PROGRESSIVE TEXTUALISM IN ADMINISTRATIVE LAW

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INTRODUCTION

Nicholas Bagley's article *The Procedure Fetish* is destined to be a classic.[1] In it, Bagley systematically dismantles administrative law's obsession with procedure. He decimates the arguments that procedure is necessary to legitimize the administrative state and avoid agency capture. He nullifies the contention that administrative law is neutral by showing how proceduralism inhibits regulation and "favors a libertarian agenda over a progressive one."[2] Bagley urges progressives to abandon "gauzy claims about legitimacy and accountability" and approach procedure with skepticism.[3]

The Procedure Fetish addresses the normative question of what administrative law ought to require. Bagley writes about how progressives should solve the "optimization problem: [w]hich set of procedures will best balance the competing goals of efficiency, the protection of legal rights, and public accountability."[4] Bagley does not, however, provide an answer to the question of where progressives should find currently binding administrative law. The answer is simple: the Administrative Procedure Act (APA). Progressive textualism provides the missing piece for Bagley's analysis.

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1. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019); *see also* Jeffrey Pojanowski, *How to Learn to Stop Worrying and Love the Administrative State*, JOTWELL (Aug. 16, 2019), https://adlaw.jotwell.com/how-to-learn-to-stop-worrying-and-love-the-administrative-state/ [https://perma.cc/7PVG-CYQ2].

2. Bagley, *supra* note 1, at 364.

3. *Id.* at 369; *see also* Kathryn E. Kovacs, *Getting Agencies Back into the Game*, REG. REV. (Oct. 29, 2018), https://www.theregreview.org/2018/10/29/kovacs-getting-agencies-game/ [https://perma.cc/5KM4-UDAV] ("The progressive regulatory reform agenda also should focus on alleviating the burdens that agencies confront when making rules and consider how that objective should be balanced against other progressive rulemaking goals.").

4. Bagley, *supra* note 1, at 352.

I. PROGRESSIVE TEXTUALISM

Textualism in constitutional interpretation was long the province of conservatives.[5] Now many progressives have embraced textualism.[6] Progressive textualists "seek[] to beat conservatives at their own game by insisting that arguments about the text, history, and structure of the Constitution often lead to liberal rather than conservative results."[7] As Katie Eyer observed recently, "the textualism revolution has been so successful as to lead even prominent progressives to proclaim that 'we're all textualists now.' "[8]

James Ryan's article *Laying Claim to the Constitution: The Promise of New Textualism*[9] synthesized the work of Akhil Reed Amar, Jack M. Balkin, and other progressive scholars who embrace the premise that constitutional interpretation must start with a determination of what the text of the Constitution means.[10] To begin, the Founders' original expectations "might shed some light on the meaning of the text," but "the meaning of the language must control over the expectations of the framers."[11] Unearthing the mean-

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5. Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 901 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) ("[T]extualism has become a conservative brand.").

6. *See* Edward J. Sullivan & Nicholas Cropp, *Making It Up—"Original Intent" and Federal Takings Jurisprudence*, 35 URB. LAW. 203, 280 (2003) (" '[P]rogressive textualism' . . . starts with the text and goes from there. It does not endorse abandoning the text in favor of liberal or conservative politics, nor does it subject the text to impossible thought processes requiring one to resurrect the ghosts of those long dead to obtain answers, nor does it try to glean historical truths about the meaning of words in a vacuum without regard to other sources.").

7. Jeffrey Rosen, *How New Is the New Textualism?*, 25 YALE J.L. & HUMAN. 43, 44 (2013); *see also* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1527 (2011) ("[P]rogressive academics are engaging conservatives on their own turf and showing how numerous constitutional provisions are more in line with contemporary progressive values than conservative ones.").

8. Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 85 (2019) (quoting Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793, 793 n.10 (2018) (quoting Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, HARV. L. TODAY (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation [https://perma.cc/4PUQ-JZ57])). Of course, not all progressives have embraced textualism. *See, e.g.*, Rosen, *supra* note 7, at 48.

9. Ryan, *supra* note 7, at 1524. I am less concerned with whether "textualist" is the proper label, *see* Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 625–26, 626 n.3 (2012) (identifying Ryan and others as "originalist"), than whether Ryan and the other scholars he reflects present a methodology that could be helpful in administrative law.

10. Ryan, *supra* note 7. Ryan's article provided the foundation for the litigation strategy of the Constitutional Accountability Center founded by Douglas T. Kendall, which has enjoyed many victories in the courts. *See* Rosen, *supra* note 7, at 44–46; CONST. ACCOUNTABILITY CTR., https://www.theusconstitution.org/ [https://perma.cc/WM5F-NN8T].

