]

For much of the Act's history, this fact did not seem to bother most observers. The APA was a "constitution for the administrative state" and it was treated like one.[3] Courts created administrative law doctrines that adapted the broad purpose of the Act – ensuring that administrative action conformed to the procedural expectations of a liberal democracy – to the rapidly changing context of postwar America. They fleshed out the Act's skeletal rulemaking procedures when rulemaking became an increasingly significant form of administrate action.[4] They facilitated public participation in the administrative process as American political culture evidenced increasing distrust of the government.[5] They tinkered, sometimes incoherently, with the intensity of their own role in substantive review, reflecting the waxing and waning of legal liberalism.[6] In eras of "purposive" or "dynamic" statutory interpretation, this approach to the APA seemed perfectly appropriate.[7] Indeed, considering the APA's sketchy legislative history and its inflexible, feast or famine procedural requirements, the Act unsurprisingly presented courts committed to purposive or pragmatic modes of interpretation with the opportunity to innovate.

Of course, purposivism or dynamism are not the only approaches to statutory interpretation, and by the end of the twentieth century, both had

2. Katherine E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1212 (2015) (quoting Gillian E. Metzger, *Annual Review of Administrative Law—Forward: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1291, 1293 (2012)); *see also* Gillian Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010); and Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEXAS L. REV. 1137 (2014).

3. Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253 (1986).

4. Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1139-40 (2002) [hereinafter Schiller, *Rulemaking's Promise*]; Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 1669, 1713–70 (1977).

5. Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism*, 1945-1970, 53 VAND. L. REV. 1389, 1410-17, 1421-28, 1440-42 (2000) [hereinafter Schiller, *Enlarging Polity*]; and Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1669, 1713–70 (1975).

6. Schiller, *Rulemaking's Promise*, *supra* note 4, at 1140-41; Schiller, *Enlarging Polity*, *supra* note 5, at 1417-28.

7. *See generally* William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985); William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 115-150 (1999).

fallen into disfavor, replaced by textualist approaches to the APA.[8] That said, while partisans of each of these schools disagreed fundamentally about how courts should read statutes, none had much use for history. Purposivists might invoke the basic materials of legislative history, but their portrayal of "intent" was far from specific. Congress, for example, "expressed a mood."[9] Similarly, dynamic approaches are, by definition, more concerned with contemporary consequences of statutory interpretation than with the historical context of age-old statutes.[10] Textualists, of course, had even less use for historical context beyond a reference or two to dictionaries published in the 1940s.[11] Indeed, to the extent that the whole point of textualist approaches was to avoid the use of easily manipulated legislative histories, it's not hard to see why they avoided reliance on the even vaguer suggestions of intent embodied in the wider historical context of the Act's passage.

Recently, however, something has changed. Administrative law scholars have evidenced a new-found interest in the history of the APA beyond a mechanical invocation of the traditional materials of statutory interpretation and legislative history. A form of APA originalism is emerging, in which advocates of contemporary administrative reform deploy historical materials that justify their preferred reading of the APA.[12] Simple references to House and Senate Reports have been supplemented with materials previously familiar only to the geekiest of historians of the administrative state: the legislative debates over the Walter-Logan Act; the reports of the ABA's Special Committee on Administrative Law and the Attorney General's Committee on Administrative Procedure; the thousands of pages of information about individual agency practices assembled by Walter Gellhorn to support the AG's Committee's work; the writings of James Landis, John Dickinson, and Ernst Freund; nineteenth-century mandamus cases; the records of the Board of Supervising Inspectors created by the Steamboat Safety Act of 1852.[13]

8. *See generally* Reuel E. Schiller, *An Unexpected Antagonist: Courts, Deregulation, and Conservative Judicial Ideology, 1980-94*, *in* MAKING LEGAL HISTORY ESSAYS IN HONOR OF WILLIAM E. NELSON (Daniel J. Hulseboch & R.B. Bernstein eds., 2013).

9. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

10. Eskridge, *supra* note 7, at 1497; *see generally* Richard A. Posner, *Some Realism About Judges: A Reply to Edwards and Livermore*, 59 DUKE L.J. 1177 (2010).

11. *See generally* Dir., Workers' Comp. Programs, DOL v. Greenwich Collieries, 512 U.S. 267 (1994); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005).

12. *See generally* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018); Bernick nicely summarizes this literature.

13. One might speculate on why APA originalism has emerged with such force in the 20-teens. Perhaps it reflects an increasingly contentious debate over the legitimacy of the administrative state that stems from our polarized politics. For people who wish to weaken the contemporary administrative

While this turn to history is gratifying to those of us who study the legal history of the administrative state, some of us (okay, me) might find it disconcerting to be drawn into the obviously politicized legal battles over administrative law. If the debates over constitutional originalism have taught historians anything, it is that forensic, "law office" history is often not very good history.[14] Accordingly, weaponized legal history often gives rise to an impulse among historians that Laura Kalman calls "Border Patrol"—"guarding our disciplinary boundaries against the encroachment of others."[15] While Kalman's description of lawyers and law professors using and misusing historical sources and arguments suggests that the legal profession is a bit cavalier and instrumental when it turns to historical materials, she doesn't let historians off the hook either. Her description of them "prowling the borders" and "patrolling our turf" suggests a street gang rather than a learned community.[16] Her point is that lawyers' use of historical materials is inevitable these days. Arrogant hostility from the historical profession won't change that. Instead, historians should attempt to engage lawyers and law professors in a way that leads to a better use of history.

Accordingly, in good faith, I head to the border. I will examine two first-rate pieces of administrative law scholarship that are heavily reliant on the legal history of both the APA in particular and administrative law in general: Nicholas Bagley's "The Puzzling Presumption of Reviewability"[17] and Aditya Bamzai's "The Origins of Judicial Deference to Executive Interpretation."[18] I've chosen these two pieces for several reasons. Both are widely cited examples of the originalist turn in administrative law scholarship. Similarly, both are excellent, well-researched pieces. They are not strawmen. Finally, they have contrasting doctrinal and ideological valances. Bagley's piece argues that examining the original intent of the APA

state, a good starting place is the elimination of the seventy-five years of innovation that has occurred since the Act's passage. People defending contemporary doctrines have accepted the originalism as an appropriate battlefield to fight this war, perhaps because they believe there is plenty of material to help their side.

14. *See, e.g.*, Martin S. Flaherty, *History 'Lite' in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 549-90 (1995) (assessing the use of history by some of the late-twentieth century's most renowned constitutional theorists); *see* Martin S. Flaherty, *Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 FORDHAM L. REV. 905-76 (2015) (providing critique of more recent constitutional originalism).

15. This quote is drawn from Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 87–88 (1997).

16. *Id.*

17. Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014).

