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**Article**

**The APA and the Assault on Deference**

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INTRODUCTION

This Article examines the question of whether the Administrative Procedure Act (APA) forbids reviewing courts from displaying deference to administrative agencies’ interpretations of the statutes and rules that they administer. Some readers might initially suppose that the answer to that question is too self-evident to require exploration in a law review. After all, courts have displayed such deference routinely during the entire seventy-plus years in which the APA has been

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in force. But events of the past few years tell a different story. The propriety of such deference is one of the most contested issues in current administrative law discourse.<sup>1</sup>

A proposal to abolish judicial deference to agencies' legal interpretations even found its way into congressional deliberations a few years ago, when the House of Representatives was under Republican control.<sup>2</sup> The deference debate has multiple dimensions, ranging from the constitutional to the prudential, but the APA dimension has comprised one battleground in this wider war.

*Kisor v. Wilkie*<sup>3</sup> provides the most conspicuous evidence that the stated question is up for grabs. In that 2019 case, the Supreme Court considered whether to overrule so-called *Auer* deference. That doctrine, a close cousin of the better-known *Chevron* doctrine,<sup>4</sup> provides that an agency's interpretation of an ambiguous regulation is "controlling unless plainly erroneous or inconsistent with the regulation."<sup>5</sup> The result was something of a standoff. A plurality opinion by Justice Kagan reaffirmed support for *Auer*,<sup>6</sup> but Justice Gorsuch, in a lengthy separate opinion, condemned *Auer* and lamented the Court's failure to abandon it.<sup>7</sup> Among other reasons, Justice Gorsuch relied on § 706 of the APA. The first sentence of that provision states that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."<sup>8</sup> According to Gorsuch, § 706 commands independent, nondeferential review of legal issues,

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1. See generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018).

2. See H.R. REP. NO. 114-622, at 5 (2016) (supporting the proposed Separation of Powers Restoration Act, in part because "it has . . . been suggested that *Chevron* conflicts flatly with the express terms of the Administrative Procedure Act of 1946"). The House later voted to adopt the amendment. Regulatory Accountability Act, H.R. 5, tit. 1, 115th Cong. § 107 (2017).

3. 139 S. Ct. 2400 (2019).

4. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

5. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quotation marks omitted) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). The doctrine was previously called *Seminole Rock* deference, after an earlier case that recited the same verbal formula. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

6. *Kisor*, 139 S. Ct. at 2410–14.

7. *Id.* at 2425–48 (Gorsuch, J., concurring in the judgment). Gorsuch's opinion was technically a concurrence, because he agreed with the majority's decision to remand the case for further proceedings. In its substance, however, it was more like a dissent.

8. 5 U.S.C. § 706.

including agencies' interpretations of their own regulations.<sup>9</sup> Although Kagan disagreed with this view,<sup>10</sup> the *Kisor* case as a whole did not resolve the question, because each of these two opinions spoke for only four Justices. The deciding vote was cast by Chief Justice Roberts, who supported *Auer* only on stare decisis grounds.<sup>11</sup> Roberts also concurred in Kagan's opinion insofar as it articulated limitations on the doctrine.<sup>12</sup>

Presumably, *Kisor*'s inconclusive outcome means that conflict over the issues in the case, including the § 706 issue, will continue. Perhaps the Court will leave the *Auer* deference controversy alone for a while (although Gorsuch did warn that "this case hardly promises to be this Court's last word on *Auer*").<sup>13</sup> Even if it does, the § 706 issue could easily return to the Court in a challenge to *Chevron* deference. Under *Chevron*, as most readers of this Article are doubtless aware, a reviewing court is generally expected to uphold an agency's reasonable interpretation of an ambiguous statute that the agency administers.<sup>14</sup> That standard obviously raises many of the same questions about its consistency with § 706 that *Auer* deference does. Indeed, Gorsuch would undoubtedly be more than willing to support an assault on *Chevron* deference, for he has long proclaimed his antipathy for that doctrine, both as a lower court judge<sup>15</sup> and as a Justice.<sup>16</sup> Justice Thomas has already suggested, post-*Kisor*, that *Chevron* deference "is likely contrary to the APA."<sup>17</sup> Moreover, both Chief Justice Roberts and Justice Kavanaugh, in their separate opinions in *Kisor*, pointedly

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9. *Kisor*, 139 S. Ct. at 2432–34, 2435–37 (Gorsuch, J., concurring in the judgment).

10. *Id.* at 2418–20 (plurality opinion).

11. *Id.* at 2424–25 (Roberts, C.J., concurring in part).

12. *Id.*; see *id.* at 2414–18 (Kagan, J., for the Court).