11. Ryan, *supra* note 7, at 1540, 1546; *see also* Eyer, *supra* note 8, at 89 ("[T]he practice of ascertaining the meaning of words at the time of their enactment [is] a well-established statutory interpretation approach.").

ing of the text requires a deeper inquiry.[12] Ryan endorses Amar's "holistic" approach, which relies not only on text and structure, but also on history—and not just enactment history, but also "the broader historical context surrounding the enactment."[13] In addition, later amendments may "shed light on" or even modify the meaning of the original text.[14]

While the meaning of the text is the starting point for a progressive textual analysis,[15] even the most exhaustive review of the text's structure and history will not yield a definitive answer to every question.[16] Nonetheless, text might "narrow the range of possible outcomes."[17] Moreover, the text itself "provides guidance regarding the level of generality at which to interpret that language."[18] Text that is precise should be interpreted precisely; text that is abstract should be interpreted more generally.[19]

Progressive textualists recognize that the Constitution "is not frozen in time."[20] Additionally, as Katie Eyer explained in the statutory context, "the meaning of the words . . . is fixed," but the application of the text evolves.[21] Underlying the text are general principles, the application of which may change.[22] Thus, a progressive textual analysis "requires translating the text to apply to the present context."[23] History is critical insofar as it elucidates the meaning of the text[24] and "shed[s] important light on the purposes and principles underlying the more general and abstract phrases in the documents."[25]

This is the key to progressive textualism. It's not just about proving that individual provisions yield progressive results. Rather, progressive textualism recognizes that the entire document is progressive in that it is amenable

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12. Ryan, *supra* note 7, at 1540.

13. *Id.* at 1548.

14. *Id.* at 1548–49; *see also id.* at 1568.

15. Peter Brooks, Essay, *Law and Humanities: Two Attempts*, 93 B.U. L. REV. 1437, 1450 (2013) ("What Ryan elsewhere appears to be saying is that progressives as well as conservatives need to argue from constitutional text . . . .").

16. Ryan, *supra* note 7, at 1544–45; *see also* Ethan J. Ranis, Note, *Loose Constraints: The Bare Minimum for Solum's Originalism*, 93 TEX. L. REV. 765, 782 (2015) ("Ryan's proposed lexical order lends the text greater weight but does not give it full control unless it is completely specific and determinative.").

17. Ryan, *supra* note 7, at 1553; *see also* Brianne J. Gorod, *Originalism and Historical Practice in Separation-of-Powers Cases*, 66 SYRACUSE L. REV. 41, 52–53 (2016) ("Under [Ryan's] view, text and history is the place to start an inquiry into constitutional meaning, but that does not mean that text and history alone can answer every question. Indeed, text and history often do more to reject certain possible answers than to provide one definitive one.").

18. Ryan, *supra* note 7, at 1546; *see also id.* at 1554.

19. *Id.* at 1544.

20. *Id.* at 1539.

21. Eyer, *supra* note 8, at 90; *see also* Ryan, *supra* note 7, at 1539.

22. Ryan, *supra* note 7, at 1539, 1546, 1554.

23. *Id.* at 1542.

24. *Id.* at 1548.

25. *Id.* at 1554.

to change and has in fact progressed throughout its history.[26] The meaning of the text and its core principles do not change, but their application does.[27] Progressive textualists reject the idea that the drafters' expectations fix the meaning of the text for all time. Rather, a progressive interpretation studies the larger historical context and reads the text in light of current circumstances.[28] "To show fidelity to the Constitution . . . requires translating the meaning of the text to apply to the present context."[29]

Ultimately, Ryan suggests that courts and scholars should follow the model of Amar, Balkin, and Seigel by determining the text's meaning "as precisely as possible" before applying the text to the circumstances at issue.[30] They should "linger a little longer than they do now over the text and history."[31] He calls on scholars to do the yeoman's work of "elucidat[ing] the meaning of important constitutional provisions that remain shrouded in mystery or obscured by current doctrine."[32] An ounce of history, he says, is worth a pound of theory.[33]

Needless to say, academics continue to debate constitutional interpretive methodology. Nonetheless, variants of textual approaches have become nearly universal in constitutional law.[34] As Sara Solow and Barry Friedman observed, "we now see some convergence between the Left's and the Right's versions of constitutional interpretive theory, albeit one obscured by their rhetoric (and differing outcomes, of course)."[35]

II. INTERPRETING THE APA

Progressives should take a parallel approach in administrative law. Even if Kevin Stack is generally correct that democratic values and the rule of law "suggest that constitutional and statutory interpretation diverge,"[36] that is not true of the APA. The APA is not a typical statute. It arose from a long period of public deliberation and has become deeply entrenched in U.S. law. It was written as a constitution for the Fourth Branch, and it has come to

26. *Id.* at 1529, 1538–39, 1549.

27. *Id.* at 1539.

28. *Id.* at 1540.

29. *Id.* at 1542.

30. *Id.* at 1560–61.

31. *Id.* at 1561.

32. *Id.* at 1570.

33. *Id.* at 1555 ("[A]n ounce of history is not always worth a pound of theory, but that is a pretty typical exchange rate.").