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

demonstrates that courts should be less involved in the administrative process than they are currently. In particular, he argues that the presumption that administrative action is subject to judicial review, a canonical piece of administrative law articulated most forcefully in *Bowen v. Michigan Academy of Family Physicians*[19] and *Abbott Labs. v. Gardner*,[20] is inconsistent with the APA.[21] Bamzai, on the other hand, argues that placing the APA in its historical context proves that courts should be more involved in the administrative process. He argues that a historical examination of the APA demonstrates that the *Chevron* doctrine cannot be justified by the statute. The APA's intent was to have courts review all issues of law de novo, even if statutory language is ambiguous or unclear. While the politics of judicial review of administrative action has oscillated dramatically over the years, in our current moment, Bagley's argument is considered liberal or progressive, while Bamzai's is conservative. Both authors, however, use history in the exact same way.

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Bagley's historical analysis is one of a series of justifications for eliminating the presumption of reviewability. This presumption is not required by the Constitution,[22] the traditional relationship between courts and agencies,[23] or the Administrative Procedure Act.[24] It is bad public policy because it disrupts the efficient functioning of the administrative process.[25] Even worse, it is frequently used to undermine the will of Congress as courts use it "to contort statutes that appear to preclude review to nonetheless permit it."[26] The presumption of review is thus a doctrine with no basis in law or historical practice that empowers courts to ignore Congress's desires and hobbles the administrative state. Accordingly, Bagley suggests that it should be eliminated.

Bagley's argument has two historical components. First, he demonstrates that when the modern Supreme Court looks to nineteenth-century cases to justify a presumption against preclusion, it misreads those cases profoundly.[27] Using the pathbreaking work of Jerry Mashaw and Tom Mer-

19. 476 U.S. 667, 670 (1986).
20. 387 U.S. 136, 140 (1967).
21. *See generally* Bagley, *supra* note 17.
22. *Id.* at 1309-18.
23. *Id.* at 1318-27.
24. *Id.* at 1303-09.
25. *Id.* at 1329-36.
26. *Id.* at 1287.
27. *Id.* at 1301-03.

rill on nineteenth and early twentieth-century administrative law, Bagley demonstrates that there was no concept of appellate-style arbitrariness review in the nineteenth century.[28] Instead, there was either total deference for the category of discretionary executive acts, or de novo review of non-discretionary acts subject to mandamus review.[29] Similarly, the primary nineteenth-century remedy for arbitrary administrative action – a common law damages claim against agency actors – is a terrible analogy for contemporary judicial review.[30] Not only was the remedy completely different from what modern administrative law contemplates, but nineteenth-century courts inquired into whether the legislature gave administrative officials the power to act in the first place, not into the arbitrariness of the official's action.[31] In any case, none of these forms of judicial interaction with the administrative process – non-review of discretionary action, rare mandamus review, or common law damages claims again government actors – provide meaningful precedents for the appellate-style review that developed at the beginning of the twentieth century.[32] Indeed, it's hard to see how a presumption of appellate-style review can be inferred from cases decided at a time when a large chunk of administrative action was unreviewable.[33]

Having demonstrated that the nineteenth century cases relied on by the Supreme Court to justify the presumption of reviewability are inapposite, Bagley turns his attention to the APA, presumably the place the contemporary Court should have started its inquiry. Bagley starts with the text of section 701(a) of the Act: "the sections providing for judicial review apply 'except to the extent that . . . statutes preclude judicial review.'"[34] On its face this language seems to create a presumption neither for nor against preclusion of judicial review. Indeed, an earlier version of section 701(a) that would have required review "[e]xcept . . . so far as statutes *expressly* preclude judicial review" was replaced by the existing language.[35] That said, Bagley notes that the legislative history of the APA seems to create some ambiguity. According to Bagley, the Senate Committee Report "confined itself to the bland statements that Congress '[v]ery rarely . . . withhold[s] judicial review' and has no general 'policy' of

28. *Id.* at 1295-1300.
29. *Id.*
30. *Id.* at 1299-1300.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 1304.
35. *Id.* at 1306.

precluding such review."[36] This seems to be a rejection of a presumption of review. Similarly, the Senate Report reprinted a letter from the Attorney General that also seems to reject such a presumption.[37] On the other hand, there is language in the House Committee Report that endorses a presumption of review: "To preclude judicial review under this bill, a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."[38] Bagley, however, dismisses the House Report's assertion. The House Committee added this language to the Report after the elimination of "expressly" from the proposed legislation, as well as after the Senate Report and the AG's letter clearly rejected the presumption.[39] The House simply attempted to manufacture legislative history to reinsert a presumption that had been rejected in the legislative process. Bagley then adds a historical coup de grace: "[t]he absence of an established pre-APA practice of presuming review in the face of statutory ambiguity or silence further undermines the reliability of the House report."[40] To the extent that the APA codified the existing state of administrative law – an assertion that many of the Act's supporters repeated – the Act created no presumption against statutory preclusion of review.

Though Bamzai's article may have a different ideological valence than Bagley's, it uses an identical analytic strategy. Like Bagley, Bamzai starts his assessment of the Court's contemporary adherence to *Chevron* deference by examining the nineteenth-century precedents that the modern Court relies on to justify judicial deference to administrative agencies in the face of statutory ambiguity.[41] Also, like Bagley, he argues that the Court has dramatically misinterpreted these cases.[42] Citing the same literature that Bagley does (Mashaw and Merrill), as well as scads of nineteenth-century cases and treatises written as long ago as the fourth century C.E., Bamzai argues that, in the absence of appellate-style arbitrariness review, judicial examinations of executive interpretation of statutes occurred in one of two contexts: as part of common law actions against an executive official, or as part of a decision to grant or deny a writ of mandamus.[43] In neither of these contexts was there a rule of deference to executive glosses on a statute. Modern courts that found deference were actually misreading the ap-

36. *Id.* at 1307.
37. *Cited in id.* at 1307.
38. *Id.* at 1306.
39. *Id.* at 1307.
40. *Id.* at 1308.
41. Bamzai, *supra* note 18, at 941-61.
42. *Id.* at 920-22, 995-97.
43. *Id.* at 930-65.

plication of one of two venerable canons of statutory construction that courts often "applied . . . to eliminate the problem of ambiguity: a reliance on the contemporaneous understanding of a text (what was called '*contemporanea expositio*') and a reliance on the customary understanding of that text ('*interpres consuetudo*')."[44] Courts may have referred to executive interpretations when invoking these canons, but only as a piece of evidence in an assessment of the contemporaneous or customary understanding of a statute. Modern courts have confused references to executive interpretations of a statute as part of this inquiry with actual deference to the executive, which they were not.[45]

