DEMOCRATIC DISTRUST AND ADMINISTRATIVE LAWMAKING

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Under the account common to jurists and academics, Congress delegates authority to administrative agencies for their expertise and expansive rulemaking and adjudicatory capacities. Throughout its history, and particularly of late, observers have fiercely criticized the administrative state: it is a violent and unacceptable affront to our Constitution, to democratic values, and to the rule of law. To the extent Congress feels itself functionally limited, scholars of this tradition contend, Congress should invest in its own institutional capacity, or use administrative agencies in an advisory role, but in any event conduct lawmaking itself.

This Article contends that this familiar account of delegation—and its criticism—misconceives the foundations of the administrative state. Congress’s binding limitation is not information or its capacity for lawmaking, but instead (justified) distrust between voters and elected representatives. Today, it is easy to see the distrust between voters and representatives—it is on the surface of our political debates as voters grope for candidates they feel they can trust to be free from, variously, special interest lucre or ideological faithlessness. But the problem of distrust is not new, and in fact inheres to any representative democracy set to a complex society. In the United States, the distrust has been acute and, I contend, institutionally formative since the late nineteenth century.

The theory of this Article maintains that the administrative state and procedures develop as devices that address this problem of democratic distrust. The critical feature of administrative lawmaking is that, unlike legislative lawmaking, it is subject to credible verification, whereby relatively informed entities probe the nexus between stated objectives and chosen means. Though hardly dispelling democratic distrust, the administrative state, with procedural constraints and judicial review, diminishes it. The Article considers implications for the prevailing theories of administrative procedures as well as the continuing debates over the administrative state.

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I. Introduction .................................................................................................................. 3

II. Conventional Views and Consistency Constraints .............................................. 8
    A. Conventional Views ............................................................................................... 9
    B. Consistency Constraints ..................................................................................... 15

III. The Problem of Distrust and Legislative Delegations .................................. 23
    A. The Problem of Distrust ..................................................................................... 23
    B. Legislative Delegations ....................................................................................... 26
    C. Judicial Review: Credibility and Constitutional Lessers ............................ 30
    D. Fairness and Administrative Procedures .......................................................... 35

IV. Probing Considerations and Complications .................................................... 37
    A. Heterogeneous Policies: Tax and Financial Regulation .............................. 38
    B. Historical Sequencing and Procedures ............................................................... 40

V. Erosion? .................................................................................................................... 45
    A. Procedural Erosion and Distrust ..................................................................... 45
    B. Procedural Restoration ...................................................................................... 56

VI. Conclusions .......................................................................................................... 61

VII. Analytical Appendix ........................................................................................... 63
    A. Legislation .......................................................................................................... 63
    B. Delegation and Administrative Procedures ..................................................... 66
    C. Thoughts on Transitions .................................................................................... 70
I. INTRODUCTION

Under the account common to jurists and academics, Congress delegates authority to administrative agencies for their expertise and expansive rulemaking and adjudicatory capacities.\footnote{1} The administrative state, that is, emerges from crippling congressional limitations: the institution has neither the time nor the information to resolve the problems that our complex society presents, so it creates and delegates authority to other entities that have the time and capacity to resolve them. Throughout its history, and particularly of late,\footnote{2} observers have fiercely criticized the administrative state: it is a violent and unacceptable affront to our Constitution, to democratic values, and to the rule of law.\footnote{3} To the extent Congress is limited, scholars of this tradition contend, Congress should invest in its own institutional capacity, or use administrative agencies in an advisory role, but in any event conduct lawmaking itself.\footnote{4}

This Article contends that this familiar account of delegation—and its\footnotemark[1]\footnotemark[2]\footnotemark[3]\footnotemark[4]
criticism—misconceives the foundations of the administrative state. Though policy complexity importantly establishes a precondition for legislative delegation, Congress’s binding limitation is not information or its capacity for lawmaking. Instead, what limits Congress is (justified) distrust between voters and elected representatives. Today, it is easy to see the distrust between voters and representatives—it is on the surface of our political debates as voters grope for candidates they feel they can trust to be free, variously, from special interest influence or ideological faithlessness. But the problem of distrust is not new, and in fact inheres to any representative democracy set to a complex society. In the United States, the distrust has been acute and, I argue, formative to our institutions since at least the late nineteenth century.

This distrust follows from the fact that voters do not have good information about complex policy choices confronted by elected representatives. As a result, they cannot be sure that their elected representatives resolve issues in ways faithful to the voter, or instead in ways faithful to special interests or opposed ideological perspectives. Working only within Congress, this distrust is essentially irreducible, as it is difficult to foster credible transparency within the institution. Moreover, the distrust presents an electoral risk for members, spurring them to find—for self-interested reasons—alternative methods of addressing policy problems that credibly serve voter interests. Using the perspective of positive theory, this Article argues that the administrative state serves this purpose.

The idea that legislative delegation and the much-maligned bureaucracy address problems of voter distrust likely seems absurd to many. The administrative state is the source of our ills, not relief. This reaction is understandable, particularly given the more or less standard view that, if Congress had sufficient information and time, it would be better on democratic grounds for it to resolve questions rather than the administrative

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5 The articles describing such distrust in the context of the 2016 presidential election are voluminous. For one such example, see David Frum, The Great Republican Revolt, The Atlantic, Jan. 2016, available at http://www.theatlantic.com/magazine/archive/2016/01/the-great-republican-revolt/419118/.

6 See, e.g., infra note 74 and accompany text.

7 In the vocabulary of positive theory, voters operate in an environment of incomplete information: they cannot be sure what policy the facts on the ground call for, and nor can they be sure that they have elected a “good” representative rather than one who is captured by special interests or an ideological turncoat (e.g., a RINO).

8 It is in this sense that expertise is not a binding constraint. Even if Congress had the time and information necessary to resolve every important public problem, that is, members would still face strong incentives to delegate lawmaking authority to administrative agencies. Note that the claim of this Article is not that the administrative state necessarily solves problems of distrust, but rather that it ameliorates it under certain conditions, some of which may be eroding at present. See infra Part IV.
DEMOCRATIC DISTRUST

state. Even those who defend the administrative state, that is, most often view it as a distinct second best, a necessary concession to the complex demands that our society places on government. But problems of distrust between voters and the elected come hand-in-hand with modern representative democracy. Voters do not do particularly well by legislative lawmaking in complex societies, and by helping to resolve this distrust, the administrative state—at least with adequate safeguards—furthers rather than compromises democratic values.9

To see how delegation may be useful in addressing this problem of distrust, observe that, as others have argued,10 the administrative state offers advantages over the legislature in terms of transparency and deliberative values. These advantages do not, of course, emerge simply by virtue of the fact that an agency is not the legislature, but instead from the fact that agencies operate under a set of constraints that do not apply to the legislature.11 Under the Administrative Procedure Act (APA), agencies must follow certain procedures before issuing a valid order or rule: formal adjudication and rulemakings require proper notice and other procedural safeguards that approach the protections afforded at a court of law;12 and even informal rulemakings require notice and, as glossed by courts, a notable degree of dialogue between agencies and regulated parties.13 The APA’s generic standards of review, likewise, demand from agencies a minimum of rationality in policymaking: the agency must provide reasons

9 For a related theoretical inquiry, see Edward H. Stiglitz, Distrust and Legislative Dysfunction (Dec. 2015) (unpublished manuscript) (observing that delegation can overcome problems of voter distrust and consequent legislative gridlock).

10 See, e.g., Brian Galle & Mark Seidenfeld, Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power, 57 DUKE L.J. 1933 (2008); Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1511, 1515 (1992) (arguing that administrative lawmaking represents the “best hope” for realizing the values of deliberative democracy); Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29 (1985); CROLEY, REGULATION AND PUBLIC INTEREST, infra note 59, at 134-42; see also, Norton E. Long, Bureaucracy and Constitutionalism, 46 AM. POL. SCI. REV. 808, 814 (1952) (arguing that “[t]he capture of commissions such as the ICC by the regulated interests has often been charged, not without persuasive evidence . . . Yet however crassly one-sided an agency of government may become, few indeed will be found so completely under dominance of a single interest as the subject matter committees of Congress.”).


for its actions and justify its choices in light of statutory text and objectives.\textsuperscript{14} This transparency and deliberation is important because it allows the administrative state to act as a verification mechanism that constrains policymaking behavior and thereby fosters voter trust in public policies. Against the backdrop of administrative procedures and judicial review, it is relatively challenging to engage in at least the most obscene forms of misfeasance through administrative lawmaking.\textsuperscript{15}

Notably, this type of trust cannot be achieved through direct legislation, which lacks a meaningful record, and is inevitably reviewed far deferentially by courts and with little regard to rationality or to the nexus of stated objectives and chosen means. Whereas courts have no problem reviewing and reprimanding administrative agencies—that is, constitutional lessers—for procedural failures or flaws in reasoning, they cannot be expected to regularly do so with respect to the legislation produced by a coordinate branch of government.\textsuperscript{16} In a complex society, the absence of meaningful judicial review—to say nothing of safeguards like those afforded by administrative procedures—in the legislative context implies that voters will often question the fidelity of legislation to their interests. This voter distrust represents a significant electoral risk for members, leading them for self-interested reasons to favor administrative policymaking over direct legislation. At foundation, therefore, the administrative state ameliorates a problem of voter distrust and legislative credibility, not one of information and capacity: by delegating to a procedurally constrained, constitutional lesser, the legislature addresses a critical information problem between voter and legislators that naturally arises in complex representative democracies.

This theoretical perspective on the administrative state recasts our understanding of administrative procedures. Positive theorists have long argued that administrative procedures represent instruments of political

\textsuperscript{14} See 5 U.S.C. § 706.

\textsuperscript{15} Although this Article is, to my knowledge, the first to ground concerns over capture in underlying problems of information and consequent voter distrust, and to indicate how the administrative state and procedures help resolve these information problems, the idea that insulation from “politics” might help to avoid problems of capture is not new. For a compelling recent entries on this point, see Rachel E. Barkow, \textit{Insulating Agencies: Avoiding Capture Through Institutional Design}, 89 TEX. L. REV. 15 (2010); CROLEY, \textit{infra} note 59. For an excellent and concise historical overview, see William J. Novak, \textit{A Revisionist History of Regulatory Capture}, in \textit{PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT} (Daniel Carpenter & David Moss, eds., 2013).

\textsuperscript{16} Reflecting this basic reality, even where the courts stand in the strongest position, on claims of constitutional violations, they have created an impressive array of justiciability doctrines to avoid deciding cases that implicate the operations of coordinate branches. \textit{See} Part II.C.
control, and that the traditional legal focus on the ability of procedures to ensure fairness and promote legitimacy is, at best, misplaced or incomplete. This article differs. Fairness is not a rhetorical façade used to justify crass ideological machinations. Nor is fairness relevant because it reflects some free-floating normative ideal. Fairness is important, instead, because it serves a political and electoral purpose for legislators: it fosters voter trust amid problems of incomplete information and allows legislators to delegate lawmaking authority. In this way, this article articulates a positive theory of administrative procedures that restores the values of fairness and legitimacy as core to their understanding. It also addresses several puzzles that the political control perspective on administrative procedures leaves us with, for example explaining the otherwise perplexing obsession of the framers of the APA with whether the public would perceive the procedures as fair.

The final parts of this Article observe erosion in procedural integrity—slippage between administrative practice and administrative procedure—over recent decades, and draws from the theory to comment on continuing debates over the administrative state. As suggested by the recent U.S. House passage of the Separation of Powers Restoration Act of 2016, which seeks to curb administrative agency discretion, along with countless aligned symposia and scholarly contributions, we are undergoing one of the more significant examinations of the administrative state since the New Deal. This theory informs these debates. For instance, it suggests that calls to fortify the non-delegation doctrine, or to otherwise eliminate the ability of administrative agencies to produce rules and orders that bind with the force of law are wrong-footed. The administrative state represents a necessary patch to representative democracy in complex societies, and with appropriate safeguards it advances democratic values and the rule of law. At the same time, this perspective on the administrative state shows the critical


19 See supra note 2.
importance of administrative procedures, of procedural integrity supported by meaningful judicial review, thus pointing a way forward in the face of the widespread erosion of procedural regularity.

This Article proceeds in five main parts. Part II discusses the conventional approaches to understanding the administrative state. It then advances two theoretical consistency constraints that, though not dispositive, suggest the incompleteness of these conventional approaches. Part III articulates the main theoretical contribution of this Article, introducing the problem of democratic distrust, and showing how procedurally constrained delegation to a constitutional lesser addresses the problem. Part IV probes the theory by considering two important challenges to it. Part V questions whether the procedural regularity at the foundation of the administrative state’s functional role in our representative democracy is eroding; this part emphasizes the implications for current debates surrounding the administrative state and judicial review. Part VI concludes.20

II. CONVENTIONAL VIEWS AND CONSISTENCY CONSTRAINTS

Over the years, scholars and jurists have advanced a wide range of views about delegation and the foundations of the administrative state. The most common view is that the legislature delegates to administrative agencies for their expertise and expansive capacity to issue rules and adjudicate cases—that the administrative state exists due to various capacity constraints that the legislature suffers from. But this is not the only view. Another view is that the legislature is institutionally unable to commit to a policy over time, leading to problems of dynamic inconsistency that can best be resolved through delegation.21 Relatedly, others suggest that delegation is a method of removing “politics” from policy decisions. Still other scholars have argued that legislators delegate for more cynical reasons, centrally the desire to shift “blame” to other institutional actors for the inevitable problems that arise in public policies;22 or similarly as a

20 The Analytical Appendix contains a formalization of the Article’s main theoretical argument and contribution.
22 Ely, supra note 4, at 132 (arguing that by delegating “our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic”); Morris P. Fiorina, Legislative Choice of Regulatory Forms: Legal Process or Administrative Process? 39 PUB. CHOICE 233 (1982) (observing that by delegating “legislators not only avoid the time and trouble of making specific decisions, they avoid or at least disguise their responsibility for the consequences of the decisions ultimately made.”); Peter H. Aranson et al., A Theory of Legislative Delegation, 68 CORNELL L. REV. 1, 57-58 (1982) (arguing that delegation results in a “shift in responsibility” to agencies
means of generating politically useful constituent service work.²³

Scholars thus forward radically divergent views of the foundations of the administrative state, and these views inform our normative view of it, as well as the types of judicial doctrines in constitutional and administrative law we might favor. Yet it is not easy to conjure feasible empirical tests that sharply differentiate these theories, and consequently informative empirical work is virtually non-existent. It is in any event probably an error to argue that any one of these theories explains the administrative state to the strict exclusion of the others. The question then is, or should be, one of weight and importance. With this in mind, this part explains the main existing theories of delegation, and then introduces two important consistency constraints that question these theories and force us to re-consider swathes of the administrative state.

A. Conventional Views

1. Expertise and Capacity

By a substantial margin, the most common view among scholars and jurists is that the administrative state exists because the legislature cannot resolve the complex problems that it confronts given its institutional limitations. Most prominently, as a generalist legislative body, Congress does not have the information necessary to address the incredibly varied set of public policy problems that it encounters. The solution to this difficulty, in the common view, is to establish institutions that do have the time and expertise necessary to resolve the relevant problems, and to delegate, in large measure, the responsibility of resolving the problems to these institutions. Collectively, we call these new information-privileged lawmaking institutions “the administrative state.”

This perspective on the administrative state so deeply pervades the scholarly literature and judicial doctrine that it is difficult to isolate highly relevant pieces. One foundational statement of this perspective, though, comes from the period following the New Deal and accompanying expansion of the administrative state. Shortly after leaving government—he served in both the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC)—James M. Landis delivered the 1938 Storrs Lectures on Jurisprudence at Yale University. In the opening paragraphs of

his lectures, Landis sets up the administrative state in classic fashion: “the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems.”

The administrative state, thus, emerges from the deficiencies of the legislature and traditional Madisonian institutional forms. The great advantage of administrative agencies, in his view, was specialization and expertise. “With the rise of regulation,” by which Landis meant the regularization of economic conduct, “the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operations, ability to shift requirements as condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.”