34. *Id.* at 1552; *see also* Simon Lazarus, *Hertz or Avis? Progressives' Quest to Reclaim the Constitution and the Courts*, 72 OHIO ST. L.J. 1201, 1205 (2011) ("[T]he long-running academic debate about interpretive methodology appears to have little if any substance left to it.").

35. Sara Aronchick Solow & Barry Friedman, *How to Talk About the Constitution*, 25 YALE J.L. & HUMAN. 69, 73 (2013).

36. Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 COLO. L. REV. 1, 5 (2004).

function as one.[37] For such superstatutes, a more constitutional style of interpretation is appropriate.[38]

For too long, administrative law scholars and judges have ignored the APA.[39] Courts continue to give certain agencies superdeference, even though the text and history of the APA show that Congress deliberately chose to subject all agencies to the same standard of review.[40] Courts continue to apply common law ripeness doctrine, even though the APA replaced it with the final agency action requirement.[41] Courts continue to presume that courts may review agency action, even though the APA "establishes a default rule favoring [judicial] review [only] where no statute precludes it."[42] Courts continue to hold that the waiver of sovereign immunity in the APA is not constrained by the other limitations in the APA, even though the text and history show that to be incorrect.[43] In informal rulemaking, courts continue to require agencies to produce a record, provide notice of the information considered in drafting the proposed rule, disclose ex parte communications, and write an extensive explanation for the final rule, even though those requirements contradict the text and history of the APA.[44]

The acceptance of doctrines that contradict the APA flows from the view that the APA codified the common law and left the courts free to continue to develop administrative law in a common law fashion.[45] The Attorney General's Manual of 1947 reflected this view, calling the APA a "restatement."[46] Leading scholars of the time adopted this view as well.[47]

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37. *See infra* text accompanying notes 68–71.

38. Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1222–23, 1250–54 (2015).

39. *See* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 808–09 (2018) ("[L]ike that of the Constitution, the text and history of the APA often do not play a role in litigated cases."); Kovacs, *supra* note 38, at 1213; Richard J. Pierce, Jr., *Waiting for* Vermont Yankee *III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 906, 908 (2007).

40. Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583 (2011) [hereinafter Kovacs, *Leveling the Deference Playing Field*]; Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 697 (2010).

41. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 177 (1998).

42. Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1305 (2014).

43. Kathryn E. Kovacs, *Scalia's Bargain*, 77 OHIO ST. L.J. 1155, 1157–58 (2016).

44. Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 534–45 (2018).

45. Duffy, *supra* note 41, at 119, 131.

46. TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93 (1947). The Supreme Court has deferred to the AG's Manual. *See* Kovacs, *supra* note 44, at 531.

47. Duffy, *supra* note 41, at 134–38.

That view, however, is not entirely correct.[48] Congress would not have spent seventeen years debating administrative reform and the attorney general would not have needed to publish a manual on the APA if the statute were merely a restatement of the common law.[49] The attorney general's characterization of the APA "is best viewed as damage control."[50] The Truman Administration "would have preferred less control of agencies" and thus interpreted the new law as a restatement that "impos[ed] limited constraints on agencies."[51] Conservatives would have preferred a stricter bill and interpreted the new law to favor their position.[52] The truth is that some provisions of the APA codified the common law; others were new.[53] Some provisions are precise; others are ambiguous.[54] The key point here is that the text provides far more answers than scholars typically realize.

It is time for progressive administrative law scholars to claim the APA as their own. Conservatives began the push for administrative reform, and many provisions of the law reflect conservative concerns.[55] The APA, however, also "reflects the Progressives' understanding that rigid legal procedures slowed government action and were unnecessary."[56] The APA's "most important reform"[57]—notice-and-comment rulemaking—was a "Progressive innovation."[58] Blake Emerson suggests that "we should give th[e] original [progressive] understanding of the administrative state a second look."[59] So too should we give the original progressive understanding of the APA a second look.

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48. Bernick, *supra* note 39, at 813 ("[T]here is much in the APA that was genuinely new in 1946."); Kovacs, *supra* note 38, at 1228 ("[M]any provisions of the APA were new.").

49. Kovacs, *supra* note 44, at 546; Kovacs, *supra* note 38, at 1228.

50. Duffy, *supra* note 41, at 133.

51. Kovacs, *supra* note 44, at 531.

52. *See id.*

53. Kovacs, *supra* note 38, at 1227–28.

54. Kathryn E. Kovacs, *Pixelating Administrative Common Law in* Perez v. Mortgage Bankers Association, 125 YALE L.J.F. 31, 34–35 (2015).

55. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1649 (1996).

56. Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 474 (2012).

57. George B. Shepherd, *supra* note 55, at 1583, 1635; *see also* Symposium, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 520 (1986).

58. Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2071 (2018). Section 4 of the APA followed the recommendation of the conservative minority on the Attorney General's Committee. Kovacs, *supra* note 38, at 1232–33. Nonetheless, it originated in progressive thinking. Emerson, *supra* at 2081–82.