Having demonstrated that modern courts have misread the nineteenth-century precedents, Bamzai, like Bagley, turns his attention to the APA. Here his story gets more complicated than Bagley's. While Bagley argues that the APA was simply codifying the existing practice (no presumption of reviewability), Bamzai argues that the APA was meant to restore the judiciary's traditional role in response to its erosion during the New Deal.[46] In particular, Bamzai argues that the traditional approach to dealing with statutory ambiguity – de novo review, supplemented by the use of canons of construction like *contemporanea expositio* and *interpres consuetudo* – continued unabated through the first three decades of the twentieth century, even as modern, appellate-style review emerged.[47] Starting in the late 1920s, however, this approach came under assault. Scholars associated with Legal Realism attacked one of the premises of the appellate-review model: that there was a meaningful distinction between "questions of law," which were reviewed de novo, and "questions of fact," which were reviewed deferentially.[48] This idea, Bamzai argues, when processed through the New Deal's affection for executive action, suggested that courts should defer to every aspect of administrative decision-making.[49] Not surprisingly, once Roosevelt's appointees came to dominate the judiciary, they implemented this philosophy of judicial review.[50] The result was the famous New Deal-era instances of judicial deference to administrative action: *Gray v. Powell*[51] and *Hearst v. NLRB*,[52] and another canonical case, *Skidmore v.*

44. *Id.* at 930.
45. *Id.* at 997-1000.
46. *Id.* at 981-90.
47. *Id.* at 969-71.
48. *Id.* at 971-76.
49. *Id.*
50. *Id.* at 976-81.
51. 314 U.S. 402 (1941).
52. 322 U.S. 111 (1944).

Swift,[53] that, while less deferential than *Gray* or *Hearst*, suggested considerably more deference than the traditional model. According to Bamzai, the APA sought to reject these cases and reestablish the traditional, de novo standard.[54]

Like Bagley, Bamzai begins this argument with reference to the statutory language. "On its face, section 706's instruction that a court 'decide all relevant questions of law' appeared to contemplate some form of de novo review of agency legal interpretation."[55] He then notes that some previous proposals had specific language requiring deference and that language was left out of the APA.[56] The legislative history also suggests that de novo review of issues of law was intended, though a little ambiguity arises to the extent that there is some evidence that Congress sought to simply restate existing law, without stating precisely what existing law was.[57] Indeed, the debate among modern scholars turns on this issue. Those who suggest that *Chevron* is consistent with the APA argue that a court "deciding relevant questions of law" would do so using the existing understandings of how courts judged agency interpretations of ambiguous statutes.[58] Bamzai is delighted to accept this analytic move because, while *Chevron's* supporters suggest that this understanding includes deference, he believes his historical research disproves this argument:

> The most natural reading of section 706—one that has, to my knowledge, heretofore escaped scholarly or judicial attention—is that the APA's judicial review provision adopted the traditional interpretive methodology that had prevailed from the beginning of the Republic until the 1940s and, thereby, incorporated the customary-and-contemporary canons of construction. In other words, when Congress enacted the APA, it did in fact incorporate traditional background rules of statutory construction. It did not, however, incorporate the rule that came to be known as *Chevron* deference, because that was not (at the time) the traditional background rule of statutory construction.[59]

Q.E.D.

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53. 323 U.S. 134 (1944).

54. Bamzai, *supra* note 18, at 981-990.

55. *Id.* at 985.

56. *Id.* at 986.

57. *Id.* at 988-90.

58. *See* Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 662-92 (2020); *see* Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 2 (2021).

59. *See* Bamzai, *supra* note 18, at 987.

So, what is a legal historian on border patrol supposed to make of these historically inflected arguments about the meaning of the APA? First, there's a lot to like here. The analytic move that both Bagley and Bamzai make with respect to the nineteenth-century case law is very appealing. The point of both their arguments is that the language of judicial decisions ripped from their historical context shouldn't be used to justify contemporary doctrine. Thus, the Supreme Court erred by trying to rest contemporary doctrine on cases that were decided in a context so different that they simply are not terribly meaningful. Mashaw and Merrill, as well as other folks who have written about the eighteenth and nineteenth-century administrative state – Nicholas Parrillo, Gautham Rao, Brian Balogh, and William Novak, to name just a few – have taught us that it was, in many ways, an alien world.[60] They have destroyed the fiction that the nineteenth century was somehow "stateless," or that common law courts were the only engines of public policy.[61] They have also demonstrated that the period was one of rapid change and experimentation in which state structures came and went as innovations were tested and discarded (or retained) amidst enormous social and political turbulence.[62] It makes for a fascinating narrative, but not one that is terribly useful for finding precedents applicable to contemporary administrative law.

Unfortunately, neither Bagley nor Bamzai approach all the data with the same historical subtleness that they use regarding the nineteenth-century case law. The first thing that might raise the eyebrows of a legal historian is that the legal doctrines they describe are strangely static. Demonstrating the consistent dominance of their preferred doctrine is crucial to each of their arguments, because the authors suggest that an examination of existing practices resolves whatever ambiguities the APA may present. According to Bagley, there never was a presumption in favor of judicial review, so, absent definitive intent, why would we assume the APA created one?[63] Similarly, according to Bamzai, except for a three year period in the 1940s, courts never deferred to executive interpretations of am-

60. *See, e.g.,* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF ADMINISTRATIVE LAW 4–5 (2012); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 940 (2011); NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013); GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE (2016); BRIAN BALOGH, GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA 5 (2009); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 2 (1996).

61. MASHAW, *supra* note 60, at 3; Merrill, *supra* note 60, at 946.

62. MASHAW, *supra* note 60, at 5, 10; Merrill, *supra* note 60, at 946.

63. Bagley, *supra* note 17.

biguous statutes, so, absent definitive intent, why would we assume the APA requires such deference?[64] Yet if the doctrines that both authors rely on stayed static for as long as they suggest, each would be a rare bird indeed.

Consider Bamzai's argument. He asserts that the answer to the primary issue underlying the debate about *Chevron* deference – what governmental institution should resolve the inevitable ambiguity of statutes – has been the same for centuries. He starts with Coke, moves through Locke, Blackstone, Mansfield, the authors of the Federalist Papers, and prominent anti-federalists.[65] We even get a brief excursion into the thought of the "Roman jurist Julius Paulus Prudentissimus—the praetorian prefect to the Emperor Alexander Severus and the most excerpted authority in Justinian's Digest. . . ."[66] The British and American judges then applied this non-differential standard of review, employing traditional canons of construction – thank you Praetorian Prefect Prudentissimus! – to resolve statutory ambiguity.[67]

I am not an expert in eighteenth or nineteenth-century legal history, so I'm not in the best position to assess Bamzai's claims about the relationship among courts, executives, and legislatures in those times. It is worth noting, however, that even as the formal doctrinal categories and canons of construction retained the same names, the nature of executive, legislative, and judicial action that they purported to address changed dramatically. As Bamzai demonstrates, scholars of the nineteenth-century administrative state—Mashaw, Novak, Balogh, Rao and Parrillo, for example—have described an administrative state that was remarkably different from our own.[68] It was more local, less uniform, more experimental, more invasive in some subject matters, and less so in others. Most significantly for our purposes, it was not court-centric. The appellate-review model of controlling executive action simply did not exist until the beginning of the twentieth century.[69] This description of the relationship between courts and administrative action complements scholarship that describes the remarkably fluid role of the judiciary in the nineteenth century. At some times (and on some subjects) courts were anti-formalist, instrumentalist policy-