13. *Id.* at 2448 (Gorsuch, J., concurring in the judgment).

14. *Chevron*, 467 U.S. at 843–44. For a more precise exegesis of the *Chevron* test, see *infra* Part III.

15. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and Chevron Deference*, 70 ALA. L. REV. 733 (2019) (surveying Gorsuch's lower court pronouncements on *Chevron*). Gorsuch's opinion in *Gutierrez-Brizuela* was reportedly a key factor in President Trump's decision to appoint him to the Court. See, e.g., DAVID A. KAPLAN, *THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT'S ASSAULT ON THE CONSTITUTION* 42 (2018) ("[W]hen Gorsuch became a finalist for the Court, his opinion on *Chevron* deference proved decisive in clinching the nomination.").

16. See, e.g., *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908–09 (2019) (Gorsuch, J., dissenting).

17. *United States v. Baldwin*, 140 S. Ct. 690, 692 (2020) (Thomas, J., dissenting from denial of certiorari).

stated that the outcome of that case had no implications for *Chevron*.<sup>18</sup> In addition, the lower court bench is populated with more than a few additional deference skeptics who might well take on this issue in anticipation of another Supreme Court encounter with it.<sup>19</sup>

Against this background, the need for scholarly attention to the § 706 issue is manifest. At the time of *Kisor*, the weight of scholarly opinion, at least in quantitative terms, was on Gorsuch's side. He was able to cite to many commentators who had given some degree of support to the de novo reading of § 706.<sup>20</sup> Most of those authors had expounded that position only passingly or with reservations, but others, most notably John Duffy and Aditya Bamzai, had defended it in extended analyses.<sup>21</sup>

At the same time, Kagan cited to only one article—by Cass Sunstein and Adrian Vermeule—to support her claim that § 706 does contemplate, or at least allow for, judicial deference on legal issues.<sup>22</sup> Indeed, there were few, if any, other articles she *could* have cited. In the

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18. *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part); *id.* at 2449 (Kavanaugh, J., concurring in the judgment).

19. See, e.g., Egan v. Del. River Port Auth., 851 F.3d 263, 278–83 (3d Cir. 2017) (Jordan, J., concurring in the judgment); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 324 (2017); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1348–49 (2018) (finding widespread distaste for *Chevron* in the regional courts of appeals, although not in the D.C. Circuit).

20. *Kisor*, 139 S. Ct. at 2433 n.49 (Gorsuch, J., concurring in the judgment). A partial list of such commentators (not identical with Gorsuch's list) would include CALEB NELSON, STATUTORY INTERPRETATION 707 & n.26 (2011); Michael McConnell, *Kavanaugh and the "Chevron Doctrine,"* DEFINING IDEAS (July 30, 2018), <https://www.hoover.org/research/kavanaugh-and-chevron-doctrine> [<https://perma.cc/WG42-ZKEG>]; Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1313 (2015); Thomas W. Merrill, *Re-Reading Chevron*, 70 DUKE L.J. 1153, 1194 (2021); Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2243 (2011); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 788–89 (2010) [hereinafter Beermann, *End the Experiment*]; Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2640 (2003); Jonathan Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1249 (2002); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 23–24 (1996); Cynthia A. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 473 & n.85 (1989).

21. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) [hereinafter Bamzai, *Origins*].

22. *Kisor*, 139 S. Ct. at 2419, 2421 (plurality opinion) (citing Cass R. Sunstein &

wake of *Kisor*, Sunstein has expanded on his previous analysis in another article,<sup>23</sup> and Craig Green has also written helpfully on the subject.<sup>24</sup> These treatments, however, are relatively brief. In view of the deeply contested and ideologically charged nature of this controversy, I believe a more comprehensive analysis of the manifold dimensions of this issue is needed, and this Article seeks to provide one.

That inquiry will show, I believe, that the *de novo* reading of § 706 is quite weak. With due respect for those who have argued to the contrary, I propose to demonstrate that the no-deference thesis is deeply flawed, and many individual arguments that have been deployed to support it are decidedly shaky. In a way, this conclusion should not be surprising, because for more than seven decades the courts have regularly proceeded on the assumption that the first sentence of § 706 imposes no real constraint on their decision-making. The revisionists, seeking to overturn an APA interpretation that has prevailed in the courts since before any of them was born, have a heavy burden to carry, and I will argue that they cannot come close to carrying it.