59. Emerson, *supra* note 58, at 2073.

A. *Method*

A progressive textualist approach to interpreting the APA begins with the text. Indeed, it is particularly important to pay close attention to the text of the APA because it was such a "monumental compromise."[60] As John Manning explained, failing to focus on a statute's "implemental detail" risks undermining complex legislative bargains.[61] The enacting Congress's expectations may illuminate the meaning of the text, but the language itself must control.[62]

In addition to analyzing statutory structure, a complete understanding of the text requires studying "the full context and history" of each provision.[63] Jerry Mashaw warned that a failure to understand the history of administrative law leads to misunderstanding the law now.[64]

Lastly, a progressive textualist approach to interpreting the APA requires considering "ongoing deliberation" about the Act, including amendments that have been enacted and those that were defeated following significant debate.[65] In short, progressive scholars should take the APA's text

60. Kovacs, *supra* note 54, at 33.

61. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1304 (2010).

62. Thus, regardless of whether Congress in 1946 expected that the APA would cover the president, the plain language of the Act does. *See* 5 U.S.C. § 551(1) (2018); Kathryn E. Kovacs, *A Day in the Life of an Administrative Law Nerd*, YALE J. ON REG.: NOTICE & COMMENT (Oct. 29, 2018), https://yalejreg.com/nc/a-day-in-the-life-of-an-administrative-law-nerd-by-kathryn-e-kovacs/ [https://perma.cc/LR2Z-BSPM].

63. Kovacs, *supra* note 54, at 35. Evan Bernick agrees that "[a]scertaining communicative content requires attention to the context in which a given text took shape," Bernick, *supra* note 39, at 841, but he cautions against "drawing upon the APA's pre- and post-enactment history," *id.* at 845. *But see* Evan Bernick, *The Regulatory State and Revolution: How (Fear of) Communism Has Shaped Administrative Law*, YALE J. ON REG.: NOTICE & COMMENT (Aug. 11, 2019), http://yalejreg.com/nc/the-regulatory-state-and-revolution-how-fear-of-communism-has-shaped-administra-tive-law-by-evan-bernick/ [https://perma.cc/J6SP-NR4Z] (exploring how anti-communism shaped the APA). Instead, Bernick posits that interpreting the APA "could entail an effort to reconstruct the actual understanding of the text that was held in 1946 by those to whom it was initially addressed." Bernick, *supra* note 39, at 843. As Katie Eyer showed, however, the original public meaning approach "has essentially no pedigree in the statutory interpretation case law," "violates core principles of textualism," and raises rule-of-law concerns. *See* Eyer, *supra* note 8, at 71, 87, 102. Moreover, such an approach is particularly awkward as applied to the APA. The APA was addressed to federal agencies. Their view in 1946 is reflected in the Attorney General's Manual. But that document is not a fair representation of the Act's text or the conservative minority's interpretation of the text. *See* Shepherd, *supra* note 55, at 1683 ("No reason exists to give more weight to the *Attorney General's Manual* than to conservatives' contrasting interpretations.").

64. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 286 (2012).

65. Kovacs, *supra* note 38, at 1251; Kovacs, *supra* note 54, at 35. Evan Bernick's originalist approach to the APA, in contrast, would fix the meaning of the text at the time of enactment. Bernick, *supra* note 39, at 834.

as the starting point for analysis and delve deeply into the history and context to discern its meaning before applying it to present circumstances.[66]

This textual approach is preferable for many reasons. First, the APA is the law.[67] It is not just any law, however. Numerous scholars have recognized the APA's quasi-constitutional nature.[68] William Eskridge and John Ferejohn theorized that some statutes "successfully penetrate public normative and institutional culture in a deep way"[69] and become "resistant to change."[70] The APA is such a statute; it has become deeply entrenched and achieved superstatute status.[71] At this point, diluting the APA's core precepts seems out of the question.

Second, a progressive textual approach in administrative law respects the outcome of one of the most remarkable episodes of deliberation in Congress in the twentieth century. The APA developed through an unusual process of public deliberation spanning seventeen years, "with numerous, voluvoluminous reports, hundreds of pages of hearing transcripts, multiple drafts, and hours and hours of debate."[72] A textual approach effectuates the compromise embodied in the APA's text. As the Supreme Court said shortly after the APA's enactment:

> The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon

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66. Jeffrey Pojanowski's *Neoclassical Administrative Law*, 133 HARV. L. REV. (forthcoming 2019) (on file with the *Michigan Law Review*), resembles this approach in some respects. He too suggests that "courts should [be] more attentive and faithful" to the APA in "recognition of the hierarchy of statutory law over judicial doctrine." *Id.* (manuscript at 5); *see also id.* (manuscript at 35). Like a progressive textualist, a neoclassicist would begin "by seeking the best reading of the APA or the agency's governing statute, not asking whether common law . . . can be reconciled with a colorable reading of such legislation." *Id.* (manuscript at 44). Like a progressive textualist, a neoclassicist would defer to Congress's statutory solutions to polycentric problems. *Id.* (manuscript at 45). Pojanowski, however, is decidedly originalist. *See id.* (manuscript at 34–35, 44). Presumably, Pojanowski would not endorse an inquiry into broad historical context or ongoing deliberation to discern the APA's meaning, apply the text to take account of changed circumstances, or allow the text to override "the original understanding" of the Act. *See id.* (manuscript at 25); *see also* Ryan, *supra* note 7, at 1552–53 (distinguishing progressive textualism from originalism).