64. Bamzai, *supra* note 18.
65. *Id.* at 930-41.
66. *Id.* at 937.
67. *Id.* at 941-46.
68. *See supra* note 60.
69. *See generally* MERRILL, *supra* note 60; Mashaw, *supra* note 60, at 302-03.

makers, enamored of broad doctrines of equity.[70] At other times they adhered to the strictures of formal legal reasoning and rigid common law categories.[71] The role of legislatures also changed dramatically over the course of the century, as they shifted from entities that rarely met, and spent most of the time passing private legislation, to ones that sought to displace courts as the primary policy-making entities.[72] These changes were embedded in a historical context – revolution, constitution, industrialization, democratization, and Civil War, for example—that can be described as dynamic only if you love ironic understatement. No wonder most scholars who have examined the question of judicial deference to executive action in this period have found complexity rather than consistency.[73]

However, even if Bamzai is correct about eighteenth and nineteenth century judicial behavior, his case grows substantially weaker, both factually and theoretically, in the twentieth century. Bamzai barely acknowledges that at the beginning of the twentieth century a new, recognizably modern system for structuring the relationship between courts and the administrative state emerged.[74] As Merrill has demonstrated, political conflicts over the behavior of the Interstate Commerce Commission generated the recognizable appellate-style arbitrariness review that structures judicial review even today.[75] This system divides the subjects of administrative action in categories – issues of law, issues of fact, the application of facts to legal standards – and mandates particular standards of review for each category based on the relative institutional expertise of agencies and courts.[76] Merrill explains that this system emerged out of contentious political conflict over the relationship between federal courts and the Interstate Commerce

70. *See generally* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); *see generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); *see generally* LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957). These germinal works of legal history are the classic statements of this idea.

71. *See* William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974); *see also* HORWITZ, *supra* note 70, at 253-66.

72. Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 720 (2018); Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271 (2004).

73. Green, *supra* note 58, at 677-81, 743-51; Ann Woolhandler, *Judicial Deference to Administrative Action*, 43 AD. L. REV. 197 (1991).

74. Bamzai, *supra* note 18, at 969.

75. Merrill, *supra* note 60, at 953–71.

76. *Id.* at 940.

Commission.[77] Progressives and economic actors hostile to the railroads viewed the judiciary's aggressive review of ICC rate-making as a manifestation of illiberal, biased, pro-railroad behavior by the courts.[78] This led to the Hepburn Act which, while it didn't dictate specific standards of review, was seen by courts as a tacit threat.[79] Congress would curtail their power over the ICC even further if they did not reduce the intensity of their review. Courts responded by beating a "strategic retreat" from their aggressive review of rate-making.[80] The substance of this retreat was the appellate review model: deference to factual findings and the application of facts to legal standards, but de novo determination as to whether the agency was acting within the legal authority delegated to it by Congress. Thus, in the face of Populist and Progressive threats to take away all their power, courts conceded power over a chunk of the administrative process in order to retain control over the rest.[81] This mode of review soon spread to other agencies, found academic and legislative defenders, and became the dominant method dictating how courts and agencies should interact.[82]

There is nothing in the emergence of appellate-style arbitrariness review that specifically refutes Bamzai's story. Indeed, de novo review of agency determinations of their own statutory authority is a component of the appellate-review model.[83] However, Merrill's narrative suggests that there was a paradigm shift in the thinking about judicial review of agency action in the first decade of the twentieth century. This, in turn, suggests that we might want to view critically how courts used nineteenth-century precedents when applying them in this new context. Indeed, this is precisely the approach that Bamzai uses when assessing how modern courts misuse those precedents.[84] Yet, he essentially ignores the emergence of the appellate review model, the moment when "administrative law," as a distinct category of law, came into being.[85] Is it not appropriate to wonder

77. *Id.* at 953-55.
78. *Id.*
79. *Id.* at 955-59.
80. *Id.* at 959-63.
81. *Id.*
82. *Id.* at 965-972.
83. *Id.* 970-71. For examples, *see id.* at 971 nn.153-56.
84. Bamzai, *supra* note 18, at 997-1000.
85. It's at this time, for example, that the first administrative law casebooks were published. *See infra* note 92. *See* G. EDWARD WHITE, LAW IN AMERICAN HISTORY VOLUME III 155-67 (2019); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 213–246 (1992) [hereinafter HORWITZ, TRANSFORMATION II]; WILLIAM C. CHASE, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNANCE 60–83 (1982).

whether the emergent doctrines with respect to deference might diverge from their antecedents as they were adapted from the old to the new?

Indeed, Bamzai's article gives us a tantalizing hint that this is just what happened. In a section entitled "A Crack in the Glass," he describes the Supreme Court's holding in *Bates & Guild Co. v. Payne*,[86] a 1904 case in which the Court deferred to the Postmaster General's interpretation of the statute giving him the power to define the different classifications of mail.[87] This deference was driven by the Court's concern that if courts did not defer to a wide range of agency actions, the judiciary would be overwhelmed by appeals of administrative action, a not unreasonable concern at a time when the federal administrative state was in the process of expanding.[88] Yet, according to Bamzai, *Bates* was an outlier – a case with "a relatively narrow arc" and a "lack of immediate impact."[89]

This is a curious conclusion regarding *Bates'* significance. Bamzai himself identifies seven Supreme Court cases between 1904 and 1924 that cite it as a precedent.[90] A quick Lexis search reveals another thirty-six federal appellate and district court cases before 1933 when the Roosevelt administration began appointing judges who might have been more sympathetic to deferent judicial review.[91] Similarly, *Bates* was a staple of the first administrative law treatises and casebooks that appeared in the nineteen teens and twenties as administrative law began to define itself as a

86. 194 U.S. 106 (1904).

87. *See* Bamzai, *supra* note 18, at 966-68.

88. Bates, 194 U.S. at 108.

89. Bamzai, *supra* note 18, at 968, 969.

90. *Id.* at 968 n.253.