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

Hardly a relic of the New Deal era, this is the dominant view among scholars and courts today. The academic legal literature tends to track much this line regarding expertise and delegation. Other academic disciplines have the same tendency. The economics literature focuses on the ability of bureaucrats to render expert policies as a rationale for delegation. The political science literature follows the same line, characterizing the benefits of delegation in terms of enhanced information and expertise. Most of the literature in this area is consumed by the question of how the legislature might obtain the information advantages of delegation without undue loss of control over policies to agencies. Professor Stephenson aptly

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24 JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS I (1966)
25 Id. at 23-24.
26 See, e.g., Margaret H. Lemos, The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine, 81 S. CAL. L. REV. 405, 445 (2008) (cataloging conventional explanations of delegation to agencies, noting that “[o]ne of the most common defenses of delegation is that agencies possess technical expertise that Congress lacks”); David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 GEO. L.J. 97 (2000).
28 See, e.g., Kathleen Bawn, Political Control Versus Expertise: Congressional Choices About Administrative Procedures, 89 AMER. POL. SCI. REV. 62 (1995) (arguing that “[d]elegation allows better information to be obtained about consequences of alternative policies,” and studying the tradeoff of this benefit against loss of control over outcomes”); DAVID EPSTEIN AND SHARYN O’HALLORAN, DELEGATING POWERS: A TRANSACTION COST APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999); JOHN D. HUBER & CHARLES R. SHIPAN, DELIBERATE DISCRETION: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY (2002).
DEMOCRATIC DISTRUST

summarizes the approach of the literature across fields, “the delegation of substantial policymaking authority to administrative agencies is often both explained and justified by the belief that agencies have more accurate information about the actual impacts of different policy choices.”

The notion that the legislature delegates to agencies for their expertise is, likewise, the dominant understanding in judicial doctrine. This understanding comes to the surface occasionally. Perhaps most famously, in the landmark *Chevron v. N.R.D.C.*, the Court motivated deference to agency interpretations of law, in part, on an understanding of Congress’s intent to delegate to an expert agency. There, the Court observed the “technical and complex” nature of the regulatory program, and noted that Congress itself did not resolve the relevant legal question in the statute. The Court then speculated that, “[p]erhaps that body [i.e., Congress] consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so.” Thus, under this reasoning, the Court defers to the agency based on a theory of the congressional motivation for delegation. The theory of delegation rests, as in the academic literature, on an understanding that Congress delegates to avail itself of agency expertise, and judicial deference to the agency effectuates congressional intent.

2. Time Consistency and Cognates

Somewhat more marginally, scholars note that various forms of time consistency may give rise to delegating incentives. A time consistency problem occurs if an individual or group of individuals cannot commit to a policy over periods of time. Much of the initial thinking on this problem surrounded monetary policy.

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32 *Id.* at 865.

33 *Id.*

34 Notice that this Chevron reasoning builds on an earlier line of cases in which courts justified deference to agency interpretations on the basis of expertise, but did so without the overlay of congressional intent. For a discussion of the evolving rationales for deference, see Ronald J. Kotoszynski, *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735 (2002).

35 For an excellent review of much of the early and more recent literature, particularly as relates to political questions, see Torben Iversen & David Soskice, *New Macroeconomics and Political Science*, 9 ANNU. REV. POL. SCI. 425, 430 (2006).
government cannot easily commit to a low-inflation policy. If it announces such a policy, and citizens adapt accordingly, the government faces a second-period incentive to decrease unemployment, thereby increasing inflation. This means that the initial policy is not credible—the government cannot commit to a policy of low inflation—and that, seeing this, citizens will not behave in the first instance as though inflation is likely to be low. One standard solution to this problem in the monetary context is to delegate to an independent central bank, such as the Federal Reserve, which is presumed not to care about elections or unemployment and, therefore, has the ability to commit to a policy of low inflation.\footnote{For a seminal paper, see Kenneth Rogoff, \textit{The Optimal Degree of Commitment to an Intermediate Monetary Target}, 100 \textit{Q. J. Econ.} 1169 (1985).}

This same basic logic plausibly applies more broadly than monetary policy. For instance, if the government wishes to induce private parties to invest in some sector of the economy, would-be investors may fear that any investment will be subsequently “expropriated” by the government. An extreme form of expropriation is nationalization, but of course softer yet nearly as concerning forms of expropriation exist: after a private party invests in a costly electricity generating plant, for example, the legislature may respond to electoral incentives to then set low rates that effectively make it impossible to recoup the initial investment in the plant. Seeing this government incentive, private parties may therefore be unwilling to invest in the power plant in the first instance. As with monetary policy, one response to this quandary is to delegate the regulation of that sector of the economy to an agency that does not have the incentive to expropriate after the initial investment, that is, that is insensitive to electoral pressures. This might be one way to understand many of the earlier administrative agencies, such as the Interstate Commerce Commission (ICC), the Federal Communications Commission (FCC), the Federal Power Commission (FPC), all of which contended with investment-intensive areas of the economy plausibly subject to post legislative incentives to expropriate.\footnote{Along with co-author John de Figuereido, I examine this possibility in detail in \textit{de Figueiredo & Stiglitz}, supra note 3.}

A related set of theories builds on this idea of time consistency, but focuses on changes in the composition of the legislature as a source of inconsistency in policy. In an insightful and influential article, Professors Horn and Shepsle observe that legislatures must worry about what future legislatures will do.\footnote{Murray J. Horn & Kenneth A. Shepsle, \textit{Commentary on Administrative Arrangements and the Political Control of Agencies: Administrative Process and Organizational Form as Legislative Responses to Agency Costs}, 75 \textit{Va. L. Rev.} 499 (1989); see also Jonathan R. Macey, \textit{Organizational Design and Political Control of Administrative Agencies}, 8 \textit{J. L. Econ. & Org.} 93 (1992).} Elections, that is, very often induce changes in the
composition of legislatures, and these compositional shifts threaten to upset legislative objectives of earlier periods. This is also a sort of time consistency problem, in the sense that, as an entity, the legislature’s preferences are dynamic and not necessarily consistent over time. These dynamics present legislators with a problem—how do they assure that the policies achieved in the current legislative session remain intact? One response to this question is to delegate authority to an agency insensitive to political fluctuations. Professor de Figueiredo, for instance, observes how uncertainty over the future elections induces legislatures to delegate authority, and to do so in ways that constrain the agency’s set of permissible policy choices, thus making it more challenging for subsequent legislative coalitions to meddle with the course of policy preferred by the initial coalition.39

A more recent gloss on this point interacts with the dominant expertise rationale. In particular, of late scholars have studied a context in which agency expertise is endogenous, that is, in which agencies must develop expertise themselves. This is an important inquiry, as it is not clear how reasonable it is to assume that agencies are well-developed, expert bodies. One feature of this perspective is that the legislature often faces an incentive to “expropriate” the costly knowledge created by agencies, using it to develop policies that the legislature but possibly not the agency favors. This expropriation is of the same form as that discussed above, dampening the incentives for initial investment, and one solution to the problem is, likewise, to give agencies “independence” or to otherwise find methods of committing the legislature to not interfere after the agency has invested in expertise, such as civil service protections.40

All of these explanations fit within the more generic idea that the purpose of delegation is to take the “politics” out of some decision, to make it “independent” of the political branches. Reviewing the arguments for agency independence, Professor Barkow, for instance, observes that “[t]he classic explanation for agency independence is the need for expert decision making,”41 aligning with this recent literature on endogenous expertise. Another purpose, she notes, of agency independence is to protect the agency

41 Barkow, supra note 15, at 19.
“from future political changes in either Congress or the presidency,” aligning with Professors Horn and Shepsle’s notion of time inconsistency in coalitions.

3. Cynical Motives

An important line of arguments opposes these generally affirming theories of the administrative state. They come in essentially two varieties. The first maintains that legislators delegate authority to administrative agencies to avoid “blame” and accountability for policy choices. A second, related theory is that legislators delegate to foster politically useful constituent service opportunities, with legislators stepping in to correct errant bureaucrats. In either case, what is notable about these theories is that delegation, and hence the administrative state, exists as a cynical ruse perpetrated by politicians on an unwitting electorate.

The ultimate origins of the blame avoidance or responsibility shifting these remain unclear, but we have clear and repeated expressions of it since from the early 1980s. In his landmark work on judicial review, Professor Ely argues for a strong non-delegation doctrine largely on this basis—he contends that delegation harms political accountability and democratic values. Delegating is much easier than legislating, as he argues, “[h]ow much more comfortable it must be to vote in favor of a bill calling for . . . clean air . . . and to leave to others the chore of fleshing out what such a mandate might mean.” More comfortable, and also “safer” electorally, as “on hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some [agency] . . . take the inevitable heat.” Professor Fiorina, likewise, advances the idea that delegating allows legislators to “shift the responsibility” for policy choices. More recently, Professor Schoenbrod builds on Professor Fiorina’s theory, explaining that delegation occurs as a position-taking exercise in which legislators lay claim to the credit for policy initiatives, but the “blame” for the burdens of policy choices shifts to agencies.

A strand of these cynical theories then focuses on legislative activity following the delegation. In his influential book, Professor Fiorina argues that an important benefit to flow from delegation is the opportunity to

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42 Id. at 24.
43 See, e.g., ELY, supra note 4; Fiorina, supra note 22; SCHOENBROD, supra note 3.
45 Ely, supra note 4, at 131.
46 Id. at 131-32 (internal quotation omitted).
47 Fiorina, supra note 22 at 248.
48 SCHOENBROD, supra note 3, at 90.
hector agencies as they implement policies. Doing so allows the legislator to appear on the side of the constituent, winning electoral points, even as the legislator created the bureaucratic problem in the first instance. Delegation, in this view, is thus a “win-win”, with the legislator apparently, but only apparently, solving the public policy problem with the delegation, and then, as agencies implement the policy, stepping in to assert constituent interests, all the while taking no blame for setting this all in motion.

B. Consistency Constraints

All of these theories likely have at least some isolated truth to them. The question thus is one of importance, that is, of what weight we owe to each theory. Legislators delegate for a variety of reasons, and likely for different reasons in different policy settings. For example, problems of time consistency may present more in some policy areas—famously, monetary policy—than in other areas. Likewise, it is easy to see why Congress might need to delegate the administration of Social Security disability determinations to an agency due to capacity constraints. Here, the ability of the legislature to resolve and refine benefits or eligibility issues is plainly outstripped by the demands of the program; hence the Social Security Administration employs some 1,500 Administrative Law Judges to adjudicate such claims. Likewise, legislators may sometimes delegate to agencies to avoid blame, or to generate politically useful constituent service work.

But can we say that any one of these theories is the main theory that explains legislative delegations and the administrative state? This subpart argues that two consistency constraints should guide our view on this question. First, the theory of the administrative state should be consistent with the incentives that at least minimally effective voters place on delegations. Often oddly incompletely analyzed in much of the debate over the administrative state is the fact that we live in a representative democracy; as explained below, voters place constraints on what can be accomplished through delegations. Second, debates over the administrative state, similarly, incompletely analyze the fact that the legislature both delegates and constrains agency actions by establishing administrative procedures. The theory that explains the delegation should be consistent with the theory that explains administrative procedures. Thus, the main theory of the administrative state should, at a minimum, be consistent with our basic thinking on democratic constraints, as well as consistent with

49 Fiorina, supra note 3.
some plausible theory of administrative procedures.

1. Democratic Constraints

Long ago, the political scientist V.O. Key famously argued that “voters are not fools.” 51 If that is right, in what ways do minimally rational voters constrain delegations? We might imagine several ways, but two stand out. The first is that, as a general rule, merely introducing an intermediary—that is, an administrative agency—should not much change voters’ calculus about who is responsible for government actions. The second is that voters recognize the possibility of counterfactual institutional forms, and this informs their understanding of delegations. These points require explanation, but note again that we have in mind only the implications for our understanding of the “main”, rather than the peripheral or occasional, theory of delegation.

One way of construing the first point is that minimally rational voters require that, on the whole, delegations improve voter welfare. If delegations generally—that is, not just occasionally—but every time, or even generally, advanced the narrow interests of legislators and undermined voters interests, even minimally rational voters would have little trouble seeing this and imposing the corresponding electoral consequences. Though re-election motivated legislators may be able to shift blame to agencies, or to cynically create opportunities for constituent service sometimes, that is, they cannot do so on a regular basis. To do so would undermine the very reason that representatives seek to shift blame—that is, re-election.

Other scholars have made much the same of this important point. Against the more cynical theories of delegation, Professor Vermeule, for instance, argues that in such cases “legislators are held accountable when they delegate power—they are held accountable for their second-order decision to delegate power to the executive or agencies.” 52 Professors Farber and Frickey, likewise, argue that voters will “predict that delegations will result in unfavorable administrative decisions”, 53 allowing them to blame the legislators for the act of delegation itself. If one assumes, they continue, that voters are “constantly fooled”, it is not hard to derive pessimistic results, but one “should be chary of the underlying assumptions of voter stupidity.” 54 These scholars thus, similarly, argue that the more

54 Id. at 82 (internal quotation omitted).
cynical theories of the administrative state fail to satisfy the democratic constraint.

At the risk of repeating the obvious, this is not to say that legislators never delegate for such cynical reasons. The claim is instead more modest: that those cynical stories cannot, under the constraint of minimally rational voters, represent the primary account of delegation; that, on the whole, the story of the administrative state must under this constraint be one that advances voter welfare. Recent theoretical work on the administrative state adopts just this perspective.\(^{55}\) This work shows that delegating to avoid blame is sometimes possible, but it is only possible precisely because voters often value and benefit from the act of delegation. Under this theory, because voters operate in an environment of incomplete information they cannot be sure whether the delegation occurs for a “good” (such as expertise or superior administration) or a “bad” reason (e.g., capture). This allows legislators to sometimes delegate for “bad” reasons without being blamed by voters electorally. But for this to happen, voters must generally benefit from delegation; the cynical delegations exist, but they draft behind incomplete information and, in effect, the good will created by the general benefits of delegations. For this reason, the most cynical theories of the administrative state fail to satisfy the requirement that they be consistent with democratic constraints.

A second feature of the democratic constraint is an extension of the first. Congress plainly has the constitutional authority to greatly expand its lawmaking and oversight capacities: it can directly hire an almost unlimited number of additional staffers to gather information and craft complex and problem-responsive statutes; or similarly it can fund “advisory” agencies, much like the Government Accountability Office, to generate information that is useful for legislation and unconnected with “executive” functions. What is more, this expansion of lawmaking capacity comes at virtually no direct cost to legislators, who can easily appropriate funds for such purposes.\(^{56}\) This is in essence John Hart Ely’s suggestion, and many others have since followed in this view.\(^ {57}\)

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56 Of course, these appropriations must satisfy Article I Section 7 constraints, but the great virtue of appropriations bills is that the president has a hard time vetoing them as they tend to contain a good deal of items he wants and cannot easily reject, even if they also contain some items he does not want. See, e.g., D. Roderick Kiewet & Mathew D. McCubbins, Presidential Influence on Congressional Appropriations Decisions, 32 Am. J. Pol. Sci. 713, 714 (1988) (noting that “[e]ven under circumstances favoring the president . . . his influence over final spending figures will be limited”).

57 Ely, supra note 4, at 133 (arguing that “legislatures, certainly the Congress, can call on staffs as expert as those the administrators have available”); see also Eric Redman,
Less recognized is the fact that the availability of institutional reform implies a democratic constraint. In particular, a rational voter asks herself—why Congress has decided not to expand its institutional capacity? This simple but largely neglected question has implications for our understanding of the roots of the administrative state. Most prominently, it undermines the viability of the argument that delegations of lawmaking authority derive from informational constraints. Congress can readily acquire information under other institutional forms, and to the extent that lawmakers argue or imply that a given delegation is driven by the need for expertise—as opposed to some other motivation—voters sensibly infer from the fact that the delegation nevertheless occurred that some other motive instead is at play. If the other motive in play is harmful to voter interests, this inference is problematic for legislators. It leads voters to conclude that the delegation occurs for reasons contrary to their interests, and consequently undermines the re-election interest of the legislator.