67. *See* Ryan, *supra* note 7, at 1539 ("[T]he ultimate justification for following the original meaning of the Constitution is that the enacted text is a legal document. It is the law and universally recognized as such.").

68. *E.g.*, Jerry L. Mashaw, Foreword, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 980 (2010); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 253 (1986); Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363.

69. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001).

70. WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 8 (2010); *see also id.* at 13, 27, 28, 64.

71. *See* Kovacs, *supra* note 38, at 1223.

72. Kovacs, *supra* note 44, at 546.

> which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.[73]

A textual approach recognizes that the vision of the Greatest Generation's Congress[74] should be given a chance. As Eskrijohn established, courts should take the "deliberative process seriously, as having significant normative force."[75] Furthermore, even if we accept the separation-of-powers and electoral-accountability concerns with federal common law generally, for courts to devalue the extraordinary deliberation reflected in the APA's text exacerbates those concerns.[76]

Third, a progressive textual approach acknowledges that courts suffer from a "deliberation deficiency" because their consideration is "virtually unmoored from public deliberation."[77] Moreover, courts are ill-equipped to weigh the pros and cons of administrative requirements or to foresee the consequences of their doctrines.[78] They hear individual cases involving individual agencies and thus do not have the opportunity to consider "varied contexts and approaches to solving problems."[79] As Nicholas Bagley demonstrated, when Congress has balanced "a host of incommensurate values" in a statute, "[t]he courts have no constitutional authority to revise that judgment and no epistemic basis for thinking they can make a better one."[80]

Finally, progressive textualism in administrative law starts from a universal premise: that the text of the APA is authoritative.[81] Because everyone recognizes the authority of the text, this approach provides a common base-

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73. Wong Yang Sung v. McGrath, 339 U.S. 33, 40–41 (1950).

74. TOM BROKAW, THE GREATEST GENERATION XXXVIII (2004 ed.) (dubbing the people who came of age during World War II "the greatest generation any society has ever produced").

75. ESKRIDGE & FEREJOHN, *supra* note 70, at 435.

76. Kovacs, *supra* note 44, at 545–46; Kovacs, *supra* note 38, at 1255–56.

77. Kovacs, *supra* note 38, at 1209, 1257; *cf.* Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1356 (2012) ("Judicial development of administrative law is harder to square with the principle of democratic government if the fact that the courts play this lawmaking role is shielded from public acknowledgement and scrutiny.").

78. Bagley, *supra* note 42, at 1322, 1330; *cf.* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 900 (1936) ("Situations which demand . . . immediate action of some sort, will usually involve ignorance of certain aspects of the situation and will bring about unexpected results.").

79. Kovacs, *supra* note 44, at 546.

80. Bagley, *supra* note 42, at 1330.

81. *Cf.* Ryan, *supra* note 7, at 1539.

line for discussion, "a common language for liberals and conservatives to debate . . . issues in common terms."[82]

This approach will not necessarily lead to conservative outcomes. Although conservatives instigated administrative reform,[83] the final text, like the Constitution, is "hardly conservative."[84] The Walter-Logan bill, which President Roosevelt vetoed in 1940,[85] would have imposed a panoply of strict, conservative requirements on federal agencies.[86] By the time President Truman signed the APA in 1946, it had been pared down to a basic framework that was designed to establish a uniform baseline for agency decisionmaking and judicial review so that agencies would remain free to fulfill their statutory mandates.[87] To paraphrase Jeffrey Rosen, progressives should frame their arguments about administrative law in APA terms and use the APA "as a sword rather than a shield."[88]

Applying a progressive textual approach in administrative law could undercut longstanding common law rules and thus yield potentially disruptive consequences. For example, Aaron Nielson showed that the rule of *Florida East Coast Railway*—that formal rulemaking is required only when the substantive statute requires a hearing "on the record"[89]—may be inconsistent with the text and history of the APA.[90] Overturning *Florida East Coast Railway* would require more formal rulemaking, which certainly would be a big change. A change of such magnitude might elicit a response from Congress. One of the benefits of a progressive textual approach, then, is that it may trigger more deliberation in Congress.

Congress's ability to respond to Supreme Court decisions provides the foundation for the "strong rule of stare decisis in matters of statutory interpretation."[91] Stare decisis recently inspired the Court in *Kisor v. Wilkie* not

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82. *See* Rosen, *supra* note 7, at 44.