91. United States v. Hyams, 146 F. 15 (1st Cir. 1906); United States ex rel. Bauder v. Uhl, 211 F. 628 (2d Cir. 1914); Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917); Am. Mercury, Inc. v. Kiely, 19 F.2d 295 (2d Cir. 1927); ACLU, Inc. v. Kiely, 40 F.2d 451 (2d Cir. 1930); Indep. Co. v. Norton, 54 F.2d 734 (3d Cir. 1931); Brown v. Foster, 194 F. 855 (4th Cir. 1912); Park Falls Lumber Co. v. Burlingame, 1 F.2d 855 (7th Cir. 1924); People's United States Bank v. Gilson, 161 F. 286 (8th Cir. 1908); Lewis Pub. Co. v. Wyman, 182 F. 13 (8th Cir. 1910); St. Louis Indep. Packing Co. v. Houston, 242 F. 337 (8th Cir. 1917); Brougham v. Blanton Mfg. Co., 243 F. 503 (8th Cir. 1917); United States v. Ide, 277 F. 373 (8th Cir. 1921); Colum. Correspondence Coll. v. Wynne, 25 App. D.C. 149 (1905); United States ex rel. Reinach v. Cortelyou, 28 App. D.C. 570 (1907); Hitchcock v. Smith, 34 App. D.C. 521 (1910); New v. Tribond Sales Corp., 19 F.2d 671 (D.C. Cir. 1927); Mills & Gibb v. United States, 8 Ct. Cust. 31 (Cust. App. 1917); Yokohama Ki-Ito Kwaisha, Ltd. v. Comm'r, 5 B.T.A. 1248 (Bd. Tax App. 1927); Couzens v. Comm'r, 11 B.T.A. 1040 (Bd. Tax App. 1928); People's United States Bank v. Gilson, 140 F. 1 (C.C.E.D. Mo. 1905); Lewis Pub. Co. v. Wyman, 152 F. 787 (C.C.E.D. Mo. 1907); Putnam v. Morgan, 172 F. 450 (C.C.S.D.N.Y. 1909); Brooklyn Daily Eagle v. Voorhies, 181 F. 579 (C.C.E.D.N.Y. 1910); Branaman v. Harris, 189 F. 461 (C.C.W.D. Mo. 1911); Frick v. Lewis, 195 F. 693 (C.C. Mich. 1912); Brown v. Foster, 194 F. 855 (C.C. N.C. 1912); Sanden v. Morgan, 225 F. 266 (S.D.N.Y. 1915); United States v. Pa. Co., 235 F. 961 (D. Pa. 1916); Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917); Ex parte Willman, 277 F. 819 (D. Ohio 1921); Territory v. Annette Island Packing Co., 6 Alaska 585 (Ak. Terr. Ct. 1922); Silberschein v. United States, 285 F. 397 (E.D. Mich. 1923); United States ex rel. Finch v. Elliott, 3 F.2d 496 (Dist. Wash. 1924); Western Union Tel. Co. v. Tax Com., 21 F.2d 355 (S.D. Ohio 1927); Gitlow v. Kiely, 44 F.2d 227 (S.D.N.Y. 1930).

discipline.[92] None of this suggests that *Bates* was a single, unrepresentative "crack in the glass" of de novo review of agency legal determinations. Instead, it suggests that, as the appellate review model was emerging, there was substantial confusion among courts and commentators.[93] Indeed, often courts applied *Bates'* deferential standard to elements of agency action other than pure legal determinations.[94]

This confusion and inconsistency suggest the traditional model that Bamzai identifies was, at the very least, being challenged during the first three decades of the twentieth century. My own scholarship about this period argues that, regardless of the category of administrative action, courts were more deferential to agencies that regulated subjects falling within the traditional police powers and considerably less sympathetic to regulatory regimes that sought to move beyond these traditional powers.[95] Craig Green, who, like Bamzai, has a laser-like focus on cases involving review of "pure" issues of law, has identified numerous Supreme Court cases between 1904 and 1933 that use the language of deference with respect to these issues.[96] This is not to say that there was not a judicial preference for de novo review of issues of law. The very premise of the appellate review model dictates that there would be. Instead, it simply suggests that the first three decades of the twentieth century were a period of innovation and adaptation, as courts and commentators struggled to define the appellate review model precisely. Considering the fraught politics of the Progressive Era, as well as the spirited debates over the emergent administrative state and the role of expertise in governance during this time, some degree of judicial inconsistency is hardly surprising.[97]

92. *See, e.g.*, FRANK J. GOODNOW, SELECTED CASES ON AMERICAN ADMINISTRATIVE LAW 124, 453, 625*, 648 (1906); ERNST FREUND, ET AL., THE GROWTH OF ADMINISTRATIVE LAW, 124 (1923) [hereinafter FREUND, GROWTH]; ERNST FREUND, CASES ON ADMINISTRATIVE LAW: SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS, 682 (1911).

93. FREUND, GROWTH, *supra* note 92, at 123–24 ("As courts undertake to define judicial power when no exact and perfect, inclusive and exclusive definition of general application seems possible . . . and as they also say that they have the power to exercise or refuse to exercise it . . . much confusions arises as to *the nature and proper limitation of judicial review*.") (italics in original); *see* Levin, *supra* note 58, at 33–36.

94. *See* Indep. Pier Co. v. Norton, 54 F.2d at 735 (3d Cir. 1931); United States v. Ide, 277 F. at 382 (8th Cir. 1921); United States ex rel. Bauder v. Uhl, 211 F. at 632 (2d Cir. 1914); People's United States Bank v. Gilson, 140 F. 1 at 20 (C.C.E.D. Mo. 1905).

95. Reuel Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 Mich. L. Rev. 399, 408 (2007) [hereinafter Schiller, *Era of Deference]*; Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 15-16 (2000) [hereinafter Schiller, *Free Speech*].

96. Green, *supra* note 58, at 741-46.

97. See STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982),a germinal work on Progressive era regulation; *see also*; MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH

Bagley has the same problem with this period as Bamzai does. While it is nowhere near as central to his thesis as Bamzai's claims are to his, Bagley asserts that there was no presumption of judicial review under the appellate-review model as it developed during the first third of the twentieth century.[98] Yet he doesn't offer much support for this assertion. Writing in the mid-1950s, the renowned administrative law scholar Kenneth Culp Davis, like Bagley, rejected the presumption.[99] Similarly, Bagley quotes Felix Frankfurter's dissent in *Stark v. Wickard* that supports Davis' position.[100] On the other hand, as Bagley acknowledges, the equally renowned administrative law scholar Louis Jaffe, writing a few years after Davis, believed a presumption of reviewability was emerging in the 30 years before the passage of the APA.[101] I will not presume to adjudicate between Davis and Jaffe, but the simple fact that Jaffe can identify at least a dozen cases that seem to embody the presumption suggests that something was going on.[102] Indeed, to refute Jaffe, Bagley cites scholars from the 1920s who suggested that cases involving the presumption of reviewability were subject to "inconsistent results" during the first two decades of the twentieth century.[103] That is exactly my point. The appellate-review model of administrative law was a newborn baby during this period – growing and changing rapidly. Of course there were "inconsistent results." The legitimacy of the emergent administrative state was an extremely contentious political and jurisprudential issue. Why would one expect consistent results?

If Bagley and Bamzai's arguments are hampered by the inattention to the historical context of pre-New Deal, twentieth-century administrative law, what are we to make of their treatment of the APA itself? Unlike for the earlier period, historians and historically-inclined legal scholars have generated a robust historical context for the APA. Two interrelated narratives, one political and one ideological, have emerged.

CENTURY AMERICA (1977); MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933 (1990); MORTON KELLER, REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900-1933 (1994); Schiller, *Era of Deference*, *supra* note 95; Schiller, *Free Speech*, *supra* note 95.