A distinctive feature of this particular issue is that, unlike many other aspects of the ongoing debate over judicial deference, the APA argument can be discussed and evaluated on the basis of conventional legal materials. Usually, controversies over *Chevron* and *Auer* deference implicate fundamental disagreements about the appropriate scope, and even the legitimacy, of the regulatory state.<sup>25</sup> Legal analysts frequently, and perhaps necessarily, bring their respective ideological preferences to these discussions. I will contend, however, that the

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Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 306, 308 (2017)). In this section of her opinion, Kagan also cited to an article by Dean Manning to support one of her background premises. *Id.* at 2420 (citing John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 635–36 (1996)). As is well known, however, Manning's article as a whole is a classic statement of *opposition* to *Auer* deference (which was then called *Seminole Rock* deference). See, e.g., *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring) (disavowing his previous support for *Auer* deference, partly on the basis of Manning's analysis).

23. Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1641–57 (2019) [hereinafter Sunstein, *Chevron as Law*]. For a short, readable version of the portions of his article that are most relevant to the present article, see Cass R. Sunstein, *Chevron Is Not Inconsistent with the APA*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 16, 2020), <https://www.yalejreg.com/nc/chevron-is-not-inconsistent-with-the-apa-by-cass-r-sunstein> [<https://perma.cc/C97T-CJQG>].

24. Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 676–94 (2020).

25. For an overview of the political and legal controversy, see Gillian E. Metzger, *Foreword: 1930's Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

§ 706 issue is, or ought to be, different. It can and should depend on evidence—although, in the current politicized environment, I would hesitate to predict that this Article, or any other, will terminate all disputation over that issue.<sup>26</sup>

Part I of this Article analyzes the Kagan and Gorsuch opinions in *Kisor*, using them as a vehicle for framing with precision the scope and thrust of this Article. Part II examines the evidence closely, contending that the text of § 706, related APA provisions, legislative history, case law background, and contemporaneous understanding all fail to support the no-deference interpretation of § 706. Instead, the evidence shows that Congress was not particularly concerned about the issue of judicial review of agencies' legal interpretations, so it left the preexisting tradition of deference undisturbed.

Of course, the proposition that § 706 does not forbid all judicial deference to agencies on legal issues does not, standing alone, establish what sorts of deference the APA does allow. Over the years, the provision has been applied in a variety of ways. Part III of the Article explains why, in my view, the *Chevron* doctrine, as currently applied, falls within the range of allowable approaches.

## I. FRAMING THE ISSUE

At the outset, I will try to articulate with precision the interpretation of § 706 that the Article seeks to refute and the alternative that it will defend. To that end, I will focus on *Kisor v. Wilkie*, in which Justices Kagan and Gorsuch set forth diametrically opposed interpretations of the first sentence of § 706. First, consider Gorsuch's perspective. He wrote that the first sentence of § 706

instructs reviewing courts to “decide all relevant questions of law” and “set aside agency action . . . found to be . . . not in accordance with law.” Determining the meaning of a statute or regulation, of course, presents a classic legal question. But in case these directives were not clear enough, the APA further directs courts to “determine the meaning” of any relevant “agency action,” including any rule issued by the agency. The APA thus requires a reviewing court to resolve for itself any dispute over the proper interpretation of an agency regulation. A court that, in deference to an agency, adopts something other than the best reading of a regulation isn't “decid[ing]” the relevant

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26. It has been argued that *Chevron* must be consistent with the APA, because it largely overlaps the deferential standard of review codified in § 706(2)(A). Kristin E. Hickman & R. David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 656–69 (2020). As will be seen below, I agree with this analysis up to a point. See *infra* note 309 and accompanying text. Before reaching that proposition, however, I will devote the bulk of this Article to demonstrating that the first sentence of § 706 poses no obstacle to that conclusion.

“questio[n] of law” or “determin[ing] the meaning” of the regulation. Instead, it’s allowing the agency to dictate the answer to that question.<sup>27</sup>

Notwithstanding his argumentative tone, Gorsuch’s explanation of the meaning of the provision was straightforward: Section 706 flatly forbids deference to agency views on questions of law, including the interpretation of regulations. As he went on to maintain, the APA’s “unqualified command requires the court to determine legal questions—including questions about a regulation’s meaning—by its own lights, not by those of political appointees or bureaucrats who may even be self-interested in the case at hand.”<sup>28</sup>

Arguably, the clarity of that stance is undercut by Gorsuch’s occasional approving references to the competing review standard in *Skidmore v. Swift & Co.*<sup>29</sup> Indeed, Chief Justice Roberts and Justice Kavanaugh, in their separate opinions in *Kisor*, claimed that they could see little difference between Gorsuch’s and Kagan’s positions.<sup>30</sup> Those statements are important as expressions of the way in which *they themselves* would like Gorsuch’s opinion to be read, but one can seriously doubt whether Gorsuch himself would agree. *Skidmore*, of course, is applied differently in different jurists’ hands.<sup>31</sup> Gorsuch’s version seems to be one in which a court will accept an agency’s interpretation only if it is *persuaded* by that position, which is a very faint form of deference, if it can be called by that name at all. I will refrain from speculating about how this dynamic among the Justices will play out over time. What seems abundantly clear, however, is that nearly every page in Gorsuch’s concurrence exudes overt hostility to any incursions on a reviewing court’s “independence” in its review of legal issues. For present purposes, therefore, it seems safe to assume that Gorsuch intends to continue to propound the no-deference approach to the APA, or at least that this attitude will be a factor to reckon with in the broader intellectual debate.