83. Kovacs, *supra* note 44, at 520–21.

84. *See* Ryan, *supra* note 7, at 1547 (discussing Akhil Reed Amar, *Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, Too)*, SLATE (Sept. 21, 2005, 12:36 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/09/rethinking_originalism.html [https://perma.cc/LA2L-UVV2]).

85. Franklin Delano Roosevelt, The President Vetoes the Bill Regulating Administrative Agencies, Note to the House of Representatives, (Dec. 18, 1940), *in* 1940 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 616 (Samuel I. Rosenman ed., 1941); *see also* Shepherd, *supra* note 55, at 1625–28.

86. H.R. 6324, 76th Cong. (1939); Shepherd, *supra* note 55, at 1593–94, 1598–1625.

87. *See generally* Shepherd, *supra* note 55, at 1649–62.

88. *See* Rosen, *supra* note 7, at 53 (describing how progressive textualists should use the text of the Constitution).

89. United States v. Fla. E. Coast Ry., 410 U.S. 224, 236 (1973).

90. Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 242–53 (2014).

91. Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 587–88 (2018); *see also* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 274 (2014); Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1136–43 (2019).

to overrule its precedents requiring courts to defer to agency interpretations of their own regulations.[92] The Court there was particularly concerned about overturning a rule that "pervades the whole corpus of administrative law."[93]

Stare decisis, however, will not always prevent change. First, its rationale does not extend to the courts of appeals, where much administrative common law originates.[94] Second, it may not apply to more abstract judicial rules.[95] Third, it does not prevent the Supreme Court from overturning rules that are "unworkable" or "doctrinal dinosaur[s]."[96] In deciding whether to adhere to precedent, the Court considers " 'the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision."[97] Even if stare decisis prevents the Supreme Court from overturning precedents that conflict with the APA, such rulings may inspire Congress to act.[98]

Of course, Congress has not meaningfully amended the APA in decades.[99] Congress's inability to keep the law up to date leads some to celebrate the courts' common law creativity in administrative law.[100] As I argued previously, however, Congress's dysfunction "does not justify abandoning the constitutional design and allowing courts to enable that dysfunction."[101] The federal courts' willingness to reform the APA facilitates Congress's inaction.[102] Instead, the courts should follow Eskrijohn's advice and use their decisions to "jump-start the political process by forcing a fundamental normative discussion."[103]

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92. 139 S. Ct. 2400, 2422 (2019).

93. *Kisor*, 139 S. Ct. at 2422.

94. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 344–47 (2005).

95. *Kisor*, 139 S. Ct. at 2444 (Gorsuch, J., concurring) (arguing that stare decisis does not apply to an "abstract default rule of interpretive methodology"); *see also* Kozel, *supra* note 91, at 1127.

96. *Kisor*, 139 S. Ct. at 2423 (quoting Patterson v. McClean Credit Union, 491 U.S. 164 (1989), and Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401 (2015)); *see also* Payne v. Tennessee, 501 U.S. 808, 827 (1991).

97. Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019) (quoting Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018)) (overturning precedent requiring takings plaintiffs to exhaust judicial remedies in state court before filing suit in federal court).

98. Congress overturned *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), within six months. Kovacs, *supra* note 38, at 1258; *cf.* ESKRIDGE & FEREJOHN, *supra* note 70, at 289, 436 (advocating "deliberation-inducing" judicial review).

99. Christopher J. Walker, Essay, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 635 (2017).

100. *See, e.g.*, Metzger, *supra* note 77, at 1322, 1329, 1331.

101. Kovacs, *supra* note 38, at 1259.

102. *Id.* at 1258–59.

103. ESKRIDGE & FEREJOHN, *supra* note 70, at 56.

B. *Application*

James Ryan posits that "[s]cholarly work that establishes the most plausible reading of a constitutional provision will likely exert more influence, both within courts and outside of them, than will sophisticated refinements regarding the details of a constitutional theory."[104] If that claim is correct, and if it applies to administrative law, the following few examples of textualism in administrative law should be quite influential. Regardless of whether the authors of these pieces would characterize themselves as "progressive," their work exemplifies the approach that I urge progressives to adopt.[105]

John Duffy's now-classic *Administrative Common Law in Judicial Review* explored the history of administrative common law in depth, explaining why it survived, and why it should not have survived, the APA's passage.[106] He employed a holistic, textual approach to explain why exhaustion doctrine succumbed to the text of the APA in *Darby v. Cisneros*[107] and to prove that "ripeness doctrine has no place in the APA."[108] He analyzed *Vermont Yankee* from a textual perspective,[109] concluding that "judicial review of agency procedural discretion has no basis in the APA."[110] Finally, he discussed how *Chevron* doctrine might be "reconciled with the APA,"[111] again delving deeply into the APA's text and history.[112] In conclusion, he called for administrative law scholars to analyze "some of the oldest statutes in the Republic, . . . the origins of administrative law, . . . the politics and powers that shaped the