98. Bagley, *supra* note 17, at 1308.

99. *Id.* at n.136.

100. *Id.* at n.137.

101. *Id.* at n.137.

102. LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 339-53 (1965).

103. Bagley, *supra* note 17, at 1308 n.137.

The political narrative portrays the APA as the result of a compromise between New Dealers and their political opponents.[104] Throughout the 1930s, as the Roosevelt Administration and its political allies expanded the administrative state, a coalition of interests opposed to this expansion, institutionalized within the ABA's Special Committee on Administrative Law, sought some form of legislation to control administrative action.[105] So long as FDR's political fortunes were riding high, such legislation was a pipe dream. When Roosevelt's power waned in the late 1930s, however, these forces sprang into action, passing legislation – the Walter-Logan bill – that would have subjected the federal administrative state to substantial procedural limitations and searing judicial review.[106] Roosevelt attempted to derail Walter-Logan by creating a blue ribbon commission – the Attorney General's Committee on Administrative Procedure – charged with studying agency operations and proposing reforms.[107] This tactic failed to stop the legislation's passage, and FDR had to veto the bill.[108] The Attorney General's Committee's work, however, proved to be extremely consequential. The results of its study served as the basis for the APA.[109] After World War II ended, Congress returned its attention to administrative procedure. The political context of the immediate postwar period required compromise over the various reform proposals, and the result was the APA.[110]

Historians who have studied the ideological and intellectual history of this period have helped to explain why this compromise was forthcoming. For liberal opponents of administrative reform, the events of 1940s were chastening. The increasingly obvious horrors of totalitarian administration in Europe, objections to the comparatively benign but nonetheless unpopu-

104. This narrative is drawn from multiple sources. *See, e.g.,* JOANNA L. GRISINGER, THE UNWIELDY AMERICA STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 14-108 (2012); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 94-127 (2000) [hereinafter WHITE, CONSTITUTION]; George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); Reuel Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, *in* TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II, 185-206 (Daniel R. Ernst & Victor Jew eds., 2002) [hereinafter Schiller, *Reigning In]*.

105. Shepherd, *supra* note 104, at 1590-94; GRISINGER, *supra* note 104, at 59, 62-63, WHITE, CONSTITUTION, *supra* note 104, at 117-18, ERNST, *infra* note 114, at 119-35; Schiller, *Reining In*, *supra* note 104, at 196-97.

106. Shepherd, *supra* note 104, at 1598-1632; WHITE, CONSTITUTION, *supra* note 104, at 118; GRISINGER, *supra* note 104, at 62.

107. Shepherd, *supra* note 104, at 1594-97, GRISINGER, *supra* note 104, at 64-72; WHITE, CONSTITUTION, *supra* note 104, at 118-19; Schiller, *Reining In*, *supra* note 104, at 197.

108. Shepherd, *supra* note 104, at 1625-28; WHITE, CONSTITUTION, *supra* note 104, at 118; ERNST, *infra* note 114, at 136.

109. GRISINGER, *supra* note 104, at 73-74; WHITE, CONSTITUTION, *supra* note 104, at 118-19.

110. Shepherd, *supra* note 104, at 1649-52, 1675-78; Schiller, *Reining In*, *supra* note 104, at 197.

lar wartime administrative action in the United States, and the emergent bureaucratic manifestations of anticommunism moved many New Dealers away from their reflexive defense of administrative autonomy.[111] At the same time, despite occasionally hyperbolic rhetoric, opponents of the New Deal made their peace with the inevitability of a sizable administrative state.[112] So long as its actions fit into familiar, legalistic models, conservative objections shifted from existential ones to technical ones.[113] Debates about administrative reforms and the reforms themselves became mechanisms for legitimating the administrative state rather than weapons to destroy it.[114]

Fragments of this narrative crop up in Bagley and Bamzai's articles. Both authors acknowledge that the APA was some sort of compromise, that its language was left intentionally vague to facilitate the compromise, and that partisans larded up its minimal legislative history with statements designed to promote advantageous interpretations of the Act.[115] Bamzai also taps into a version of the ideological/intellectual narrative, suggesting that "hugely influential" intellectual attacks on the traditional model of judicial review by John Dickinson and James Landis created an "intellectual climate" conducive to eliminating de novo review.[116] In particular, Bamzai argues that Dickinson advanced a Legal Realist argument about judicial review of administrative action: that there was no meaningful distinction between the categories of factual findings and legal findings.[117] With these categories broken down, it was but a small step to suggesting that the deferential standard that the appellate-review model applied to review of facts should be applied to review of law.

I must admit, it is with Bagley and Bamzai's use of these historical materials that my instinct to patrol the border kicks in. In particular, I worry that there is some historical cherry-picking going on.[118] Both authors acknowledge that a detailed understanding of the context of the Act's pas-

111. Schiller, *Reining In*, *supra* note 104, at 188-95; WHITE, CONSTITUTION, *supra* note 104, at 117.

112. GRISINGER, *supra* note 104, at 62, 73; WHITE, CONSTITUTION, *supra* note 104, at 127; ERNST, *infra* note 114, at 136-38.

113. GRISINGER, *supra* note 104, at 107-08; WHITE, CONSTITUTION, *supra* note 104, at 120-21, 126-27.

114. *See* Schiller, *Reining in*, *supra* note 104, at 197-201; HORWITZ, *supra* note 70, at 237–40, 250–52; DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014); *see generally* GRISINGER, *supra* note 104.

115. Bamzai, *supra* note 18, at 988 n.344; Bagley, *supra* note 17, at 1308.

116. *See* Bamzai, *supra* note 18, at 973, 975.

117. *Id.* at 971-76.

118. Ron Levin compellingly demonstrates how APA originalists are often selective in their readings of the Act's legislative history. Levin, *supra* note 58.

sage reveals that its legislative history is "particularly" and "demonstrably" unreliable, yet both authors use it.[119] Similarly, neither author acknowledges that the existing narrative fails to definitively answer the question that is central to both their arguments: whether the APA simply codified existing practices or not. Bamzai's discussion of Dickinson and Landis is also perplexing. In particular, I am not sure why he thinks either of these men were influential with respect to specific judicial decisions that implemented deferential review or legislative proposals that would have codified it or rejected it. What evidence is there that either man was responsible for creating a new standard of judicial review that the APA sought to discard in favor of the traditional model? Bamzai demonstrates no connection between Dickinson and New Deal judging or folks on either side of the debate over the APA. Similarly, Landis left the Roosevelt administration three years prior to the passage of Walter-Logan.[120] He wrote plenty of articles criticizing various pieces of administrative reform legislation and endorsing particular judicial doctrines,[121] but his direct connection to either activity is doubtful. This is not to say that academics and intellectuals were not involved in drafting the legislation or deciding cases regarding judicial review. There were. Walter Gellhorn, Ralph Fuchs, Lloyd Garrison, Henry Hart, and Harry Shulman, for example, were legal scholars who served on the Attorney General's Committee.[122] Similarly, administration intellectuals, like Felix Frankfurter and Robert Jackson, were much more likely to have influenced the legislative history of the Act,[123] and, of course, both men ended up on the bench, as did other New Dealers like Thurman Arnold and Jerome Frank. Yet we hear nothing about what these people thought about the proper relationship between courts and agencies. Perhaps what Bamzai means is that Dickinson and Landis' thinking about judicial review was representative of the intellectual and jurisprudential milieu that perme-

119. *See* Bamzai, *supra* note 18, at 988 n.44; Bagley, *supra* note 17, at 1307.