Kagan’s interpretation of § 706 requires a somewhat fuller exegesis. She explained it as follows:

[E]ven when a court defers to a regulatory reading, it acts consistently with Section 706. That provision does not specify the standard of review a court

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27. *Kisor*, 139 S. Ct. at 2432 (Gorsuch, J., concurring in the judgment).

28. *Id.*

29. 323 U.S. 134, 140 (1944); see, e.g., *Kisor*, 139 S. Ct. at 2428, 2447 (Gorsuch, J., concurring in the judgment).

30. *Kisor*, 139 S. Ct. at 2424–25 (Roberts, C.J., concurring in part); *id.* at 2448–49 (Kavanaugh, J., concurring in the judgment).

31. See generally Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1250–71 (2007) (exploring how *Skidmore* is applied in various lower court opinions).

should use in “determin[ing] the meaning” of an ambiguous rule. 5 U.S.C. § 706. One possibility, as Kisor says, is to review the issue de novo. But another is to review the agency’s reading for reasonableness. . . . [W]e have long presumed (subject always to rebuttal) that the Congress delegating regulatory authority to an agency intends as well to give that agency considerable latitude to construe its ambiguous rules. . . . Because of . . . [that presumption,] courts do not violate Section 706 by applying *Auer*. To the contrary, they fulfill their duty to “determine the meaning” of a rule precisely by deferring to the agency’s reasonable reading. . . .

That is especially so given the practice of judicial review at the time of the APA’s enactment. Section 706 was understood when enacted to “restate[] the present law as to the scope of judicial review [citing the Attorney General’s Manual on the APA].” . . . We have thus interpreted the APA not to “significantly alter the common law of judicial review of agency action.” . . . That pre-APA common law included *Seminole Rock* itself (decided the year before) along with prior decisions foretelling that ruling. Even assume that the deference regime laid out in those cases had not yet fully taken hold. At a minimum, nothing in the law of that era required all judicial review of agency interpretations to be de novo. . . . And so nothing suggests that Section 706 imposes that requirement.<sup>32</sup>

That Kagan rejected Gorsuch’s claim that § 706 requires de novo review is self-evident. But several points concerning her alternative vision invite exploration.

First, one should not interpret her analysis as relying very heavily on a supposition that Congress does, *in fact*, typically “intend” to grant agencies latitude to construe their own regulations. Her “presumption” that it does was, although not entirely unprecedented,<sup>33</sup> a relatively new framework for discussion of *Auer* deference. Historically, the Court has not chosen to be explicit about the jurisprudential foundations for *Auer* deference, or for that matter *Chevron* deference. Had the question been raised, the Court would probably have described these doctrines as exercises of federal common law authority. Indeed, much of the corpus of administrative law can be described as manifestations of “administrative common law.”<sup>34</sup>

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32. *Kisor*, 139 S. Ct. at 2419–20 (plurality opinion).

33. In this regard, Kagan relied solely, see *id.* at 2412, on *Martin v. OSHRC*, 499 U.S. 144, 151–53 (1991), in which the Court held that, in a regulatory scheme in which one agency brings enforcement cases and a second agency adjudicates them, courts should presume that Congress would prefer for the enforcement agency to be the one to which the courts owe deference. The “presum[ption]” that *some* agency should receive deference was noted only briefly, as it was not directly at issue. *Id.* at 151. Of course, the basic idea, not framed in terms of a presumption, had been around for many decades.

34. Regarding the major role that administrative common law plays in regulatory cases, see, e.g., Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298–1304 (2012) [hereinafter Metzger, *Embracing*]; Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1,



Kagan's new approach was clearly modeled on the presumptions that the Court has articulated in closely related contexts. Under *Chevron*, the courts will generally presume that Congress intends for statutory ambiguities to be resolved by agencies in some reasonable fashion;<sup>35</sup> and under *United States v. Mead Corp.*,<sup>36</sup> they will also generally assume that this congressional intention extends only to actions that an agency takes after a relatively formal decisional process.<sup>37</sup> It has long been recognized (even by Professor Kagan) that these presumptions are fictions, or at best unverified assertions.<sup>38</sup> Nevertheless, by the time of *Kisor*, this somewhat artificial mode of analysis had become a familiar convention in judicial review doctrine, and Kagan's adoption of this rhetorical device in the *Auer* context was not very surprising.