This, again, is not to deny that delegations sometimes occur for reasons of expertise, information, or institutional capacity. It may be, for instance, that the legislature is transparently unable to expand capacity to respond to the problem in question. Or it may be that, with respect to the relevant problem, the “other” theory explaining delegation in some context is not harmful. In these cases, voters do not make a negative inference from the lack of native legislative expertise, and legislators’ therefore do not suffer at the polls. If so, this would free legislators to delegate to agencies for reasons of information and expertise, which might be appealing even under minimal costs of developing expertise natively. Expertise and information must remain part of the account, but theory suggests that Ely’s critique, combined with democratic constraints, pushes our beliefs away from the idea that expertise and problem-related information alone roots the administrative state.

2. Procedural Constraints

In under-appreciated ways, administrative procedures also impose constraints on theories of the administrative state. The idea underlying this constraint is simple: the legislature created the administrative state, but it also created administrative procedures, which constrain and shape agency behavior. The straightforward observation that delegations and procedures (largely) originate from the same source means that one should theorize about the two legislative acts jointly—that is, that the theory of delegation should be consistent with the theory of administrative procedures. A long

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THE DANCE OF LEGISLATION: AN INSIDER’S ACCOUNT OF THE WORKINGS OF THE UNITED STATES SENATE 17-18 (1973) (noting the explosion of Senate staff resources).
DEMOCRATIC DISTRUST

tradition understands procedures as responsive to concerns introduced by legislative delegations, but with a few notable exceptions, such as Professor Croley’s insightful studies, scholars do not jointly theorize these two foundational legislative actions. Those who forward theories of delegation tend to discuss procedures only in passing; and those who develop theories of procedures tend to discuss the underlying delegation only in passing.

For instance, in his landmark critique of the administrative state, Professor Lowi discusses the Administrative Procedure Act on just two of over three hundred pages; Professor Schoenbrod discusses the Administrative Procedure Act on six of some two hundred and fifty pages in his influential book on abusive delegations of lawmaking authority; Professor Rogoff, a prominent theorist associated with the time consistency notion of delegation does not discuss procedures; in his recent book, Professor Hamburger mentions the Administrative Procedure Act on some twenty five of over six hundred pages. If discussed at all, the theoretical literature on delegation tends to give administrative procedures only a hasty and typically dismissive nod.

Those who study procedures, likewise, tend to assume the administrative state, rather than engage the question of why it exists. The opening paragraph of Professors McNollGast’s pioneering study of administrative procedures, for instance, notes that “[i]nvariably, elected officials delegate considerable policymaking authority to unelected bureaucrats,” but they do not endorse a theory of delegation itself. In a similar way, Professor Stewart opens his seminal article on administrative procedures and judicial review by quoting British politician Aneurin Bevan,

58 For an excellent history of intellectual developments along these lines around the progressive era, see DANIEL R. ERNST, TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014). More recently, we have seen something of a return of similar debates, as reflected in the many introductions of procedural reform bills, supra note 2, and in thoughtful academic contributions. See Kathryn A. Watts, Rulemaking as Legislating, 103 Geo. L.J. 1003 (2014); see also Ilan Wurman, Constitutional Administration, STAN. L. REV. (forthcoming).

59 Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 COLUM. L. REV. 1, 6 (1998) (critiquing theories of regulation for “fail[ing] to incorporate any well developed vision of the administrative process,” and using administrative procedures to evaluate theories of regulation) see generally, STEVEN P. CROLEY, REGULATION AND PUBLIC INTEREST: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 23-25 (2008) (same). The present effort is similar in arguing that the two areas should be thought of together and that we can learn about each from the other.

60 LOWI, supra note 3.

61 SCHOENBROD, supra note 22.

62 Rogoff, supra note 21.

63 McNollGast, Administrative Procedures as Instruments of Political Control, supra note 17, at 243.
that “[t]here is now general agreement about the necessity for delegated legislation; the real problem is how this legislation can be reconciled with the processes of democratic consultation, scrutiny and control.” Thus, the literature on procedures tends to regard delegations as “inevitab[e]” or a “necessity,” but leaves unclear precisely why it is inevitable or necessary.

But a theory of delegation should be compatible with a theory of procedures. This is not a mere marmish demand that theory be more rigorous. A joint theory is, instead, important because it constrains and guides our understanding of the administrative state. Focus on the constraint that procedures place on theories of delegation. This compatibility constraint implies that a given theory of the administrative state should be consistent with at least some plausible theory of administrative procedures. To the extent one cannot easily square a theory of delegation with a plausible theory of procedures, this weighs strongly against the theory of delegation. That is, if a theory says that the legislature delegates to accomplish X, we should be skeptical about that theory if administrative procedures make it impossible or unduly burdensome to achieve X.

It is useful to place theories of administrative procedures into two main categories: the traditional school, and the political control school.

The traditional view of administrative procedures focuses on their ability to ensure fairness and thereby confer legitimacy on the administrative state. This perspective draws from the many discussions and debates around the formation of the Administrative Procedure Act, which often centered on these notions of fairness and legitimacy. It points to the self-conscious effort of drafters, and before them agencies themselves, to craft procedures that emulated those of the courts, then viewed as the embodying high forms of procedural fairness and legitimacy. The procedures for formal adjudications contained in the APA, for example, approximate those of a civil trial: notice of the proceedings, an opportunity for a hearing before an impartial adjudicator, a decision on the record, and a bar on ex parte communications. Formal rulemaking procedures follow much the same contours, and informal rulemaking procedures can be

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65 For an excellent historical account of the Administrative Procedure Act, see Joanna L. Grisinger, The Unwieldy American State: Administrative Politics Since the New Deal 60 (2012) (noting, for example, that the APA’s “drafters consistently argued that the APA was a significant reform that would improve the fairness of administrative governance and bring due process to the administrative state”). Instances of legal academics promoting fairness in administrative procedures abound. For an early example, see Ralph F. Fuchs, Fairness and Effectiveness in Administrative Agency Organization and Procedures, 36 Ind. L. J. 1 (1960).

66 Id.

viewed as a mix of traditional adjudicatory and legislative procedures: even under the sparse guidance of the APA, they require notice, much like an adjudication, but the process is open to the public, without bars on ex parte communications, and the type of information that might validly be relevant to a decision is more loosely regulated, much as in an ordinary legislative environment.\(^\text{68}\) Through such formalities, this perspective views administrative procedures as effectuating norms of fairness in the first instance, thereby legitimizing the activities of administrative agencies.

Another theoretical perspective contends that administrative procedures principally serve as instruments of political control.\(^\text{69}\) Whatever the origins of the administrative state, the legislature has created it, and needs some device to manage and control it. Under McNollGast’s theory, administrative procedures help the legislature do so in two ways: by ameliorating information asymmetries between the legislature and administrative agencies, and by “stacking the deck” in favor of interests aligned with the enacting legislative coalition.\(^\text{70}\) On the former, for instance, the requirement that agencies provide notice before issuing a rule or engaging in a formal adjudication makes it easier for Congress, or more accurately coalitions within it, to conduct oversight and intervene if necessary. On the latter, McNollGast point for instance to the National Environmental Protection Act (NEPA), which required agencies to file Environmental Impact Statements (EIS) in certain policymaking settings. This filing requirement provides a procedural channel through which environmental groups might delay or defeat agency actions they disagree with, thereby “stacking the deck” in favor of groups aligned with the NEPA coalitions.

Thus, whereas the traditional perspective sees procedures as effectuating norms of fairness and due process, the political control school, instead, sees procedures as mitigating problems of control that inhere to the delegation of authority from principal (the legislature) to agent (the administrative agency).

Though neither of these perspectives centers on expertise, the traditional approach to procedures is not inconsistent with that rationale for delegation. That is, fairness and expertise often run together. The same procedures that protect due process also force the agency to deliberate, provide reasons, and consider alternatives, all hallmarks of applied expertise. The notice and comment procedures of informal rulemaking, while also sounding in norms

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\(^{68}\) 5 U.S.C. § 553.


\(^{70}\) McNollGast, *Administrative Procedures as Instruments of Political Control*, supra note 17, at 255.
of fairness, clearly further potentially serve an informational purpose.\textsuperscript{71} Though the connection may be more indirect, the political control approach to procedures might likewise be reconciled with expertise by noting that legislators may only delegate for expertise if they can be assured some measure of control over the agency.

The time consistency rationale for delegation is most consistent with the traditional school of procedures. Before upsetting expectations, the agency must undergo time-consuming procedures that respect due process and norms of procedure. It is thus less likely that, for example, an agency will be able to turn against an industry that has invested considerable sums in infrastructure for political purposes. Just as formal procedures protect due process, they also protect expectations and diminish the problems of time inconsistency. The political control school, on the other hand, is harder to square with this theory of delegation. The delegation, after all, predominately holds value in this theory precisely because the political interests cannot easily intervene following delegation.

The more cynical theories of delegation have the most trouble squaring with procedures. The political control theory plainly poses a problem for the theory of “blame” avoidance. The objective of delegating is to take credit and avoid blame for the costs of policies—the entire point of the delegation, recall, is for the legislature to not be in control of (and therefore responsible for) agency actions. The traditional fairness perspective on procedures seems in less tension with the blame avoidance notion of delegation, but at the same time is hard to reconcile with the constituent service aspect of the cynical theories. If the politician is in some sense “selling” the service of bureaucratic intervention, it is not easy to understand, for example, the requirement that decisions be based on the record in formal proceedings. Allowing decisions based on off the record communications presumably would be a profitable channel of bureaucratic interventions.

3. Learning from Constraints

None of this analysis dispositive, of course, but it should raise questions about the adequacy of existing theories of delegation.

Democratic constraints imply that delegations cannot exclusively, or even mainly, harm voter interests. This constraint does much damage to the more cynical theories of delegation. Unless we take an exceptionally dim view of voters and the democratic process, it is not clear how politicians could delegate as these theories suppose without suffering electoral losses. A version of this same democratic critique also does some damage to the

expertise model. The legislature, after all, is in a good position to gather far more information than it does—it faces no constitutional constraint on vastly expanding the scope of advisory commissions. A rational voter understands this and therefore doubts that information alone, or expertise, drives delegations.

Procedural constraints, likewise, inform our views of the administrative state. The more cynical theories, again, have difficulty. If the goal is to shift blame to the bureaucracy, it is not clear why Congress would design procedures to enhance their control over agencies; control over policies, after all, is precisely what legislators hope to escape from in this theory of delegation. Fairness in procedures does seem compatible with an effort of the legislature to divest itself of responsibility, but if the legislator is instead seeking to develop constituent service work, most administrative procedures either foreclose effective interventions (e.g., requiring a record) or ensure openness and transparency, so that the legislator is not in a particularly privileged position (e.g., informal rulemaking). A graft-seeking legislator would, instead, likely design procedures to open channels of off the record communications between legislators and agency officers. The time-consistency and expertise theories seem at least consistent with the traditional, fairness approach to administrative procedures.

To reiterate, none of these considerations should force us to disregard the existing theories of the administrative state. They are not dispositive. But they do suggest that our understanding may be incomplete; they should shade our beliefs away from the notion that we have a satisfactory theory of the administrative state.

III. THE PROBLEM OF DISTRUST AND LEGISLATIVE DELEGATIONS

A. The Problem of Distrust

A fundamental problem of trust infects modern representative democracies. The problem is rooted in information: voters have poor information about at least two critical aspects of the political environment in virtually any complex democracy. The first is that they do not know for certain whether their representative is “loyal” or “faithful” to their interests. The ways in which a representative may be unfaithful are manifold, but include prominently the possibility that the representative is corrupt, or captured by special interests, and the possibility that the representative is ideologically impure or inconsistent. The second is that, between various policy options, they do not know for certain which is in their best interest.

\(^{72}\) See infra Part VII.
Although the first element of information—regarding faithfulness—is likely an issue in any representative democracy, the absence of the second element of information only becomes acute in complex societies, in which the relationship between policies and material outcomes is often not clear to voters. Together, these factors produce distrust between voter and elected representative. When the voters observe a legislative policy choice, that is, they wonder—did my representative act faithfully? Is this policy in my best interest? This distrust may be greater or lesser in one environment or another, or one time or another, but it is sown deeply into the fabric of modern representative institutions.

The first element of the problem relates to the characteristics of the representative himself. For example, we cannot easily observe whether our representative is the type of person who resists the entreaties of special interest groups. The voter knows that special interest groups operate aggressively in the legislative arena—suggesting to the voter that they have some purchase on policy—but the voter does not know if the representative rebuffed them or instead made an under-the-table deal with them. Some types of legislators would rebuff the special interests; but many others would publicly declare themselves un-buyable just as they are being privately bought. Voters also remain unsure about other characteristics of the representative. Among the most important, voters cannot be sure how steadfast the representative is to the voter’s ideological principles. If the representative compromises on a position, agreeing with the opposition, did he have to compromise? Or, instead, did he betray his professed ideological roots and want to compromise? In most cases, just as it is unclear whether a member was bought, it is impossible for the voter to come to any clear view on such questions of the politician’s internal motivation.

Voters, of course, attempt to sort out these difficult-to-observe characteristics of their elected representatives in a variety of ways. Classically, the media may be able to unearth information relevant to the legislator’s faithfulness, showing for example disturbing patterns of favor-giving by special interests. Public interest groups, or the opposing campaign, might perform much the same role. Voters readily assimilate such information. Voters also make inferences about unobservable characteristics based on observable behavior of politicians. Why do voters appear to place so much weight on the perceived “authenticity” of candidates? Why does it matter whether a politician received a DUI ten years ago? Or how much he spent on a hair cut? Unlike questions of

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(footnote: Classically, the muck-raking journalists performed this role at the turn of the (last) century. See Louis Filler, The Muckrakers (1993). Recently, a large literature has arisen studying the relationship between information provide in newspapers and political outcomes. See, e.g., Riccardo Pugilisi & James M. Snyder, Jr., Newspaper Coverage of Political Scandals, 73 J. Pol. 931 (2011).)
candidate health, for example, almost all such questions have virtually no direct bearing on the qualities of the candidate relevant to duties in office. But such questions nevertheless hold great interest because we use them to make inferences about characteristics we cannot observe: an authentic candidate is less likely to flip flop or change ideological tunes; a DUI suggests that the candidate may be reckless or not care much about shared norms; a taste for expensive haircuts or clothes suggests that the candidate may be pliable by special interest lucre. But while such techniques have value, they also incompletely resolve the questions, in part because candidates manicure their histories and public performances in full knowledge of how voters make inferences based on them.

The second element of information relates to the complexity of a society. In a complex society, the voter will often not know with certainty whether a given policy is in his interest. This might also be true at times in less complex societies, but it has been an acute problem in the United States since roughly the late nineteenth century. Then, the problem centered largely on issues of managing novel economic interdependencies and corporate forms. To achieve some goal, such as a fluid railroad network, what legal concessions must we give to the railroads? If the legislature sets a railroad rate, is the rate too high? Too low? Will public development goals be met with lower railroad rates or less substantial subsidies? The responses to such questions depend on information that voters cannot easily obtain: for example, candid testimony from railroads about their cost structure and business constraints. Likewise, today we have many similar questions about legislative choices: when, if ever, is it necessary to bailout a financial institution? Or an auto manufacturer? Despite inevitable reassurances from decision-makers that the decision is in the voter’s best interest, the voter appropriately discounts these declarations. Indeed, the answer to these questions, too, depends on information that is exceptionally challenging for voters to obtain. As such, at least in any complex democracy, when the voter observes some legislative policy choice—for example, a legal concession to a developer, a bailout to a bank—the voter will often not know if the policy serves his interest, or instead the interests of a railroad, a bank, or some other narrow concern.

As with the problem of faithfulness, the voter attempts to determine the answer to the pressing questions via the usual sources: newspapers, trusted

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74 See, e.g., CHARLES POSTEL, THE POPULIST VISION 146 (2007) (noting that “[i]n order to stimulate railroad expansion . . . town and county officials, state legislatures, and the U.S. Congress authorized untold millions of dollars in subsidies, bonds, and grants to corporations.”).

75 E.g., FILLER, supra note 73.
interest groups, and so on. But even with this help, the voter cannot resolve much of the uncertainty that surrounds the policies in question.