120. For a concise timeline of Landis' career see his front-page obituary in the *New York Times*. *James M. Landis Found Dead in Swimming Pool at His Home; Adviser to Three Presidents and Ex-Dean of Harvard Law School was 64*, N.Y. TIMES (July 31, 1964) https://www.nytimes.com/1964/07/31/archives/james-m-landis-found-dead-in-swimming-pool-at-his-home-adviser-to.html [https://perma.cc/SHS3-44YN].

121. Landis' most comprehensive discussion of his views about the relationship between courts and the administrative state was *The Administrative Process* (1938), particularly chapter IV, 123-55. For his scathing critique of the Water-Logan legislation, see Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1082 (1940).

122. *Letter of Submittal*, ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE iv (1941).

123. Jackson wrote Roosevelt's veto message for the Walter-Logan legislation. ERNST, *supra* note 114, at 136.

ated the New Deal. I am extremely sympathetic to this argument.[124] But this is a much weaker causal link between the intellectual thought of the time and the behavior of New Deal judges or participants in the debates over the APA than Bamzai asserts.

If their footnotes are any indication, these missteps with respect to the historical context of the APA stem from a failure to engage with more than a smattering of the writings about this context. Laura Kalman, Morton Horwitz, and Ted White have each written about the connections between realist thinking and the New Deal.[125] Edward Purcell's foundational *The Crisis of Democratic Theory* is essential for anyone, like Bamzai, who wishes to argue about the ebb and flow of the impact of Legal Realism.[126] Similarly, while there has not been as much writing about the politics of the APA specifically, there is more than just George Shepherd's *Fierce Compromise*[127] article—most obviously, Joanna Grisinger's *The Unwieldy American State*, but also Dan Ernst's, Ted White's, and my own writing on this subject.[128]

My point is, if you're going to engage with the historical literature, engage with all of it. A more complete look at the intellectual history of the 1930s and 1940s, and of changes in New Deal-era political culture suggests a waxing and waning of faith in the administrative state that aligns better with Bamzai's narrative than with Bagley's. On the other hand, it's unclear to me why Bamzai relies on the intellectual history of the New Deal-era to support his thesis, but does not examine similar writings from the first three decades of the century. These materials would reveal the deeply contested nature of the state, thereby undermining his assertion that a consensus around methods of statutory interpretation was unaffected by the emergence of the appellate-style review regime. Either intellectual history matters or it doesn't. Either it reflects (and perhaps influences) the behavior of legal actors, or it doesn't. Why should intellectual thought and political culture be a significant part of the narrative in the 1930s and 1940s, but not in the 1910s and 1920s?

124. Schiller, *Era of Deference*, *supra* note 95, at 413–20.

125. *See* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 13–22 (1996) [hereinafter KALMAN, STRANGE CAREER]; Horwitz, *supra* note 70, at 169–246; G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT, 65–88, 151–88 (1978) [hereinafter WHITE, PATTERNS].

126. *See* EDWARD PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973).

127. Shepherd, *supra* note 104, at 1560.

128. GRISINGER, *supra* note 104, at 14–108; ERNST, *supra* note 114, at 107–38; *see also* Schiller, *Era of Deference*, *supra* note 95; Schiller, *Reining in*, *supra* note 104; WHITE, CONSTITUTION, *supra* note 104, at 94–127.

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At the center of Kalman's description of border patrol is the idea that legal historians should be helpful colleagues, not condescending nitpickers.[129] It seems to me that there are two ways they can be particularly helpful. They can identify gaps in a historical narrative that, if filled, might generate a more or less definitive answer to some particular question about the meaning of the APA. They can also be sure that the limitations of their discipline are clear for all to see. Understanding these limitations is crucial to deploying historical arguments honestly. Accordingly, before suggesting specific historical inquiries that might aid the process of generating a history of the APA that addresses the needs of lawyers and legal academics, it is important to layout the limitations of any such inquiry.

The first limitation is the specificity problem. The historical narratives surrounding the APA exist at many levels of generality. There is the broad historical framework in which the APA sits: the end of the New Deal, the emergence of the cabined liberalism of post-war America, the decline of progressive distrust of courts, and the increase in progressive distrust of the administrative state. Most legal historians would feel comfortable placing the APA within these different narratives. Unfortunately, lawyers usually need answers to questions more specific than "Was the APA representative of postwar liberalism's attitude about courts?" They need to know whether there was a presumption of reviewability, or whether the Act required de novo review of agency interpretation of statutes. These types of questions are harder to answer definitively. Often times, the data are simply not there. The historical record was not created to help us solve contemporary problems. For example, modern debates about judicial review focus on the allocation of authority to decide questions of law. In the 1930s and 1940s, however, policymakers were much more concerned with judicial review of agency factual findings.[130] There is much more material concerning this issue in the debates over Walter-Logan, the Attorney General's Committee's Report and the sketchy legislative history of the APA than there is about judicial review of agency legal decisions. It may be that there are certain, specific historical questions that are simply unanswerable because the concerns of the past, and the historical record they generated, are dif-

129. Kalman, *Border Patrol*, *supra* note 15, at 124 ("Historians should pay less attention to policing our disciplinary borders and more to figuring out how we can cross them to open a dialogue with lawyers, judges, and law professors.").

130. *See* GRISINGER, *supra* note 104, at 86–91; *see also* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONGRESS 1944-46, at 39–40, 214, 278–80 (1946) (discussing judicial review of agency fact finding).

ferent from the contemporary concerns that have stimulated the modern inquiry.

The second limitation on the ability of historical inquiries to help lawyers is the incoherence problem. Useful legislative histories tell us that the people who wrote a piece of legislation and voted in favor of it intended a particular thing. Or they tell us that the background legal rule against which a statute was drafted had a precise, accepted meaning. Yet frequently the historical record does not reveal such coherence. Instead, it reveals inconsistency or chaos. Judges interpreted the same rule differently. Legislative allies actually intended different things. Indeed, as Emerson reminds us, even individuals are not always consistent in their own views on a particular subject.[131] Accordingly, some of time, there may not be enough evidence for historians to give a definitive answer regarding legislative intent. Other times, there may be enough evidence to give a definitive answer with respect to legislative intent, but it turns out that intent was incoherent. Both of these outcomes are sufficient for the historian. Neither is of much use to the APA originalist.