104. Ryan, *supra* note 7, at 1555.

105. Not included here is the historical work of scholars like Daniel R. Ernst, Joanna Grisinger, Sophia Z. Lee, Jerry L. Mashaw, Maggie Blackhawk, Nicholas R. Parrillo, Reuel E. Schiller, and Nicholas S. Zeppos, whose accounts have added substantially to our understanding of the APA. Also not included here is Aditya Bamzai, who provided a thorough historical analysis to argue that *Chevron* doctrine has no basis in section 706 of the APA. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017). Bamzai did not round out his analysis with a textual and structural analysis or an examination of the ongoing deliberation about deference doctrines. It may be possible to reconcile *Chevron* with the APA. *See* Kovacs, *supra* note 38, at 1215–16 (discussing Justice Scalia's and Chief Justice Roberts's attempts to do so). Congress is aware of *Chevron* doctrine and, when delegating rulemaking authority, may provide that *Chevron* does not apply, as it did in the Dodd-Frank Wall Street Reform and Consumer Protection Act, *id.* at 1253. The Bumpers Amendment, which would have overruled *Chevron*, faced significant deliberation and failed. *Id.*; *see also* Kent Barnett, *Codifying* Chevmore, 90 N.Y.U. L. REV. 1, 52 (2015). Obviously, the literature on *Chevron* doctrine is too vast to canvas here.

106. Duffy, *supra* note 41, at 121–52

107. *See id.* at 154–62 (discussing Darby v. Cisneros, 509 U.S. 137 (1993)).

108. *Id.*

109. *See id.* at 181–89 (discussing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978)).

110. *Id.* at 187–88.

111. *Id.* at 190.

112. *See id.* at 193–99.

APA, and . . . the intellectual movements in federal court theory in this century."[113]

Nicholas Bagley adopted a textualist approach to the APA in *The Puzzling Presumption of Reviewability*, where he proved that the presumption that agency action is reviewable contradicts the APA's limitation of judicial review to circumstances in which no statute precludes judicial review.[114] After describing the origins of the modern presumption,[115] Bagley did a deep dive into the historical, statutory, constitutional, and prudential arguments that might support the presumption and found them all wanting.[116] After that holistic analysis, Bagley explored the costs of the presumption and concluded that "it can impede the proper functioning of the regulatory and administrative regimes that Congress has established."[117]

Jack Beermann and Gary Lawson "reprocessed" the Supreme Court's opinion in *Vermont Yankee* and concluded that a number of administrative law doctrines contradict a natural understanding of the case.[118] Their close analysis of *Vermont Yankee* led them to endorse a textual approach.[119] They showed how the doctrine regarding ex parte communications during informal rulemaking,[120] the requirement that decisionmakers in rulemaking have an open mind,[121] and the judicial requirements for notices of proposed rulemaking contradict the text of the APA.[122] Recently, I added the requisite historic and contextual analysis[123] before going on to show how the judicial rules about rulemaking have contributed to the rise of presidential direct action.[124] I also have taken a progressive textual approach to analyzing the courts' practice of giving superdeference to the military,[125] the waiver of sovereign immunity in section 702 of the APA,[126] and the D.C. Circuit's imposition of rulemaking procedures on agency shifts in the interpretation of their own regulations.[127]

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113. *Id.* at 214.

114. *See* Bagley, *supra* note 42, at 1304–05.

115. *Id.* at 1289–94.

116. *Id.* at 1294–1329.

117. *Id.* at 1289; *see also id.* at 1329–39.

118. Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 860 (2007).

119. *Id.* at 874, 879, 882.

120. *Id.* at 883–88.

121. *Id.* at 888–92.

122. *Id.* at 892–900.

123. Kovacs, *supra* note 44, at 518–45.

124. *Id.* at 545–66.

125. Kovacs, *Leveling the Deference Playing Field*, *supra* note 40.

126. Kovacs, *supra* note 43.

127. Kathryn E. Kovacs, *Abandoning Administrative Common Law in* Mortgage Bankers, 95 B.U. L. REV. ANNEX 1 (2015), http://www.bu.edu/bulawreview/files/2015/01/KOVACS.pdf [https://perma.cc/WDE8-6F8L].

Aram Gavoor and Steven Platt surveyed the APA's text, structure, and history to conclude that the administrative record in judicial review "should include only those materials that individuals working on the decision actually and directly considered."[128] In a testament to the value of this sort of work, Justice Thomas cited Gavoor and Platt's article in his opinion in *Department of Commerce v. New York*.[129] Notably, although their work attracted the attention of a conservative justice, their mode of analysis was progressive, and they emphasized progressive values. Among other things, they argued that misinterpreting the phrase "whole record" in the APA "wastes resources and shifts expenditure[s] away from core agency functions"; takes a "toll" on agencies and agency employees, as well as challengers and the courts; and "might contribute to the erosion of the arbitrary and capricious standard."[130]

III. MOVING FORWARD

A progressive textual analysis of the APA will not answer every question of administrative law. The APA is often silent on pressing issues.[131] Indeed, in many ways, the APA is now woefully out of date and cannot possibly address the challenges of the modern administrative state.[132] This led Gillian Metzger to observe that administrative common law—that is, judicial rules that "venture too far afield from statutory text or discernable legislative purpose to count simply as statutory interpretation"[133]—"cannot be discarded because it plays too important a role in enabling the courts to navigate the challenges of modern administrative government under our constitutional separation of powers system."[134]

Regardless of whether Metzger is correct, the text must be the starting point. The exceptional legislative effort that led to the APA should have consequences, among them that any interpretation of the Act "must stay within

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

129. 139 S. Ct. 2551, 2579 n.5 (2019) (Thomas, J., concurring in part and dissenting in part).