So information is a critical problem in modern representative democracies—voters cannot be sure that their representative is faithful, and they cannot independently assess if the policy in question serves their interest. In the first instance, this is a problem for the voter. But the voter can fire the legislator. And this in turn makes voter distrust a problem for the legislator. In particular, if given these information problems the voter does not trust the incumbent, the voter may come to the view that she is better off electing a challenger who she believes to have a greater likelihood of being faithful to her interests. This belief may turn out to be false, but that is not the important point for the incumbent, for by the time that comes to light the incumbent will be out of office. The incumbent recognizes this electoral risk and, therefore, has an incentive to find a method of reducing voter distrust.

B. Legislative Delegations

Delegations of lawmaking authority to constitutional a lesser, subject to specified procedures and judicial review, resolves much of the problem of distrust. Delegations of this nature serve as a verification mechanism: the legislature states the statutory objective, and an administrative agency effectuates the objective by setting policy. But critically, the way in which the agency sets the policy is highly constrained and subject to scrutiny by external reviewers. These constraints and scrutiny allow the voter a window into policymaking that is not possible in the pure legislative context, providing some faith that the policy serves her interests. Moreover, and critically, it is often in the elected representative’s interest to delegate to administrative agencies. The representative’s interest in doing so lies not necessarily in the “public good” but rather in the desire to be re-elected. That is, voter distrust is harmful to the representative because it increases the likelihood that the voter throws him out of office, and methods of

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77 See infra Part VII.
78 It is hard to over-state the significance of this point, as it marks a radical departure from other theories that posit public interest regulation. In this analysis, legislators nakedly seek self-preservation, not the public good. For other theories, see, e.g., CROLEY, supra note 10, at 153 (positing legislators “motivated at least in part to advance general interests”).
reducing this distrust, such as delegation, therefore help his re-election chances.

Consider in more detail how delegations might ameliorate voter distrust. With delegation, instead of directly legislating a policy outcome—say, approving a particular railroad rate, or a radio broadcasting license, or a pharmaceutical product—the legislature establishes some outcome of interest and invests another entity, an administrative agency, with the authority to effectuate that outcome. For example, the legislature might tell an administrative agency to set railroad rates at a fair and reasonable level, or to approve safe and effective drugs, or to grant radio licenses in the public interest. The legislative action, therefore, is oriented towards abstract objectives, or outcomes, rather than particularities of means. Many observers have criticized Congress for legislating by setting objectives rather than grappling with the particulars of policy,\(^79\) reflecting an “abdication” of legislative responsibility,\(^80\) but beyond being helpful politically to members of Congress, this objectives-oriented style of legislating is in the voters’ interests.

This follows from the critical fact that, unlike the legislature, the administrative agency sets the particularities of the policy in highly constrained ways. Agencies, first, operate under the constraints of administrative procedures. When an agency wishes to issue a rule or order, that is, it must follow specific procedures before doing so. Even if issuing an informal rule, for example, the agency must give adequate notice of its intentions to issue a rule, along with an opportunity for the public to comment on the notice of proposed rulemaking.\(^81\) Under the APA, the procedures that apply to formal adjudications and rulemakings constrain further, requiring notice, but also for agencies to make a decision on the record, after a hearing that approximates that of a civil trial.\(^82\) Compelling agencies to follow such procedures encourages transparent and reason-based decision-making.\(^83\) An agency decision that is seriously fails in its transparency, for example, by failing to give adequate notice of the proposed rule, or that fails in its reason-giving, for example, by wholly ignoring one side of an argument or important pieces of evidence, is likely to be set aside on review. These procedural safeguards mean that it is difficult for agencies to obscenely favor one side over the other, thereby for

\(^79\) See, e.g., SCHOENBROD, supra note 22.
\(^81\) 5 U.S.C. § 553.
\(^82\) 5 U.S.C. §§ 556-57.
\(^83\) See, e.g., Galle & Seidenfeld, supra note 10.
example reducing the odds of bald, wholesale corruption, and relieving voter distrust in policy making.

The tempting rejoinder to this argument is that agency lawmaking falters both in its transparency and in its reason-based deliberative value. Much research, indeed, suggests that agencies strategically adapt their behavior to reduce transparency, for example, by shifting to one procedural form or another, as calculated to reduce judicial or public oversight.\footnote{See, e.g., Jerry L. Mashaw & David L. Harfst, \textit{Regulation and Legal Culture: The Case of Motor Vehicle Safety}, 4 \textsc{Yale J. on Reg.} 257 (1987); Jennifer Nou & Edward H. Stiglitz, \textit{Strategic Rulemaking Disclosure}, \textsc{S. Cal. L. Rev.} (forthcoming). Courts often attempt to curb such behavior, but whether they are, or can be, successful is an open question. See, e.g., \textit{Allentown Mack Sales & Service, Inc. v. NLRB}, 522 U.S. 359 (1998) (chastising the agency for articulating one rule and applying another against regulated entities'). For a more general discussion, see Part IV.A.} At least in the context of informal rulemakings—the subject of most recent scholarly attention—much research also suggests that the level of engagement with the public is limited. A common and perhaps dominant view among administrative law scholars, for instance, is that a rule is complete or nearly so by the time the agency issues its notice of proposed rulemaking.\footnote{See, e.g., Donald Elliott, \textit{Re-Investing Rulemaking}, 41 \textsc{Duke L.J.} 1490, 1495 (1992); Wendy Wagner, Katherine Barnes & Lisa Peters, \textit{Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emissions Standards}, 63 \textsc{Admin. L. Rev.} 99 (2011); Jennifer Nou & Edward H. Stiglitz, \textit{Strategic Rulemaking Disclosure}, 89 \textsc{S. Cal. L. Rev.} 732 (2016) (collecting references). For a counter-view, see Cass Sunstein, Keynote Address at the Brookings Institute: The Future of E-rulemaking: Promoting Public Participation and Efficiency (Nov. 30, 2010) (“Proposed rules are a way of obtaining comments on rules and the comments are taken exceedingly seriously.”).} The supposed “deliberation” therefore that occurs following notice is largely for show. Similarly, even if a rule is set aside because an agency failed to acknowledge some point, the agency can often repair the rule by making superficial changes in the rule preamble, without substantive revision.

This is all true, so far as it goes. The transparency of agency decision-making is surely incomplete, and the level of reason giving and deliberation in agency decisions is often wanting, and it seems increasingly so.\footnote{See Part IV.A.} But this rejoinder neglects two related points. Agency decision-making is, first, incomplete and wanting in these respects only within bounds. The ability of the agency to paper over substantive points of disagreement, for example, is limited. This much is suggested by the fact that agencies not infrequently withdraw rules after receiving adverse public comments,\footnote{E.g., Withdrawal of Notice of Proposed Rulemaking, Hazardous Materials: Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquids, 80 Fed. Reg. 81501 (Dec. 30, 2015) (withdrawing proposed rule following negative public comments). \textit{See also}, Anne Joseph O’Connell, \textit{Political Cycles of...}
multiple notices of proposed rulemakings in a single rulemaking effort. If an agency issues a rule entirely without giving its reasons for doing so, it is almost sure to be set aside on review; if an agency changes its story and gives different reasons for a regulatory decision on review than it gave to at the agency level, the agency action is likewise probably bound to be set aside;\textsuperscript{88} if an agency avoids the notice and comment process of informal rulemaking by saying that it is merely offering “guidance”, it may likewise be set aside, and if it attempts to rely on this guidance as the basis for a decision in subsequent enforcement proceedings, it is all the more likely to be set aside.\textsuperscript{89} All of this is to say that, true, agencies have discretion, and that they surely often use this discretion to their own ideological or institutional ends, but also that they operate under constraints that bind at a meaningful point. Whatever discretion agencies have is limited.

Now, second, compare this to the baseline of transparency and reason giving of the legislature. Congress does not need to give notice of intended legislation. It may hold a hearing prior to voting on a bill, or it may not, and any hearing is likely to be engineered for partisan or ideological rather than informational purposes.\textsuperscript{90} No individual or regulated party has a “right” to a meeting with members or a committee. The equivalent of the legislative “record”—floor statements, the bill preamble, and the legislative reports—likewise reflect partisan engineering instead of the factual basis for legislation.\textsuperscript{91} And in any event the validity of any legislation does not turn on the adequacy of the “record” or of the nexus between the stated objectives of legislation and chosen means.\textsuperscript{92} Indeed, under the highly

\textsuperscript{88} See SEC v. Chenery, 318 U.S. 80 (1943).
\textsuperscript{89} E.g., Community Nutrition Institute v. Young, 818 F.2d 943 (D.C. Cir., 1987).
\textsuperscript{90} E.g., Tevi Troy, Congressional Hearings Aren’t What They Used to Be. Here’s How to Make them Better, Wash. Post (Oct. 21, 2015) (noting that “[t]hese days, hearings tend to be seen as partisan affairs, and coverage is often limited to C-SPAN and select cable news channels).
\textsuperscript{91} See, e.g., McNollGast, Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation, 57 L. & CONTEMP. PROBS. 3, 8 (1994) (noting that “[p]robably the most persuasive argument against using legislative history in statutory interpretation is that politicians sometimes misrepresent their actual policy preferences,” and arguing that politicians may be sincere under some circumstances.).
\textsuperscript{92} On review for a violation of the Equal Protection Clause, for example, courts generically apply the rational basis standard, which is exceptionally deferential, and requires only that the law serve some conceivable rational purpose—what the legislature actually thought it was doing is largely beside the point. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); see also, id. at 180 (Stevens, J, concurring) (deriding the “conceivable basis” formulation, arguing that the “Constitution requires something more than merely a ‘conceivable’ or ‘plausible’ explanation for unequal
deferential standard of review most commonly applied to legislation, legislation will be upheld if supported by any conceivable rational basis that a court might later conjure—there needs be no evidence that the legislature actually contemplated any rationale for the legislation. In short, even if the transparency and deliberation required of agencies is not complete, the requirement is virtually absent for legislatures.

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

C. Judicial Review: Credibility and Constitutional Lessers

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

treatment.”). Now compare that standard of review to the generic standard that courts apply to administrative actions, the arbitrary and capricious standard, which, if anything, scholars criticize for being overly harsh and searching. See, e.g., Frank B. Cross, Pragmatic Pathologies of Judicial Review of Administrative Rulemaking, 78 N.C. L. Rev. 1013, 1014 (1999) (arguing that “judicial review ineluctably produces pathological consequences”).

93 E.g., Fritz, 449 U.S. 166 (1980). On this point, see Jerry L. Mashaw, Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State, 70 Fordham L. Rev. 17, 19 (2001) (observing that “[w]e have in crucial ways given up on the project of rationality as applied to legislative action. As a constitutional matter we do not require that the legislature have a ‘rational basis’ for its actions, only that we could imagine one.”).
Of course, we have nothing of the sort in reality. The legislature, as I suggest, is essentially free to do as it wishes. The Houses of Congress have procedural rules, as permitted by the Constitution, but they are both self-generated and, for reasons discussed below, almost entirely self-enforced. Moreover, there is no requirement for rationality from outside or inside of Congress. One, indeed, need not look much farther than the titles of legislation to observe the complete vacuum of any norm, much less enforeceable requirement, for rationality in the legislature. Here, outlandish exaggeration is the norm, absurdity not uncommon.

The key to understanding why no Legislative Procedure Act exists—and to understanding the unlikely virtue of administrative lawmaking—is enforceability. What would happen if members violated a procedural rule? If a leading member had ex parte contacts with special interest groups, for example? How would the rule be enforced? One possibility is that the legislature would enforce its own rules, but the history on this front, even on charges far more serious than disallowed ex parte contacts, is not encouraging. Consider the U.S. Senate history. Since the founding, the Senate has formally expelled 15 members, but the body did so only in truly extraordinary circumstances: one case of treason shortly after independence, and 14 cases of support for the Confederate rebellion during the Civil War. Facing charges, a number of senators resigned from office, but even this has occurred only five times since the founding: three cases of corruption, two of those after criminal convictions; one case of alleged election fraud; and one case consisting of equal parts favor peddling and lurid sexual misconduct. All in all, the Senate does not seem particularly active in self-policing. Incredibly, the U.S. House is even less assiduous. It has expelled only five members in its history: three for support of the South during the Civil War, and two bribery-related charges. Thus, the cases of

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94 U.S. CONST. art. I, § 5 (providing that “Each House may determine the rules of its proceedings”).
98 Id.
99 Jack Maskell, Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in
self-policing are rare, and tend to involve highly visible and obvious violations of rules. The idea that the legislature would self-polic with respect to ex parte contacts, much less to undue laxity in ends-means rationality strains belief.

For this reason, credible enforcement in this area must come externally. The problem is that the most natural external enforcer, the judiciary, cannot itself credibly enforce procedures or standards of rationality against the legislature. It is indeed only a modest stretch to say that the courts’ justiciability doctrines exist precisely to permit courts respectably to avoid deciding such questions. It is important not to overstate the firmness or completeness of this point—the Court is not consistent in applying justiciability doctrines,\textsuperscript{100} as many have observed.\textsuperscript{101} And individual doctrines ebb and flow in influence.\textsuperscript{102} But they also all serve essentially the same objective of the option of face-saving abstention,\textsuperscript{103} and so even if one doctrine or another falls from favor, or if the facts of a given case fit oddly with precedent on that or another doctrine, the likelihood is high that courts can avail themselves of some route to avoid a decision on the merits. When it comes to a question of the internal operations of the legislative branch that the courts wish to sidestep, what, today, on these facts is decided on the basis of the political question doctrine,\textsuperscript{104} tomorrow, on those facts, might for example be decided on the basis of legislator or generic standing.\textsuperscript{105}

\textit{the House of Representatives}, Congressional Research Service 21 (June 27, 2016).

\textsuperscript{100} E.g., Michael B. Miller, \textit{The Justiciability of Legislative Rules and the Political Question Doctrine}, 78 CAL. L. REV. 1341 (1990).

\textsuperscript{101} E.g., William A. Fletcher, \textit{The Structure of Standing}, 98 YALE L. J. 221 (1987) (noting that standing has long been regarded as “incoherent” and “permeated with sophistry”) (internal quotation omitted).

\textsuperscript{102} E.g., Rachel E. Barkow, \textit{More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy}, 102 COLUM. L. REV. 237 (2002) (tracing the rise of the political question doctrine in its constitutional and prudential forms, and arguing that it is much diminished as a result of rising judicial supremacy).

\textsuperscript{103} See, e.g., Vander Jagt v. O’Neill, 699 F.2d 1166, 1178-79 (1983) (Bork, J., concurring) (Observing that “[a]ll of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”)

\textsuperscript{104} E.g., Nixon v. United States, 506 U.S. 224 (1993) (finding the political question doctrine to apply to the manner in which the Senate “try” an impeachment).

\textsuperscript{105} E.g., Raines v. Byrd, 521 U.S. 811, 816 (1997) (finding that Members of Congress did not have standing the challenge the constitutional status of the Line Item Veto Act, despite the fact that the Act’s authorization of such suits by Members of Congress); Kucinich v. Obama, 821 F. Supp. 2d 110 (D.D.C. 2011); Common Cause v. Biden, 909 F. Supp. 2d 9 (D.D.C., 2012) (holding that plaintiffs, including both Members of Congress and private citizens, did not have standing to challenge the constitutional status of the filibuster).
And though important not to overstate the completeness of judicial abstention, it is also important not to underestimate what judicial enforcement of any Legislative Procedure Act would entail. It would mean judicial intervention into the legislative process, not just in the occasional *Powell* or *Nixon*,¹⁰⁶ but instead a regular, near-constant involvement of the courts in the legislative process, much as we have with respect to the administrative process. Someone will always be aggrieved by a legislative action, and they will challenge on procedural or substantive grounds, arguing that the legislation fails a rationality test. It is not credible that courts would be able to engage in this type of oversight for a period of any length. Once in a while, courts may challenge and act the policeman to the political branches, but their ability to do so on a continued basis is sharply limited;¹⁰⁷ the few instances in which courts have forgotten this lesson and aggressively countered the political branches have led to near-disasters for the judiciary.¹⁰⁸ Among other things, this means that it is highly unlikely that courts will enforce, for example, procedural rules that apply within Congress.¹⁰⁹ A corollary of this point is that distrust in direct legislative lawmaking is essentially irreducible, as the dominant verification mechanism—procedures and at least minimal substantive rationality, supported by judicial review—is not meaningfully available in that context.