With those caveats, and the concomitant lowered expectations, contemporary attempts to discover specific statutory meaning within the APA suggest a couple of avenues of research that might be useful to the originalist project. First, we need to know a lot more about how the appellate-review model worked prior to the New Deal. Many aspects of the legal history of the Progressive Era have been studied in great detail. We know a lot about state-building, constitutional law, and the jurisprudential struggles between formalist and antiformalist legal thought.[132] But we do not know enough about the actual practice of administrative law and its doctrinal contours. Merrill, Ernst, and, nearly forty years ago, Stephen Skowronek started us down this path.[133] The landscape is rather daunting, with no unifying statute, and only the first inklings of even an idea of administrative law as something separate from siloed regulatory regimes. However, if

131. RALPH WALDO EMERSON, SELF-RELIANCE 27 (Thames & Hudson 2021) (1841) ("Foolish consistency is the hobgoblin of little minds.").

132. For state-building see the works by Skowronek and Keller, *supra* note 97. For a nice summary of the robust literature on the Constitution, the Supreme Court and Progressive-Era regulations, see WHITE, LAW IN AMERICAN HISTORY, VOLUME II, 379-423 (2016), and OWEN FISS, THE TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, 101-222 (2006). For formalism v. antiformalist thought in this period, see HORWITZ, TRANSFORMATION II, *supra* note 85, at 109-212; WHITE, PATTERNS, *supra* note 125, at 65-88; WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937 (1998).

133. Merrill, *supra* note 60, at 940; ERNST, *supra* note 114, at 9–50; SKOWRONEK, *supra* note 97, at 248–84.

we want to find the original intent of the APA, we need to understand the chaotic world of administrative law that it was designed to corral.

Second, to truly contextualize the APA, it would be helpful to dig deeper into actual administrative practice during the New Deal. There is no lack of scholarship about the Roosevelt Administration's massive expansion of the administrative state.[134] Similarly, plenty of scholars have examined New Deal administrative law, at least with respect to the Supreme Court, and Dan Ernst has examined the practice of New Deal agency lawyers in great detail.[135] However, assessing Bagley and Bamzai's articles suggests that we do not know enough about the granular practice of administrative law, either in the lower courts, or in the agencies themselves. The staff of the Attorney General's Committee studied twenty-seven federal agencies – interviewing agency actors, reviewing internal agency documents, and observing the day-to-day functioning of agencies. This fieldwork resulted in more than two dozen reports – veritable ethnographies of the New Deal administrative state.[136] These reports are an underused source, perhaps because they are overwhelming in their detail and length.[137] Nonetheless, their potential for revealing the base-line from which the APA did or did not depart is enormous.

Finally, the existing historical literature on the APA reveals a dispute which, if resolved, would be helpful to APA originalists. Shepherd's *Fierce Compromise*, the go-to source for the APA's legislative history, argues, as its title suggests, that the Act reflected a compromise between

134. It's hard to know where to start with histories of the New Deal. My favorite one volume history is Anthony Badger's *The New Deal: The Depression Years, 1933-1940* (1989). It is particularly useful for examining the growth of the administrative state (and the welfare state) because Badger divides up his examination by subject matter, not chronologically. David Kennedy's *Freedom from Fear: The American People in Depression and War, 1929-1945* (1999) is the standard survey, and deservedly so.

135. WHITE, CONSTITUTION, *supra* note 104, at 94-127; Schiller, *Era of Deference*, *supra* note 95, at 429–39; Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L. J. 1565 (2011); Daniel R. Ernst, *Of Sheepdogs and Ventriloquists: Government Lawyers in Two New Deal Agencies*, 69 BUFF. L. REV. 43-54 (2021); Daniel R. Ernst, *The Shallow State: The Federal Communications Commission and the New Deal*, 4 U. PA. J.L. & PUB. AFF. 403-458 (2019); Daniel R. Ernst, *Mr. Try-It Goes to Washington: Law and Policy at the Agricultural Adjustment Administration*, 87 FORDHAM L. REV. 1795–1815 (2019); Daniel R. Ernst, *Morgan and the New Dealers*, 20 J. POL'Y HIST. 447–481 (2008).

136. *See generally* Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379 (2008). As Dan Ernst pointed out to me, the files of the research staff and the transcripts of the Committee's hearings are an ever richer source for people interested in understanding the functioning of New Deal agencies. These can be found at the National Archives, Department of Justice Records, Record Group 60, entries 376-388. *See also* Reed Abrahamson, *The Ideal of Administrative Justice: Reforming Deportation at the Department of Labor, 1938-1940*, 29 GEO. IMMIGR. L. J. 321–49 (2015).

137. A notable exception is Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021).

conservative political forces that wished to constrain the administrative state, and liberals who wished to ensure that it retained as much autonomy as possible.[138] On the other hand, Grisinger suggests that the Act simply codified existing practices.[139] I suppose it is possible that both views are correct. Perhaps the same conditions that generated the political compromise had altered existing administrative practice over the course of the 1940s. It seems more likely, however, that one view is more accurate than the other. Resolving this historiographical dispute would be a crucial step in recapturing the original meaning of the APA. Of course, it may be that resolving this dispute, particularly at the level of specificity that APA originalists desire, is impossible. Nonetheless, the reflexive acceptance of Shepherd's compromise narrative that pervades APA originalism deserves to be interrogated.

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I must admit that this encounter with APA originalism amplified my preexisting preference for purposive approaches to the APA. For most statutes, particularly as their passage recedes into time, the historical record is more suited to a purposive approach than an originalist one. Historical inquiry is more likely to reveal the broader goals of statute than what a specific phrase means. This is particularly true with a statute, like the APA, that is intentionally vague and has a skeletal legislative history. Accordingly, I'm unsure that the work of historians is ever going to be that helpful to APA originalists who want to know the intent of the drafters of a specific subsection of the statute. Historians, I think, are disciplinarily inclined to search for and discover change, contingency, uncertainty, and complexity in the historical record. These are the very things that drew so many of us to the study of history. Yet they are precisely the things that undermine the originalist project.[140]

That said, I am not a nihilist. It is possible that information useful to APA originalists will emerge from serious historical research into Progressive-era administrative law, New Deal administrative practice, and the question of the APA's commitment to continuity or compromise. More importantly, research in all three areas will yield interesting narratives, and help enrich our understanding of contours of the administrative state in

138. Shapiro, *supra*, note 1 at 452-53.

139. GRISINGER, *supra* note 104, at 61, 76-77. White describes several other scholars who take this view. *See* WHITE, CONSTITUTION, *supra* note 104, at 121-25.

140. KALMAN, STRANGE CAREER, *supra* note 125, at 180 ("historians . . . favor context, change, and explanation" while the "authors of lawyers' legal history value text, continuity, and prescription.").

twentieth-century America. If the emergence of APA originalism inspires that sort of work, then it has done the historical profession an enormous favor.