130. Gavoor & Platt, *supra* note 128, at 69, 70, 73; *see also* Aram A. Gavoor & Steven A. Platt, Administrative Records After *Department of Commerce v. New York*, SSRN 8, 13 (July 29, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3434608&dgcid=ejournal_htmlemail_u.s.:administrative:law:ejournal_abstractlink [https://perma.cc/NM2Z-DRHM] (alleging that misapplying "the whole record" "divert[s] resources from agencies' core missions").

131. Metzger, *supra* note 77, at 1350.

132. For a few recent contributions to the ongoing discussion about amending the APA, see DANIEL A. FARBER ET AL., REFORMING "REGULATORY REFORM": A PROGRESSIVE FRAMEWORK FOR AGENCY RULEMAKING IN THE PUBLIC INTEREST (2018), https://www.acslaw.org/wp-content/uploads/2018/10/Oct-2018-APA-Farber-Heinzerling-Shane-issue-brief.pdf [https://perma.cc/WS75-2A7S]; William Funk, *The Future of Progressive Regulatory Reform—A Review and Critique of Two Proposals*, 94 CHI.-KENT L. REV. 707, 726–29 (2019); Walker, *supra* note 99; and Kovacs, *supra* note 3.

133. Metzger, *supra* note 77, at 1295.

134. *Id.* at 1320.

the boundaries of the text that Congress enacted."[135] In the very least, the text might "narrow the range of possible outcomes."[136] Too often, scholars dispute the underlying principles before analyzing the APA itself. A proper progressive textual analysis takes time and effort and often is unavailing. But we should take the time to examine the APA closely before jumping to the conclusion that the text has nothing to tell us.[137]

Ultimately, however, progressive administrative law scholars must address the principles underlying the APA. When the text does not provide a clear answer, interpretation depends on those underlying principles.[138] Jeffrey Rosen cautioned that "the new textualism may provide a useful rhetorical framework for liberal[s] . . . to pursue their substantive goals, but it's no substitute for the substantive goals themselves."[139] Nonetheless, if we are to use the APA to advance progressive principles in administrative law, we need "more articles that seek to elucidate the meaning of important [APA] provisions that remain shrouded in mystery or obscured by current doctrine."[140]

CONCLUSION

Progressive administrative law scholars should claim the APA as a document that reflects a progressive history, progressive inspiration, and progressive development over time. To do that, we should follow our colleagues in constitutional law who have appropriated textualism and shaped it into a progressive mode of analysis.

This brings us back to *The Procedure Fetish*. Employing a progressive textualist approach to interpreting the APA should lead us to do as Bagley suggests: lighten the procedural load on federal agencies. The APA's text imposes only modest procedural burdens, leaving the bulk of procedural design to agency discretion. The history and context surrounding that text includes the progressive movements that inspired the creation of many federal agencies in the first place. Among the goals of progressive administrative law

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135. Kovacs, *supra* note 43, at 1190.

136. Ryan, *supra* note 7, at 1553.

137. *See id.* at 1561 (suggesting that scholars "sail[] right past [text and history] in the often mistaken belief that they offer little of value"); *id.* at 1569 ("Too often those who claim that certain constitutional provisions are hopelessly indeterminate have not bothered to investigate the history or to examine the text closely."). I myself have fallen into this trap. *Compare* Kovacs, *Leveling the Deference Playing Field*, *supra* note 40, at 617–18, 617 n.221 (asserting that the holding in *Franklin v. Massachusetts* that the president is not an "agency" under the APA "is permissible"), *with* Kovacs, *supra* note 62 (suggesting the opposite).

138. Neil S. Siegel, *The New Textualism, Progressive Constitutionalism, and Abortion Rights: A Reply to Jeffrey Rosen*, 25 YALE J.L. & HUMAN. 55, 61 (2013).

139. Rosen, *supra* note 7, at 52; *see also id.* at 44–45 ("[T]he success or failure of the new textualism will depend on the ability of liberals to stop squabbling about constitutional methodology and to agree on the substantive values that they believe the Constitution protects."); Siegel, *supra* note 138, at 56.

140. Ryan, *supra* note 7, at 1570.

scholarship should be freeing agencies to pursue the progressive ends for which they were established. As Bagley prescribes, we should approach procedure with caution and be sure that the increased burden does not undermine the achievement of progressive statutory goals.