With all of this in mind, now consider administrative agencies. The great virtue of administrative agencies is that, unlike the legislature, a credible means of procedural enforcement exists. Indeed, the very fact that administrative agencies represent constitutionally awkward, distinctly lesser

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¹⁰⁷ This, of course, is an old idea. As Alexander Hamilton wrote in the Federalist Papers, “the judiciary, from the nature of its functions, will always be the least dangerous [branch]. . . . The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” *The Federalist No. 78* (Alexander Hamilton).


entities that scholars and jurists regard with natural suspicion is paradoxically a boon to their credibility as policymakers. They are awkward and suspect, as many have observed, for a number of reasons. Most prominently, they render policy judgments as unelected bureaucrats, creating a fundamental tension with our self-conception as a democracy. But they also violate other norms, for instance as they combine constitutional functions more typically separated, or at least more typically combined less obviously—a single agency might easily exercise powers we might otherwise think of judicial, legislative, and executive in nature—upsetting the lore of the separation of powers. Courts cannot but help be offended by these suspect features, and they invite judicial scrutiny and willingness to meddle. So if an agency skips a procedural step, courts have no problem remanding the rule or order so that the agency may comply with the procedure; if the agency fails to explain itself, or behaves irrationally or arbitrarily, courts have no trouble vacating and remanding the action. This is all possible because agencies are regarded as awkward, indeed suspected, constitutional lessers with no inherent legitimacy. Thus, whereas meaningful review is repelled in the legislative context, it flows naturally, some indeed argue too naturally, in the administrative context. Of course, review of agency actions is not costless for any party, and its implications are far-reaching and complex, but one under-appreciated benefit of review—the central one in this account—is that it supports credibility in administrative procedures and at least a “thin” form of rationality in administrative lawmaking that is all but impossible to achieve in legislative lawmaking.

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

113 See, e.g., Mashaw & Harfst, supra note 84; Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59, 65 (1995) (arguing that “the judicial branch is responsible for most of the ossification of the rulemaking process”).

114 On this notion of “thin” rationality, see Jacob Gersen & Adrian Vermeule, Thin Rationality Review, 114 MICH. L. REV. 1355 (2016).
Thus, for delegation to serve its function of ameliorating voter distrust, it is important for administrative agencies to represent constitutional lessers that courts may police without fearing for their own status in our constitutional system. The manner of congressional delegations, along with administrative procedures, makes this relationship clear. It is well understood in our system that agencies have no inherent authority and that any authority they have derives from statute. Moreover, the political branches have clearly subordinated administrative agencies through the judicial review provisions of the APA. Those provisions call on courts, for example, to set aside any agency action that is arbitrary and capricious. Reflecting this subordination, the justiciability doctrines generally either do not apply, or arise less commonly in the context of agency actions. The political question doctrine, for instance, which courts have used to bar review of issues relating to the congressional self-governance, in inapt with respect to agency actions.\textsuperscript{115}

\textit{D. Fairness and Administrative Procedures}

As indicated above, scholars have advanced two basic types of theories for administrative procedures: a traditional normative school of thought, which argues they exist to ensure fairness and promote the legitimacy of the administrative state;\textsuperscript{116} and a positive theory school of thought, which argues that they exist as tools by which Congress might exercise control over agencies through decentralized monitoring.\textsuperscript{117} This perspective on delegation refashions our understanding of administrative procedures. In particular, it suggests a positive rather than normative rationale for fairness and legitimacy in our understanding of procedures.

The objectives of fairness and legitimacy have long been associated with administrative procedures.\textsuperscript{118} A central concern of the drafters of the APA, indeed, was fairness,\textsuperscript{119} a fact reflected in the preamble of the APA.

\textsuperscript{115} The exception for review of actions committed to agency discretion, APA 701, might be viewed as a type of codified political question doctrine, but notably courts have interpreted this fairly narrowly, and indeed have established a general presumption of reviewability with respect to agency actions. Standing, too, is fairly permissive under the APA.

\textsuperscript{116} \textit{E.g.}, GRISINGER, supra note 65, at 67 (noting that the Attorney General’s Committee, which heavily influenced the APA, “offered recommendations intended not to strictly limit the agencies but to help them improve their overall operations and gain legitimacy in the public’s eyes”).

\textsuperscript{117} \textit{E.g.}, McNollGast, supra note 63.

\textsuperscript{118} GRISINGER, supra note 65.

\textsuperscript{119} \textit{Id.} at 60 (noting that the APA’s “drafters consistently argued that the APA was a significant reform that would improve the fairness of administrative governance.”)
DEMOCRATIC DISTRUST

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

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

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

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122 See, e.g., GRISINGER, supra note 65, at 76 (quoting from a study of the ICC that “a regulatory body must be especially solicitous that the public should believe it to be competent, careful, and fair, and if this end can be furthered by procedural concessions which to some extent lower efficiency the gain may well be worth the price”). See also, Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. REV. 461 (2003) (arguing that preventing arbitrariness is central to the legitimacy of the administrative state). For a more recent example of this sort, see Emily Hammond & David L. Markell, Administrative Proxies for Judicial Review: Building Legitimacy from the Inside Out, 37 HARV. ENVTL. L. REV. 313 (2013).

123 Id. at 67 (noting that the Attorney General’s Committee report “offered recommendations intended . . . to help [agencies] . . . gain legitimacy in the public’s eyes”).

124 McNollGast, Administrative Procedures as Instruments of Political Control, supra note 63, at 244.
DEMOCRATIC DISTRUST

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

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

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

IV. PROBING CONSIDERATIONS AND COMPLICATIONS

The theory explains a great deal—for instance, the necessity of delegation to agencies, and the obsession of the drafters of the APA with fairness and, further, the public perception of fairness. But it also raises some questions and carries implications that call out to be tested. I intend to do so historically and empirically, but this Article is not the place for those

125 E.g., William N. Eskridge & John Ferejohn, A Republic of Statutes: The New American Constitution 10-11 (2010) (arguing that “[t]he framework for understanding most national lawmaking and much adjudication in this country is no longer Article I, Section 7, of the Constitution, but is instead the Administrative Procedure Act of 1946, which codified the new public order.”).

126 For example, consistent this view, as noted by Daniel Ernst, Mills Logan said of the Walter Logan bill, a failed predecessor of the APA, that it would stop “the entire subordination of both the legislative and judicial branches of the Federal Government to the executive branch,” Ernst, Tocqueville’s Nightmare, supra note 58, at 133.
exercises. Still, the skeptic may sweep aside the theory as mere conjecture, and I wish to probe two aspects of the theory presently. The first is an implication: the theory suggests delegation should be most common in policy areas characterized by public distrust of our representative institutions. The second is an important historical challenge: Congress did not pass the Administrative Procedure Act, the so-called “Bill of Rights” for the administrative state, until decades after the first major delegations of lawmaking authority. It is seemingly problematic for the procedural regularity to follow so far after the initial delegations.

A. Heterogeneous Policies: Tax and Financial Regulation

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

The theory of this Article suggests answers to these questions. There is relatively little delegation in the fiscal area because the public trusts Congress in this area, at least in the politically relevant sense. That is, voters can generally determine whether a given fiscal policy is in their interest or not: they ask, does my tax rate increase? Am I paying more now than I used to? Am I receiving more transfers than I used to? Am I receiving more now than I used to? For better or worse, these questions largely motivate voter judgments in fiscal policy, and hence they dictate fiscal policy. That voters can answer them natively means that there is little distrust and little need for delegation. Much the same might be said for

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

128 E.g., Lars Calmfors, Fiscal Policy to Stabilize the Domestic Economy in the EMU: What Can We Learn from Monetary Policy?, 49 CESIFO Econ. Stud. 319, 347 (2003) (concluding that “a far-reaching reform as delegation of fiscal stabilization policy to an independent Fiscal Policy Committee has a lot to speak for itself”).

other areas where we see virtually no delegation to agencies: gun control policy, for instance.

By comparison, voters have tremendous distrust of the legislature when it comes to financial regulation. And for good reason. It is not easy to determine whether financial policy A or financial policy B is better for us—this is true even for relatively attentive citizens. Moreover, the immense resources of the financial sector suggest the ability to ply legislators. Voters, thus, do not know if policy A or policy B is in their best interest, but they have a natural and justified suspicion of the legislative process. Fearing for their jobs, legislators come to see delegation as a convenient path forward. They therefore set the objective legislatively; and the agency matches facts to objectives, constrained by administrative procedures and judicial review.130

Notice that though the problem that delegation solves is not necessarily one of expertise, this is not to say that expertise is irrelevant to policymaking, even where Congress does not delegate. Indeed, the classic example of non-delegation, fiscal policy, undoubtedly involves the application of expertise. The difference is that Congress can solve the expertise problem internally with respect to fiscal policy—because of voters’ ability to evaluate the policy’s implications for their own welfare—whereas it cannot for many other areas of policy, such as financial regulation. This explains why Congress has, in fact, invested heavily in developing native expertise for fiscal policy. It is one of the few areas, indeed, where Congress has created precisely the type of advisory agency that Ely and followers have urged upon the institution. In 1974, Congress created the Congressional Budget Office (CBO), which “produces independent analyses of budgetary and economic issues to support the congressional budget process.”131

Much the same story exists at the level of congressional committee. Consider, for instance, the resources of various U.S. House committees. The Committee on Appropriations, which bears primarily responsibility for setting spending levels for federal programs, spent approximately $21 million on salaries in 2015.132 The House Budget Committee, which

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130 Naturally, this is not to say that financial interests are not active in the rulemaking process. For accounts of such influence, see Thomas O. McGarity, Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age, 61 DUKE L. J. 1671 (2011) (describing combat over the implementation of the Durbin amendment); Kimberly D. Krawiec, Don’t Screw Joe the Plumber: The Sausage-Making of Financial Reform, 55 ARIZ. L. REV. 53 (2013). Rather, the point is that agencies capacity to capitulate to these pressures—pressures equally, if not more present in the legislative context—is constrained.


establishes the resolution setting the overall funding level that the Appropriations Committee works with, had salaries of about $4.1 million in 2015. In the same year, the House Ways and Means Committee, which is responsible for tax policy, spent roughly $7.6 million on salaries. Thus, even ignoring the Joint Committee on Taxation and the CBO, not to mention the U.S. Senate committee structure, the House spends over $32 million per year on salaries for those working on fiscal policy. By comparison, the House spends relatively little developing expertise on financial regulation. In 2015, the House spent about $6.4 million on salaries for the House Financial Services Committee, the principal committee with jurisdiction in that area.

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

B. Historical Sequencing and Procedures

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

It is important to note three points. The first observation is that, though Congress passed the APA in 1946, it is error to suggest that Congress first

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133 U.S. HOUSE WAYS AND MEANS COMMITTEE, http://waysandmeans.house.gov/about/ (last visited July 22, 2016) (observing that the committee is the “chief tax-writing committee in the House of Representatives”).

134 For a history of the Joint Committee on Taxation, see George K. Yin, James Couzens, Andrew Mellon, the ‘Greatest Tax Suit in the History of the World,’ and the Creation of the Joint Committee on Taxation and Its Staff, 66 TAX L. REV. 787, 849 (2012) (quoting one Member of Congress involved with its creation as saying the committee “should be composed of experts . . . and ought to be made up in such a fashion that it can not [sic] be said that it is a whitewashing committee or anything of that sort; not to be subject to any such criticism as that”).
then contemplated procedures. Indeed, far from it. Though the solution of delegation to the problem of distrust no doubt came haltingly and only half-knowingly, as an evolution rather than as engineered, many of the initial delegations of authority came with agency-specific procedures that represented early prototypes of what eventually became the APA. Consider, for instance, the Steamboat Safety Act of 1852, which Professor Mashaw carefully details in his recent entry on early “administrative law.”

This act, which pre-dated the APA by nearly a century, delegated authority to a board to inspect and license steamboats for safety—during this period, steamboats, a major form of public transportation, had the unfortunate tendency to explode. However, with the delegation of authority came administrative procedures. The statute called on inspectors to certify vessels for seaworthiness, signing a statement if approving the boat, and in the event of a denial, the inspectors “shall state, in writing, and sign the same, their reasons for their disapproval.” The statute, further, provided for an appeals process, allowing for a supervisor to consider the case “anew” if the party appealed within thirty days of the initial decision and submitted the inspector’s written reasons.

By the turn of the century, it seems to have become fairly standard for Congress to accompany delegations with procedures. The Hepburn Act of 1906, for instance, which dramatically expanded the Interstate Commerce Commission’s (ICC) authority, including for the first time unambiguous

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135 JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 187-208 (2012). See also, John G. Burke, Bursting Boilers and the Federal Power, 7 TECH. & CULTURE 1, 3 (1966) (arguing that, in response to the dangers of steamboat engines, “Congress passed the first positive regulatory legislation and created the first agency empowered to supervise and direct the internal affairs of a sector of private enterprise in detail,” a trend that lead to the growth of federal power and other agencies, such as the ICC). For another excellent entry on pre-twentieth century regulation, see William J. Novak, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA (1996).

136 Id.

137 For several hundred pages of gruesome, one hopes sensationalized, accounts of many steamboat disasters, see JAMES T. LLOYD, LLOYD’S STEAMBOAT DIRECTORY, AND DISASTERS ON THE WESTERN WATERS 227 (1856) (describing, for example, the explosion of the Louisiana in 1849 near New Orleans, observing that “it is utterly impossible to describe all the revolting objects which presented themselves to the view of the beholders [of the accident]. Suffice it to say, that death was there exhibited in all its most hideous forms; and yet the fate of the many who still lived was more shocking and distressing than the ghastly and disfigured corpses of those whose sufferings were terminated by death.”).

138 10 Stat. 66 (1852). See also, Mashaw, supra note 135, at 195 (noting that, “[s]o far as I have been able to ascertain, this is the first statute at the national level to require written reasons for an administrative decision”).

139 10 Stat. 67 (1852).
ratemaking authority, featured an impressive suite of procedural requirements. In the event of a complaint against a carrier, the ICC must “make a report in writing”, and in the event of a damages awards, “shall include findings of fact on which the award is made.”\textsuperscript{141} The report “shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.”\textsuperscript{142} The Act further provided for a “full hearing”,\textsuperscript{143} and though that term was not well-defined in the statute, its meaning was clear enough to courts. Such a hearing, the Court declared in \textit{ICC v. Louisville & Nashville Railroad Company}, “conferred the privilege of introducing testimony, and at the same time imposed the duty [on the ICC] of deciding in accordance with the facts proved.”\textsuperscript{144} And though the statute likewise did not establish a generic standard of review,\textsuperscript{145} Congress plainly provided avenues for judicial review of Commission orders. The keystone standard of review that emerged from this judicial review, the substantial evidence standard,\textsuperscript{146} was conceived as somewhat more deferential than “weight of the evidence” standard,\textsuperscript{147} but certainly constituted more than a free-pass for agencies;\textsuperscript{148} with some modification, this standard of review made its way

\textsuperscript{140} 34 Stat. 589 (1906).
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} 227 U.S. 88, 91 (1913).
\textsuperscript{145} On orders calling for damages, the Hepburn Act provided that “the findings and order of the Commission shall be prima facie evidence of the facts therein stated,” 34 Stat. 590 (1906). The prima facie standard is itself not self-explanatory, but it appears not to require much deference from courts. \textit{See} Louisville, 227 U.S. at 90 (noting a government argument that the 1887 Act that established the ICC rendered its orders “only prima facie correct”, and that the Hepburn Act, which did not apply that standard to orders not dealing with damages, therefore envisioned a more deferential standard of review on such matters.) For other types of orders, Congress was even less clear. If a carrier refused to obey an ICC order, the Commission or an injured party may seek enforcement in a circuit court, and “the court shall prosecute such inquiries as it shall deem needful in the ascertainment of the facts at issue . . . If, upon such hearing as the court may deem necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process . . .”, 34 Stat. 591 (1906).
\textsuperscript{146} \textit{See}, \textit{e.g.}, E. Blythe Stason, “\textit{Substantial Evidence}” in \textit{Administrative Law}, 89 Penn. L. Rev. 1026, 1029-30 (1941) (noting that “the substantial evidence rule is today gradually being accepted by the courts as a controlling guide,” and that that standard emerged from ICC cases in which the statute provided no clear standard of review of facts).
\textsuperscript{147} \textit{See}, \textit{e.g.}, Ernst, \textit{supra} note 58, at 4.
\textsuperscript{148} \textit{See}, \textit{e.g.}, Louisville, 227 U.S. at 91; Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) (noting that “[s]ubstantial evidence is more than a mere scintilla. It means that such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”)
A second critical observation is that agencies themselves generate a substantial body of procedures. This was true, as Professor Mashaw notes, even before the APA provided scaffolding for additional self-generated procedures. The reason that agencies develop these procedures—that is, that they constrain themselves—is admittedly not entirely clear. Perhaps agencies have some self-conception of how administration “should” occur. Perhaps, as agencies grow in size, they must develop procedures more for reasons of internal self-control and self-governance. Or perhaps they develop procedures in attempts to forestall the external imposition of procedures by courts or Congress that they feel might be ill-fitting or unduly onerous. The motivation of self-generated procedures is indeed of great interest, yet what matters most is that self-generated procedures exist in substance and quantity, and effectuate many of the values associated with the APA. Indeed, Professor Mashaw observes that, due to these self-generated rules of procedure, “the modern administrative lawyer would find little surprising in the administrative adjudicatory process utilized in the late nineteenth century.”

The third observation builds on the first two. To a substantial degree, the APA, as passed, represented a codification of the practices and procedures that already existed in agencies, largely either by virtue of their

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149 5 U.S.C. 706(2)(E). The APA requires the court to review the “whole record”, seemingly calling for a more searching review than courts had at times applied previously. On the modification, see Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (observing that “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in [the APA] that courts consider the whole record.”). But against the notion that the “whole record” requirement added much, see Reginald Parker, The Administrative Procedure Act: A Study in Overestimation, 60 YALE L. J. 581, 589 (1951) (concluding that the substantial evidence standard of review “is little more than a codification of the Consolidated Edison case”, cited above).

150 For important statements of this point, see Elizabeth Magill, Agency Self-Regulation, 77 GEO. WASH. L. REV. 859, 860 (2009) (observing that “[s]trangely absent from [standard] accounts is a ubiquitous phenomenon: administrative agencies routinely self-regulate . . . They voluntarily constrain their discretion”); Mashaw, supra note 135, at 277-82 (discussing self-generated “internal administrative law”).

151 See, e.g., Mashaw, supra note 135, at 112 (arguing that “[a]dmnistrators, because of the imperatives of responsible administration, shrink from unconstrained discretion vested in themselves and fear the centrifugal effects of discretion vested in subordinates.”); see also Hammond & Markell, supra note 122.

152 Id.

153 See, e.g., GRISINGER supra note 65, at 76 (noting that by the time of the APA, “[m]ost agencies and commissions already adhered to judicially defined standards of due process and employed quasi-judicial procedures in their work, a result of agencies scrambling to satisfy reviewing courts and prove their lawfulness to the public for years.”)

154 Mashaw, supra note 135, at 254.
self-constraint, their organic statutes, or judicial influence. The APA’s procedures for formal adjudications, then the dominant channel of agency activity, largely resemble those of a civil trial, and were clearly presaged by the notice and “full hearing” requirements of the Hepburn Act and other congressional actions. Much the same holds for the review provisions in the APA. I have already noted one important area where this is the case: the standard that courts apply to agency findings of fact, a standard that largely developed in the courts as they reviewed ICC orders without clear guidance from Congress on the appropriate standard of review. Naturally, this point of the continuity of the APA can be overstated; the APA seems to have introduced procedures and requirements in a number of important areas, and even under this continuity thesis, the APA brought the laggard agencies into line with the more procedurally conscious agencies. But it is perhaps easier still to overstate the significance of the innovations brought about by the APA. Congress was not drafting against a status quo in which agency officials exercised freewheeling, unconstrained discretion. Congress, instead, was drafting against a backdrop of administrative procedures and standards of review that had developed organically and piecemeal for many years, and intensively so for roughly half a century.

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155 See, e.g., Risinger, supra note 65, at 77 (observing that the APA standards “came largely from the existing practices of the agencies and from the doctrines of administrative law created and articulated by the courts over the past six decades, rather than the [APA] itself.”)

156 See supra notes 140-144 and accompanying text.

157 The central question during this period seems to have been how courts would review findings of fact rather than law. Fact finding was then seen as a critical area of agency discretion. Justice Hughes famously wrote as a warning, “Let me find the facts for the people of my country, and I care little who lays down the general principles.” Charles Evan Hughes, Important Work of Uncle Sam’s Lawyers, 17 Amer. Bar Assoc. J. 237 (1931). At the same time, it seems that it was generally assumed that courts would review questions of law at this point. In his magisterial entry on review of administrative action, Louis L. Jaffe observes a trend of judicial deference from the 1870s, followed by a “sudden and dramatic turn” in the 1902 case of School of Magnetic Healing v. McAnulty, 187 U.S. 94 (1902), establishing a sort of presumption of reviewability. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 337, 339 (1965). This presumption “was reinforced in the Twenties and Thirties by a judicial zeal, often excessive, to contain administrative action.” Id. at 342-43. See also, Mashaw, supra note 135, at 248 (noting that, under Jaffe’s account, there was “something like a general presumption of the reviewability of administrative action for legal error” by the early 1900s.)

158 See Parker, supra note 149, at 590 (lauding, for instance, the requirement of independent trial examiners in certain contexts).

159 E.g., Risinger, supra note 65, at 77 (noting that the APA was a “statement of best practices”).

160 Indeed, one observer writing shortly after Congress passed the APA leavened his assessment of the act by saying “[o]f course, it would be an exaggeration to say that the APA is altogether useless.” Parker, supra note 149, at 590.
All of this indicates that the cornerstones of procedures and judicial review existed, or were under active development, by the time of the first major progressive era delegations. It took time to work out the elaborate structure of the APA; but long before the APA, Congress, along with agencies themselves, began to spin out an intuition of the procedures and styles of review that profitably accompany delegations of lawmaking authority.

V. Erosion?

A core tenet of this theory is that legislative delegation combined with administrative law ameliorates problems of distrust through procedural constraints that encourage transparency, fairness, and deliberation, and thereby credibly discourage the most egregious forms of abusive lawmaking. Even if this theory aptly describes much of the history of the administrative state, it is reasonable to question whether it still does. As Professors Farber and O’Connell have recently and effectively argued, there has indeed been much erosion in administrative procedures in recent decades, erosion that this theory suggests may contribute meaningfully to the current dissatisfaction with government and with the administrative state in particular. Procedural erosion, indeed, threatens the foundational rationale of the administrative state.

A. Procedural Erosion and Distrust

Other scholars have articulated similar and compelling narratives of procedural erosion—notably Professor Rubin and, most aligned, Professors Farber and O’Connell—and that process is essential to understanding the present standing of this theory. The ambition of this sub-part is to focus on the broader historical contours of procedural erosion, with ties to the theory of distrust.

The fount of procedural erosion is the rise of informal rulemaking

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161 See Farber & O’Connell, supra note 169, at 1140 (arguing that “the actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed”).

162 For an argument that the APA is wholesale off square and maladapted to the administrative state, and has been so since inception, see Edward Rubin, It’s Time to Make the Administrative Procedure Act Administrative, 89 CORNELL L. REV. 95 (2003) (arguing that the APA is trapped in a judicial mindset and poorly fitted to administrative governance in general).

163 See supra notes 161-162.
DEMOCRATIC DISTRUST

starting in the 1960s. For most of the early history of the administrative state, agency activity was overwhelmingly adjudicatory activity, with little rulemaking. This changed in a dramatic and well-documented fashion in the 1960s. Between 1960 and 1974, the number of informal rulemakings increased from roughly 500 to over 2,000, a more than four-fold increase. Reflecting this fact, the D.C. Circuit heard very few cases involving informal rulemaking in the first decades following the passage of the APA. In the first two decades of the APA, for instance, the court heard a total of 13 cases that cited the rulemaking provisions of the APA, over the next twenty years, between 1967 and 1987, the number of such cases increased to 291, an over twenty-fold increase in volume. Similarly revealing, early administrative law casebooks contained virtually no discussion of informal rulemaking, now perhaps the dominant topic in casebooks.

This shift to rulemaking had far-reaching consequences for our administrative system that we continue to struggle with today. The most obvious, and in many ways root, problem with the shift is that, though the APA contained provisions for informal rulemaking, they were extremely sparse relative to those for formal adjudications. According to the text of the APA, an agency must take only a few steps to issue an informal rule: provide notice of the proposed rule in the Federal Register; accept public comments on the proposed rule; and “after consideration of the relevant matter presented,” include with the final rule a “concise general statement” of basis and purpose. This means that the center of the administrative mass—a rapidly increasing mass—was moving to a policymaking form that essentially had no hard-wired procedural regularity. The procedures that had

164 I reserve the question of why informal rulemaking increased in the 1960s for another effort. For other accounts, see, e.g., Schiller, infra note 165; Richard J. Pierce, Jr., Rulemaking and the Administrative Procedure Act, 32 TULSA L. J. 185 (1996).


166 Id. at 1147; see also, Todd D. Rakoff, The Choice Between Formal and Informal Modes of Administrative Regulation, 52 ADMIN. L. REV. 159, 162-65 (2000) (documenting the shift to rulemaking).

167 This figure comes from a search of Google scholar, using the string “5 U.S.C. § 553” for the years 1946-1967.

168 This figure comes from the same methodology, but applying to the years 1967-1987.

169 Daniel A. Farber & Anne Joseph O’Connell, The Lost World of Administrative Law, 92 TEX. L. REV. 1137, 1144 (2014) (noting, for example, that Kenneth Culp Davis’ 1951 casebook contained three pages on informal rulemaking).


174 Id.
assured fairness, transparency, and deliberation prior to the 1960s became increasingly irrelevant.

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

The courts tend to receive the most attention; in any event, they perhaps moved the most quickly. The lean statutory instructions in § 553 of the APA contain incredible ambiguity. For adequate notice, what exactly must the notice contain? How detailed does the proposed rule have to be? Does the agency have to report in the proposal any studies that it relied on in formulating it?175 What if the agency changes its mind after issuing the proposed rule, how much can the final rule differ from the proposed rule? Can the agency have ex parte contacts during the rulemaking process? Does the agency have to respond to all of the comments, or just give them “consideration”? How detailed must the agency’s response to comments be? To a large extent, the story of modern administrative case law is one of judicial efforts to address these and similar questions, reflected in the figures above on the D.C. Circuit’s caseload. The trend of judicial decisions was to inject adjudicatory elements into the informal rulemaking process—to make informal rulemakings somewhat more like formal adjudications.176 Much of this judicial work occurred in the D.C. Circuit, and largely during the 1970s.177

Around the same time, executive branch was developing its own responses to the rise of this new procedural form. Starting with President Johnson,178 and maturing with President Reagan, the executive response was to centralize control over agencies and the rulemaking process. For these purposes, the Office of Information and Regulatory Affairs (OIRA) is the most significant institution.179 The president uses this office to screen

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176 E.g., Farber & O’Connell, supra note 169, at 1144 (noting that “[w]hen courts started to pay more attention to informal rulemaking, they tended to respond by pushing it in the direction of adjudication through creation of a ‘paper hearing’ requirement.”).
179 See, e.g., Nicholas Bagley & Richard L. Revesz, 106 COLUM. L. REV. 1260, 1263 (2006) (observing that shortly after his inauguration, President Reagan “promulgated Executive Order 12,291 and asserted an unprecedented level of control over the administrative apparatus”).
agency rulemaking efforts: at least for the most important rules, before an agency publishes a Notice of Proposed Rulemaking, as required by the APA, the agency must first notify OIRA of the proposed rule. OIRA may then approve the rule, reject it, or ask for changes. This centralized review process had, as I suggest, largely matured by the early 1980s, with every president since continuing and refining it.

Congress, too, adapted to the new regulatory landscape, though as noted below ultimately in less effective and sometimes counter-productive ways. One congressional move was to graft additional procedures onto the APA. Congress attempted to shed some light on administrative agencies by passing the Freedom of Information Act (FOIA) in 1966, and the Government in the Sunshine Act (GSA) in 1976. Another major congressional response was to increase the oversight capacity and tools of the legislature, by reorganizing committees and endowing them with additional resources. During this same period, Congress likewise used the legislative veto more commonly, a powerful tool of legislative control. In response to the shift to rulemaking and increase in its volume, Congress, thus, attempted to revise administrative procedures, in a fashion as with the courts, and also to enhance control over agencies, in a fashion as with the executive.

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

In the relevant sense, however, all of these external adaptations substantially failed. Part of the reason for the failure is that many of them were not, in fact, designed to be responsive to the problems opened by procedural erosion. Perhaps the most successful adaptation—successful, that is, on its own terms—was centralized review through OIRA. By most accounts, the executive exerts enormous influence over executive agencies

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185 Id. at 350 (noting, for instance, that “[a]fter 1973, the [legislative veto] was proposed almost routinely whenever the Congress found itself forced to delegate some new, broad authority to the executive branch”).
through centralized review. However, even as this form of control responded to the president’s objectives, it did nothing to restore trust in administrative lawmaking, and indeed many observers believe that centralized review deepens problems of distrust. The public cannot easily determine what changes in rules OIRA required; it is likewise unclear why OIRA asks for changes in some contexts and not others; or who officers of the agency meet with and what is said in the meetings. In this way, OIRA injected a shadowy and powerful force into the administrative state. So being, as OIRA review enhanced presidential control, ameliorating his (or her) concerns over rulemaking and agency discretion, it may also have exacerbated problems of public distrust. Congressional efforts to enhance control over the administrative state might be similarly characterized—recall that legislative control itself is a root of distrust—though they generally were both less effective and less secretive; for example, the institution lost perhaps its most potent tool of control, the legislative veto, due to an adverse Supreme Court ruling.

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

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


190 Another evasive pattern involves privatization of government activity. For an excellent account of this trend, and the problems it entails, see Michaels, supra note 111, at 571 (noting that “agency leaders are employing various privatization practices that have the
First, as courts and Congress attempted to shore up informal rulemaking procedures, agencies shifted into other forms of (effectively) lawmaking to avoid them. Perhaps the most well documented shift is from rulemaking to various forms of enforcement actions. For example, Professors Mashaw and Harfst demonstrate that the National Highway Traffic Safety Administration (NHTSA) initially began policymaking by setting standards through rulemaking. However, after a series of judicial setbacks to the agency’s rulemaking efforts—for instance, *Chrysler Corp. v. Department of Transportation*, faulting the agency for failing to develop the standards using “objective” test procedures—the agency turned away from a priori standard setting through rulemaking, and instead to its authority to recall unsafe cars, which was relatively sheltered from judicial review. Other scholars have considered similar strategic transitions among agencies more generally. The APA, of course, envisions agencies potentially using various lawmaking tools, but the suggestion of this strand of literature is that agencies’ choose tools to avoid the burdens of external review rather than because adjudicatory or enforcement authorities otherwise have attractive properties.

Second, the APA’s informal rulemaking provisions contain a “good cause” exemption, allowing agencies to opt out of notice and comment in many circumstances. All of the evidence suggests that agencies have used this provision extensively. A prominent Government Accountability Office study, for example, found that agencies failed to provide for notice and comment in roughly 35 percent of “major” rules, and 44 percent of non-

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192 Chrysler Corporation v. Department of Transp., 472 F. 2d 659, 676 (6th Cir., 1972) (faulting the agency for failing to develop the standards using “objective” test procedures).

193 MASHAW & HARFST, supra note 191, at 110.

194 See, e.g., Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1446 (2004) (noting a fear that “[b]ecause the agency is able to choose the way its policy will operate and be evaluated in court, it may pick a form that is difficult to review, is not intensely reviewed, or is reviewed under circumstances favorable to the agency.”); Emerson H. Tiller & Pablo T. Spiller, Strategic Instruments: Legal Structure and Political Games in Administrative Law, 15 J. L. ECON. & ORG. 349 (1999).

195 5 U.S.C. § 553(b)(3)(B) (exempting the agency from notice and comment procedures “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”).

196 “Major” is a statutorily defined term, referring to rules that, among other things, are likely to have an effect of $100 million or more annually on the economy. 5 U.S.C. § 804(2).
major rules issued between 2003 and 2010. The solid majority of these procedural shortcuts were associated with the good cause exemption. According to another recent study by Professor Raso, which uses different data, agencies exempted roughly half of all rules from notice and comment. This same study indicates that courts do not police the good cause exemption evenly or assiduously. Thus, as above, even when agencies stay within the terms of the APA’s informal rulemaking provisions, they have of late heavily weighted the exemptions. By some metrics, indeed, the exemption has nearly engulfed ordinary notice and comment rulemaking.

Third, in like vein, agencies have opted to regulate through “guidances” rather than through “legislative rules” in many cases. Procedurally, these guidances, too, do not need to run through notice and comment under the APA. Moreover, unlike rules subject to the good cause exemption, guidances also often cannot be directly challenged and reviewed in court due to the jurisdictional limitations of standing and finality. The line between “legislative rules” and “interpretative rules”, or guidances generally, is not well defined, and has long confounded courts and scholars. In principle, the distinction between the two sets of rules is that legislative rules create new legal obligations, whereas interpretive rules and guidances “merely” interpret and clarify existing obligations. Yet it is often not clear when a rule develops new obligations and when it instead clarifies

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198 Id. at 15.
200 Id.
201 “Guidance” refers generally to non-legislative rules that agencies issue. The APA does not refer to “guidances”, but does include “interpretative rules” and “general statements of policy,” 5 U.S.C. § 553(b)(3)(A), for which the term guidances represents a sort of generic stand-in.
202 Id.
204 For an excellent account of these troubles, as well as a proposed solution to them, see Jacob E. Gersen, Legislative Rules Revisited, 75 U. Chi. L. Rev. 1705 (2007).
an existing source of obligations. The attraction of guidances to the agency is thus obvious: they can control primary behavior often nearly as well as an ordinary legislative rule, yet they can be issued without notice and comment, and indeed, perhaps without direct subsequent judicial review. Historically, there has been no general requirement to publish guidances, much less to do so in the Federal Register, or any other centralized outlet. And though, as of late, some important guidances must now be placed on agencies’ websites, there remains no requirement to publish them in a centralized outlet. One consequence of the fact that agencies have generally not archived guidance documents in any reliable way means that it is challenging to track how this form of agency activity has changed over time. Still, many observers conclude that agencies have increasingly relied on guidance documents to regulate, and moreover that they have done so in response to the procedural burdens associated with informal rulemaking.

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

This sequence of developments sheds some light on the prevailing distrust of our public institutions. It is evident that few trust Congress, despite the supposed salve of the administrative state. Trust in Congress is at an all-time recorded low, with only about 30 percent of the population reporting a “great deal” or a “fair amount” of “trust and confidence” in Congress. This is down from roughly 60 percent as recently as the mid-2000s, and down from about 70 percent in the early 1970s. Of course, trust in Congress might be declining for any number of reasons, most obviously increasing partisan acrimony, and we have little data prior to the 1970s. Still, the distrust of Congress cannot be easily dismissed. It is moreover doubly troubling under the theory of this Article that, beyond Congress, distrust seems to be at unseen heights for the administrative state.

206 See, e.g., Epstein, supra note 203, at 61 (observing that the “tough standards that the courts have imposed on notice and comment proceedings have induced administrative agencies to take [] evasive steps,” prominently including a transition to guidance documents.)
208 Id.
209 Id.
as well. We have no direct data on trust in the administrative state, but at least judging by scholarly attention, the administrative state is in something of a legitimacy crisis.\footnote{See supra, note 2.}

The discussion of the two phases of informal rulemaking suggests that this consternation may not be unfounded—that is, that consternation and distrust follows de-proceduralization. It is not feasible to test this hypothesis in any rigorous way—even aside from data limitations, if only because we have but a single federal government to consider. Yet suggestively consider the following metrics and patterns.

To measure scholarly distrust more systematically, I determine the number of scholarly articles that touch on the “legitimacy” of administrative agencies; I then normalize these figures by the number of articles touching on administrative law.\footnote{To recover the numerator, I search google scholar using the following string: administrative agency legitimacy. To recover the denominator, I search google scholar using the following string: administrative law. I limit the searches to specific years to produce a series of the intensity of scholarly interest in the legitimacy of the administrative state.} This series is itself of interest, and reveals a striking pattern of increase in concern over the legitimacy of the administrative state starting around 1970: between 1940 and 1960, the normalized count was about 0.1; by 1970, it had doubled to 0.2; and by 2010, it had tripled from its 1940s origin to roughly 0.3. One shorthand way to think about these figures is that approximately thirty percent of administrative law articles currently concern the legitimacy of the administrative state—up from about ten percent in 1940.

Moreover, this measure of scholarly distrust closely mirrors a plausible indicator of public distrust based on New York Times stories. Following a long and growing line of research that uses newspaper stories to excavate otherwise difficult or impossible-to-measure features of our political environment,\footnote{See, e.g., DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-1990 (1991) (using newspaper text to measure congressional achievements); Elena Costas-Perez et al., Corruption Scandals, Voter Information, and Accountability, 28 EUR. J. POL. ECON. 469, 470-71 (2012) (using newspaper text to measure incidence of corruption); Daniel Taylor Young, How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman’s Theory of Constitutional Change, 122 YALE L. J. 1990 (2013) (using newspaper text to measure the popular attention that the Constitution receives); Edward H. Stiglitz, Unitary Innovations and Political Accountability, 99 CORNELL L. REV. 1133 (2014) (using newspaper text to measure the legislative balance of control over agencies); Pamela Ban et al, How Newspapers Reveal Political Power (June 30, 2016) (unpublished manuscript) (using newspapers to measure the power of political offices and actors).} I calculate the number of Times stories about federal agencies that relate to unfairness, capture, or corruption; I then again normalize the counts, but now by the number of stories regarding
administrative agencies.213 I do this in bins of decades, from 1940 to 2010. This metric provides a plausible indicator of what informed citizens thought of the administrative state over time. The two series correlate highly—indeed, the correlation between these two metrics is almost unity, 0.95, and is statistically significant at any conventional level.214 This high correlation suggests that the metric of scholarly distrust captures an element of wider public distrust and disquiet, at least among informed people, rather than merely the idiosyncratic hand-wringing of obsessive academics.

Continuing then with this measure of scholarly distrust, what is even more notable is that it correlates highly with a plausible measure of de-proceduralization. There, again, is no ready-made measure of the extent to which agency actions follow rigorous and transparent procedures. But following the narrative above, consider the number of pages in the Federal Register.215 Agencies must publish rules in the Federal Register for them to have legal effect, meaning that almost all rules appear in that publication.216 For this reason, scholars often use the number of pages as a proxy for the number of rules that agency produce in a given period.217 Also critical for present purposes, agencies need not, and generally do not, publish adjudicatory orders in the Federal Register. This means that the number of pages in the Federal Register in a year provides a rough approximation of rulemaking but not adjudicatory activity, a useful feature of the series given that informal rulemaking is associated with the de-proceduralization of the administrative state. As shown in figure 1, the correlation between the extent of informal rulemaking and distrust is positive and strong, at 0.94.218

Plainly, we cannot rule out the possibility that this relationship is spurious—some third force may be causing both series to move together. For example, precisely in part because of eased procedural burdens, informal rulemaking permitted an increase in regulatory activity. Did distrust increase because of this increase in activity? Or in the de-

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213 To recover the numerator, I search the proquest New York Times archive using the following string: federal and (commission or bureau or department or agency) and (corrupt! or capture! or unfair or illegitimate or "special interests"). To recover the denominator, I search the same for: federal and (commission or bureau or department or agency). I calculate this normalized count for each decade starting in 1940.

214 The relevant p-value is 0.0003.


216 A caveat to this statement concerns guidances, discussed above. See supra notes 201-206 and accompanying text.


218 This, too, is statistically significant at any conventional level (p = 0.0004).
proceduralized nature of the activity? Or perhaps the largely coincident rise of presidential control is the culprit? It is likely impossible to sort out such questions credibly, and this remains a suggestive exercise. Still, the pattern is striking: during the first three decades after the APA, the density of articles contending with the legitimacy of the administrative state hovered around 0.1. Precisely as agencies started to adopt informal rules in the 1960s, essentially unscripted by the APA, distrust in agencies accelerated, as reflected in scholarly works and in public accounts.

B. Procedural Restoration

This Article is not the place to undertake a comprehensive or detailed assessment of how procedural erosion might be arrested, or of how to encourage a procedural restoration. That would, indeed, be a major undertaking, and the present focus is more diagnosis than prescription. Here, I want only to sketch, to gesture towards some tentative themes in the objectives of that project. The critical role of procedures is to ensure fairness and transparency, with the goal of ends-means rationality in policymaking; qualities elusive in the legislative context, but realizable in the administrative context. This suggests several broad conclusions about
the administrative state and the judicial and political branches management of it.

Over the last four decades, our system has traded off procedural formality for—largely—greater executive control of the administrative apparatus. This was a poor trade. The supposed benefits of centralized control, such as political accountability, seem unlikely to be realized—the administrative state is too vast and high dimensional for presidential elections, held only once every four years, to serve as an effective device to discipline regulatory actions. More importantly, presidential control does nothing to solve the problem of distrust that, under this theory, is the foundational rationale of the administrative state. Indeed, as with the original problem of legislative lawmaking, presidential control may exacerbate distrust and injure the goals of rationality and fairness. One way to read the many critiques of OIRA is in precisely this manner, as opening doors to special interest capture and shutting doors to meaningful deliberation and rationality in administrative policymaking. So the main theme of restoration involves, instead of centralized political control, a move to decentralized formality in administrative lawmaking.

Some reforms would, it seem, be relatively painless. For instance, it would cost little to standardize and publish agency guidances in a centralized outlet, such as the Federal Register or a companion volume. It would likewise cost little to require agencies to give notice of impending guidances, beyond what is currently required through presidential directive. More costly, but also perhaps more beneficial, agencies might be encouraged to take greater advantage of declaratory orders, as Professor Bremner has urged. The APA envisions agencies issuing declaratory

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221 See, e.g., Timothy Besley & Stephen Coate, Issue Unbundling via Citizens’ Initiatives, 3 Q. J. Pol. Sci. 379 (2008) (noting the inadequacy of elections in high dimensional policy contexts); Glen Staszewski, Reason-Giving and Accountability, 93 Minn. L. Rev. 1253 (2009) (arguing that “[p]ublic officials are not held politically accountable for their specific policy decisions pursuant to periodic elections, and there are overwhelming reasons to believe that this will never be the case,” and favoring reason-giving and deliberation as a source of legitimacy); Edward Rubin, The Myth of Accountability and the Anti-Administration Impulse, 103 Mich. L. Rev. 2073, 2076-83 (2005) (criticizing accountability as an organizing idea in the administrative state, noting for instance that voters “often suffer from apocalyptic levels of ignorance”); Nicholas O. Stephanopoulos, Discounting Accountability (July 29, 2016) (unpublished manuscript) (noting that little evidence supports the Court’s contentions about government design and political accountability, arguing that this functional consideration should be discounted).

222 See, e.g., Steinzor et al, supra note 187.

223 See supra note 205.

224 For an excellent account of declaratory orders, and a call for their greater use, see Emily S. Bremer, Administration by Declaration (June 6, 2016) (unpublished manuscript).
orders, but agencies rarely do so, as they prefer the more informal practice of issuing guidances. Among other benefits over guidances, declaratory orders would offer regulated parties certainty and they would be subject to judicial review. Other procedural reforms worth considering include requiring agencies to run through ordinary notice and comment, at least for major rules. This would eliminate the most troubling aspects of notice-less rules and the over-use of the good cause exemption. As suggested by Professor Nielson, it is also worth considering whether formal rulemaking, that heavily proceduralized and disused policymaking form, might have a role in the modern administrative state. For instance, if agencies must use informal rulemaking for major rules, perhaps they should be required to use formal rulemaking for “super” rules, such as the Clean Power Plan. And even if formal rulemaking is off the table, we might consider intermediate options for rulemaking, neither as informal as suggested by Section 553 of the APA, but less burdensome than formal rulemaking, such as those pushed by Judge Bazelon and others during the 1970s. Such options should be considered and deliberated.

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

On another front, a burning yet enduring question in administrative law

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225 5 U.S.C. § 554(e) (providing that “[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”).


227 It is important to remember the problems of extreme delay that characterized formal rulemaking. See, e.g., Robert W. Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 CAL. L. REV. 1276, 1283-1313 (1972) (describing the formal rulemaking practices of several agencies, and criticizing several, particularly the Food and Drug Administration for unnecessary delay).

228 See, e.g., International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651-52 (DC Cir. 1973) (Bazelon, J., concurring) (arguing that “[w]hether or not traditional administrative rules require it, the critical character of this decision requires at the least a carefully limited right of cross examination at the hearing and an opportunity to challenge the assumptions and methodology underlying the decision”).

229 Farber & O’Connell, supra note 169, at 1180.

230 Id. at 1181-83.

231 Id. at 1184.
is how courts should review agency actions. Roughly speaking, this question has two parts. First, how should courts review agency interpretations of law? And second, what form should arbitrariness review take? The theory of this Article provides some direction on these questions.

With respect to the first issue, many have recently called for the elimination of *Chevron* deference,\(^{232}\) whereby courts defer to agencies’ reasonable interpretations of statutes. Justice Thomas, for instance, recently questioned whether *Chevron* deference violated separation of powers principles.\(^{233}\) Many scholars have likewise called for or considered a post-*Chevron* world.\(^{234}\) Congress, too, has considered codifying de novo review.\(^{235}\) The theory of this Article elevates judicial review, but it does not suppose that courts can resolve true ambiguities in statutes more ably than agencies. It seems likely, indeed, that forcing generalist judges to find a statutory answer where one does not exist will harm the sought after goals of rationality and fairness.\(^{236}\)

But this only responds to part of the question, as much is assumed when we say that a statute is ambiguous or provides no answers. To determine whether an ambiguity exists, one must adopt a theory of statutory interpretation, and this Article weighs on the side of purposivism,\(^{237}\) for the simple reason that if we seek ends-means rationality, it makes good sense to consider the ends explicitly. This does not mean that legislative history should be enshrined as ultimate authority, but it does suggest that it should be part of our understanding of a statute, and that larger statutory structure and context matters greatly. It is heartening, therefore, that the Court seems


\(^{234}\) For an excellent entry, *see* Jeffrey A. Pojanowski, *Without Deference*, 81 MISSOURI L. REV. (forthcoming) (analyzing the implications of review without *Chevron* deference).


\(^{236}\) Here, I seem to depart from Professors Farber and O’Connell, who suggest they might be open to degrading *Chevron* deference in favor of *Skidmore* deference. *See* Farber & O’Connell, *supra* note 169, at 1186.

to be inching in this direction. In *King v. Burwell*, for instance, the Court refused to apply *Chevron* deference, instead consulting the “context” of the statute in question, the Affordable Care Act (ACA), and construing specific terms “with a view to their place in the overall statutory scheme.” In dissent, Justice Scalia criticized this approach as focusing on the “design and purposes” of the ACA rather than a narrower reading of the text of the relevant terms. But from the perspective of fairness and ends-means rationality, there is little doubt that the majority’s approach far more respected the relevant ends, as the dissenting interpretation would have seriously undermined the policy scheme erected by the statute.

The second issue is how to think about arbitrariness review, associated with the APA’s command that courts set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Judges and the wider academic community debated this question for much of the 1970s, largely in response to the rise of informal rulemaking and the meager structure that the APA gives to that form of policymaking. The essential contours of the debate involved Judge Bazelon arguing for greater procedural rigor, under the view that generalist judges have a poor read of the complex substance of agency regulations, but that procedural integrity forces a degree of rationality and reliability, exposes flaws in agency reasoning, and can be competently enforced by courts. Judge Leventhal, by contrast, called on judges to grapple with the

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239 Id. at 2489.
240 Id. at 2489 (internal quotes omitted).
241 Id. at 2502 (Scalia, J., dissenting).
243 5 U.S.C. § 706(2)(A). Although we now connect arbitrariness review with this APA provision, early cases often did so less clearly. For instance, many of the early “hard look” review cases in the D.C. Circuit did not even cite that statutory provision. See, e.g., WAIT Radio v. FCC, 418 F.2d 1153 (1969); Pikes Peak Broadcasting Co. v. FCC, 422 F.2d 671 (1969); Greater Boston Television Corporation v. FCC, 444 F.2d 841 (1970).
245 For a nice example of this position, see International Harvester Co., 478 F.2d at 651-53 (Bazelon, J., arguing for more process, and against judicial review of substance, noting that, “Socrates said that wisdom is the recognition of how much one does not know. I may be wise if that is wisdom, because I recognize that I do not know enough about dynamometer extrapolations, deterioration factor adjustments, and the like to decide
substance of the agency decision, a task that “requires enough steeping in technical matters to determine whether the agency has exercised a reasoned discretion.”

Though by common understanding Vermont Yankee laid to rest the more aggressive forms of Judge Bazelon’s procedure-encouraging review, the questions of what substantive review means, and of what substantive review might indirectly imply for agency procedure remain contested. On this point, the theory of this Article clearly indicates that substantive review, as well as interpretation of the native APA procedures, ought to be used to excite agencies to adopt processes that promote transparency, deliberation, and reasoned agency decision-making, even if at the cost of speed and efficiency.

VI. CONCLUSIONS

Do we need the administrative state? That question has surprising currency today, as observers argue that the administrative state is unlawful and that a strong non-delegation doctrine is on order. Much better, it is thought, is to have a “super” Congress, with a far greater capacity to gather information natively and to draft laws. It is indeed hard to argue with the notion that Congress ought to be more active.

But what this familiar critique of the administrative state misses is that administrative agencies draft laws in ways quite different from the ways that the legislature drafts laws. Critically, agencies draft laws subject to procedural constraints that encourage transparency, deliberation, and fairness, values that increase ends-means rationality and promote trust in the policymaking process. And while we can impose and enforce these procedural constraints on agencies—entities without independent legitimacy, and which we otherwise suspect—Congress cannot credibly do so with respect to its own activities. That Congress cannot self-limit means whether or not the government's approach to these matters was statistically valid.”). See also, Krotoszynski, supra note 244, at 999-1002.


Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524 (1978) (holding that “reviewing courts are generally not free to impose [procedural rights]” on agencies).


that we will always distrust legislative lawmaking, at least in the particulars, if not the stated objectives. When Congress passed law A rather than B, did it act in my best interest? Or was it following the hand of a special interest? The fundamental reason for delegation is not that the legislature lacks information, in this view, but instead public distrust of legislative lawmaking. This is a natural consequence of living in a representative democracy set to a complex society, where voters have incomplete information about policies and the lawmaking environment. Distrust of legislative lawmaking makes administrative lawmaking—suitably constrained—essential to the health of the modern polity.

All of this raises the issue of why the administrative state is itself criticized so fiercely today, why, that is, many question the legitimacy of the administrative state. The answer, I suggest, is a growing slippage between administrative procedure and administrative practice that has led to a decline in realized values of transparency, fairness, and rationality. The administrative state must achieve legitimacy from some source beyond mere agreement with the particular policies it produces at a moment, for those will always be contested in a heterogeneous society. This Article has argued that that source is procedural integrity, which promotes a suite of values serving fairness and means-ends rationality; it calls for a restoration of effective administrative procedures, supported and made credible by judicial review.
1. Preliminaries

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

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

Let the voter’s payoffs depend only on the state of the world, \( \omega \in \{0, 1\} \), such that,

\[
\begin{align*}
    u_v &= \begin{cases} 
        1 & \text{if } p = \omega \\
        0 & o / w
    \end{cases} 
\end{align*}
\]

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

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

\[
\begin{align*}
    u_c &= \begin{cases} 
        1 & \text{if } p = 1 \\
        0 & o / w
    \end{cases} 
\end{align*}
\]
This means that the non-aligned legislator does best when \( p = 1 \) regardless of the state of the world, \( \omega \). For example, even if the railroad survives without the increase, or the rate increase is otherwise unnecessary for systemic reasons, the legislator still prefers to increase the rate.

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

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

I assume that re-election is a function of the voter’s beliefs about the probability that the legislator is faithful. In particular, let \( \mu(p) \) denote the voter’s beliefs about the legislator’s faithfulness after observing \( p \). The probability that the legislator is re-elected is \( F(\mu(p)) \), where \( F \) is strictly increasing in \( \mu(p) \), and \( F(0) = 0 \) and \( F(1) = 1 \). This approach to modeling re-election essentially follows earlier modeling efforts by Professors Fox and Jordan.\(^{251}\)

To summarize and clarify, then, the sequence of the interaction is as follows: (1) nature determines the state of the world, \( \omega \in \{0,1\} \), and whether the legislator is faithful, \( \tau \in \{f,c\} \). The legislator observes both values, but the voter observes neither. (2) The legislature sets \( p \in \{0,1\} \). (3) The voters update beliefs about the likelihood that the legislator is faithful, and re-elects him on the basis of these beliefs. All actors receive payoffs. I seek to characterize salient perfect Bayesian equilibria.\(^{252}\)

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\(^{250}\) This is satisfied by assuming that \( \rho > 1 \).


\(^{252}\) For this intuition-building exercise, I limit attention to pure strategies.
2. Equilibria

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

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

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

Another equilibrium involves the legislators following the prior beliefs of the voter about the best policy. Under the assumption that $\gamma < \frac{1}{2}$, the voter believes that $p = 0$ is generally the most appropriate policy. The strategies in this equilibrium simply involve both types of legislators setting $p = 0$, following the voter’s uninformed belief about the best policy. Because both types select $p = 0$ regardless of the state of the world, the voter cannot update beliefs about the type of the legislator if she observes $p = 0$, meaning that $\mu(0) = \pi$. If she observes $p = 1$, she needs some off the path beliefs, and under a standard refinement, she assumes that the type

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253 It can be shown that the other candidate pooling equilibrium—with $\gamma > \frac{1}{2}$ and both types of legislators therefore selecting $p = 1$—does not exist, at least under reasonable off the path beliefs. Such beliefs would entail that a deviation to $p = 0$ leads the voter to believe the legislator is of type f; see by analogy the reasoning of infra note 254. This would mean that any time $\omega = 0$, the f-type legislator would face unambiguous incentives to deviate to $p = 0$.

254 Under the refinement, the voter, upon observing a deviation to $p = 1$, believes that the legislator is type c based on the fact that statistically the c-type legislator is more likely to benefit from that policy. This resembles the Criterion D1 refinement. See In-Koo Cho & David M. Kreps, *Signaling Games and Stable Equilibria*, 102 Q. J. ECON. 179 (1987). For a
of the legislator is c, as statistically he is most likely to benefit from the deviation. This implies that this equilibrium survives when \( \rho \geq \frac{1}{F(\pi)} \).

3. Commentary

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

\[
\pi > \frac{\gamma \pi}{1 - \pi(1 - \gamma)}.
\]

This translates directly into a reduced chance of re-election for the faithful legislator.

Much the same can be said of the pooling equilibrium. There, the fact that the voter confuses the faithful legislator with the captured legislature induces the faithful legislator to select the policy that the voter a priori believes to be most appropriate, i.e., \( p = 0 \), even when the legislator knows that he and the voter would best off with \( p = 1 \). This equilibrium is not particularly attractive on policy terms. Further, as above, the incumbent faithful legislator faces lower re-election chances as a result of the captured legislator. That is, the voter cannot update beliefs about the legislator as a result of the pooling strategies, meaning that the probability of re-election is \( F(\pi) \), some quantity less than one.

### B. Delegation and Administrative Procedures

1. Preliminaries

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

If the legislature delegates, the statute takes the form of state-contingent instructions to the agency: for example, “if \( \omega = x \), set \( p = y \)”, where

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similar approach to beliefs in a similar context, see Justin Fox & Richard Van Weelden, *Partisanship and the Effectiveness of Oversight*, 94 J. Pub. Econ. 684 (2010).
DEMOCRATIC DISTRUST

Let \( s = p_0 p_1 \) denote the statute, where \( p_x \) is the instructed policy when \( \omega = x \). For instance, \( s = 01 \) is equivalent to, “set \( p = \omega \)”, and might be thought of as saying, “set policy in the public interest.”

Administrative procedures represent a complex body of rules that undoubtedly serve multiple interests in our political system. To date, most positive scholars have focused on how procedures allow the legislature to “control” administrative agencies, that is, to attenuate the familiar problem of agency costs.\(^{255}\) I wish to consider an alternative analytical root for administrative procedures, and so I eliminate agency costs (as between the legislature and administrative agency) by assuming that the administrative agency is of the same type as the legislature. As above, let \( \tau \in \{ f, c \} \) denote agency types, with payoffs also following from above.

As an alternative positive rationale for procedures, let us take seriously the notion that they exist to promote fairness, transparency, and legitimacy. For maximal simplicity, suppose the legislature faces a choice between imposing procedures and judicial review on the agency or not. If the legislature imposes procedures, the agency reveals its read of the world, \( \omega \), to the public;\(^{256}\) if the legislature does not impose procedures, it is not required to do so. We might imagine richer procedural choices involving other tradeoffs. For example, stricter procedures and review might probabilistically force the agency to reveal its read of the world, and might further implicate some tradeoff in agency effectiveness, that is, stricter procedures and review might implicate some probability that the agency fails to issue a policy altogether. Such considerations would clearly influence the nature of procedures that the legislature imposes on the agency, but the way in which they would influence this choice would depend heavily on assumptions about the correspondences between procedural rigor and the outcomes of interest, fairness and transparency, on one hand, and on the other administrative effectiveness. Given such tradeoffs, it is unlikely that the legislature would opt for complete procedural fairness or transparency, but beyond earning this modest observation the payoff of modeling more complex procedures is unclear, particularly as we do not have any empirical guidance on the relevant correspondences.

Much as in McNollGast, administrative procedures have consequences because the courts enforce them. Here, courts set aside agency actions that violate administrative procedures, such that if the agency fails to reveal the state, or if \( s = 01 \), and the agency sets \( p = 1 \) despite \( \omega = 0 \), the court sets

\(^{255}\) See McNollGast, Administrative Procedures as Instruments of Political Control, supra note 17.

\(^{256}\) For a doctrinal analog, see, e.g., Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir., 1973).
aside the agency action. This form of judicial review approximates that under the APA, wherein courts set aside agency actions, for example, that fail to divulge the evidence that the agency relies on, or more generally exhibit inadequate connection between evidence and reasoning and stated agency or statutory objectives. If the court sets aside the agency action, all players receive a payoff of zero. To be clear, the judicial system is not a strategic actor in this model.

So amended, the sequence of the interaction is as follows: (1) nature determines the state of the world, $\omega \in \{0,1\}$, and whether the legislator and the agency are faithful, $\tau \in \{f,c\}$. The legislator observes both values, but the voter observes neither. (2) The legislature decides whether write a delegating statute, $s$, or set policy directly through legislation, $p$, and if the former whether to impose procedures on the agency. (3) If the legislature delegates to the agency, the agency sets policy, and the court reviews it for consistency with the statute. (3) The voters update beliefs about the likelihood that the legislator is faithful, and re-elects him on the basis of these beliefs. All actors receive payoffs. As above, I seek to characterize salient perfect Bayesian equilibria.

2. Equilibria

The possibility of delegation with administrative procedures dramatically alters legislative behavior. This follows from the fact that it is almost always in equilibrium for the faithful legislator to delegate with the statute $s = 01$, and to impose procedures on the administrative agency. These strategies always result in $p = \omega$, as the policy preferred by the legislator, and further maximizes his re-election prospects. That $p = \omega$ comes from the fact that, under the assumption of an aligned agency, the agency is also faithful, and therefore faces no incentive to set $p \neq \omega$ if delegated authority from the legislature. On the question of re-election, if the captured legislator’s strategies call for him to either not delegate, or to delegate without procedures, this produces a separating equilibrium—if the equilibrium exists—and therefore results in re-election of the faithful legislator with probability one. If on the other hand the captured legislator delegates with procedures, pooling with the faithful legislator, one of two scenarios unfolds, depending on agency behavior. If the agency’s strategy

\[\text{[257 See, e.g., Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir., 1973)]\]
\[\text{[259 Under reasonable off the path beliefs, it is always in equilibrium, as discussed below.]}\]
involves setting \( p \neq \omega \), then voters observe the mismatch by virtue of procedures and judicial review, allowing voters to update beliefs about the legislator, effectively producing a separating equilibrium; if the agency’s strategy is to set \( p = \omega \), the voter cannot update beliefs, but under any reasonable refinement, a deviation from the delegation with procedures strategy compels the voter to regard the deviating legislator as captured, implying that the faithful legislator cannot increase his re-election odds by so deviating.\(^{260}\) These considerations indicate that it is always in equilibrium for the faithful legislator to delegate with procedures in place.

If the faithful legislator adopts this strategy, the captured legislator must often consider a policy, re-election tradeoff. Note that if \( \omega = 1 \), the legislator faces no tradeoff, as delegating with procedures maximizes both quantities; so let \( \omega = 0 \). In this case, directly legislating allows the legislator to set \( p = 1 \), producing a policy payoff of 1, but at the cost of any hope of re-election. By comparison, deviating to \( s = 01 \) with procedures, and assuming that the agency follows the statute,\(^{261}\) produces a payoff of \( F(\pi)\rho \) (that is, no policy payoff, plus pooling re-election odds). Thus, as long as \( \rho > \frac{1}{F(\pi)} \), direct legislation is not in equilibrium for the captured legislator. The same is true of delegating without procedures and judicial review: the agency now sets the policy, but the voter infers the same information from the lack of procedures as she does from direct legislation.

We can go further to state that, under reasonable off the path beliefs, it is never in equilibrium for the faithful legislator to directly legislate. To see this, suppose that the faithful legislator’s strategies call on him to directly legislate. If the strategies call on the captured legislator to delegate, then it is plainly in the faithful legislator’s interest to deviate from direct legislation, as doing so increases his electoral odds and comes at no policy cost. If instead the captured legislature directly legislates, the faithful legislator faces an incentive to deviate and delegate with procedures; under reasonable off the path beliefs, the voter updates to believe that the legislator is faithful, and this also maximizes his policy payoffs.

3. Commentary

It is clear from this analysis that the faithful legislator is almost always better off with a system of delegation and fair, transparent procedures than

\(^{260}\) Again, the refinement above, supra note 254, would imply this of the voters’ beliefs.

\(^{261}\) This agency behavior is in equilibrium as deviating produces no policy benefit for the agency following judicial review.
with direct legislation. This device of delegation with safeguards greatly reduces the electoral risks inherent in direct legislation, wherein the voter often cannot tell whether the legislator is faithful or not. Indeed, unlike direct legislation, the worst that the faithful legislator can do with respect to re-election is face odds based on the voter’s prior beliefs.

C. Thoughts on Transitions

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

Policy complexity is a first pre-condition for distrust to exist in serious measure. That is, when voters see one policy rather than another, they must face considerable uncertainty about whether it is in their best interest. Although this kind of uncertainty almost surely existed throughout our country’s history in some way, it also undoubtedly has increased as the economy has grown more complex and the government’s relationship with businesses has become more involved. This suggests that we might expect to see fundamental transitions following periods of rapid economic growth, particularly if growth is intertwined with state activity. That feature characterizes much of the half century following the Civil War.262

Closely related, we might expect to see a striking transition if people’s perceptions of corruption change. In the terms of the model, this perception is reflected in \( \pi \), voter’s prior beliefs that the politician is faithful. A sharp reduction in \( \pi \) implies that the electoral costs of distrust increase dramatically for the faithful legislator, providing him an incentive to develop alternative lawmaking means. The rise of muckraking journalism around the turn of the century, for example, plausibly had a marked effect on \( \pi \).263 It may therefore be no accident that a characteristic of the roughly co-incident progressive era involves the delegation of authority from legislatures to various lawmaking commissions,264 subject to judicial

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263 E.g., LOUIS FILLER, THE MUCKRAKERS 9 (1968) (observing of muckraker journalism, “[n]ow, suddenly, there appeared . . . a new, moral, radical type of writing . . . that savagely exposed grafting politicians”).

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