One can assume that the Court chooses to speak in "presumption" terms in these contexts because it believes that they provide at least a patina of positive-law support for its pronouncements on deference. As a practical matter, however, not much depends in this context on whether the Court relies overtly on common-law precedents, or instead on presumptions that largely rest on the same type of reasoning that had previously been reflected in those precedents.<sup>39</sup> The Court's language about presumed congressional intent simply converts our inquiry into a question of why the APA *should* be read to direct, or at least to allow, courts to apply that presumption.

Second, one might get the impression from the above excerpt that, in Kagan's view, Congress *directed* reviewing courts to comply

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5–26 (2011) [hereinafter Beermann, *Common Law*]; Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 6–10; Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1220, 1244–48 (2014). See generally Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225 (1999) (encouraging judicial recognition of the interplay between statutes and the common law).

35. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (dictum); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 315 (2014); *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–41 (1996).

36. 533 U.S. 218 (2001).

37. *Id.* at 229–30.

38. Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1875–76 (2015) (compiling authorities); David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212–25; Beermann, *End the Experiment*, *supra* note 20, at 796–97 n.64; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

39. Beermann, *Common Law*, *supra* note 34, at 3 (noting practical equivalency between overt common law and creative statutory interpretation); Davis, *supra* note 34, at 4–5 (same); Metzger, *Embracing*, *supra* note 34, at 1295, 1310–11 (same).

with *Auer* (or more accurately *Seminole Rock*).<sup>40</sup> But that reading would surely be incorrect. To the contrary, she stated categorically that § 706 “does not specify the standard of review a court should use.”<sup>41</sup> She noted that “nothing in the law of . . . [the pre-1946] era required all judicial review of agency interpretations to be *de novo*.”<sup>42</sup> It follows, she continued, that “nothing suggests that Section 706 imposes that requirement.”<sup>43</sup> In short, her emphasis was on what the statute permits, not what it requires. Thus, the *Auer* principle (or presumption) was a permissible approach, but not the only one the statute would allow.

Third, implicit in the foregoing reasoning was an assumption that the APA maintains continuity with the past but also leaves room for the case law to evolve over time. On the one hand, the opinion presupposes a heritage of prior administrative practice—indeed, it claims that the Act does not “significantly alter the common law of judicial review of agency action.”<sup>44</sup> On the other hand, the opinion assumes that, by stating principles of judicial review at a high level of generality, Congress avoided using language that would obligate courts to adhere indefinitely to the specific principles prevailing in the 1940s.<sup>45</sup> Indeed, Kagan’s recognition of the open-ended nature of the APA is the best way to make sense of Part II.B. of her opinion,<sup>46</sup> in which she “[took] the opportunity to restate, and somewhat expand on, [the] principles [of *Auer*] here to clear up some mixed messages we have

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40. See *Kisor*, 139 S. Ct. at 2419 (plurality opinion) (“[Courts] fulfill their duty to ‘determine the meaning’ of a rule precisely by deferring to the agency’s reasonable reading.”) (quoting Sunstein & Vermeule, *supra* note 22, at 306).

41. *Id.*

42. *Id.* at 2420.

43. *Id.*

44. *Id.* (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)). Most commentators at the time of the Act’s enactment saw § 706 as largely, if not entirely, compatible with preexisting common law. See *infra* Part II.F.2.

45. A contemporaneous author expressed the basic idea aptly:

Section 10 [now § 706] . . . does no more than to collect existing broad principles of law, with no apparent change, restatement, or clarification. To those who argue that even so, it is well to “freeze” the law as respects judicial review of administrative action, one can only ask the extent to which anything is “frozen.” Such terms as “arbitrary,” “capricious,” “abuse of discretion,” “substantial evidence,” “prejudicial error,” and the like mean now as before just what courts say that they mean; and there is no assurance that either judicial expressions or concepts of today will be identical with those of yesterday or to-morrow.

Homer A. Walkup, Note, *The Administrative Procedure Act*, 34 GEO. L.J. 457, 475 (1947).

46. See *Kisor*, 139 S. Ct. at 2414–18.

sent.”<sup>47</sup> Although there is some debate about the extent to which this section of the opinion revamped *Auer* deference,<sup>48</sup> it does seem clear that her account of the doctrine emphasized its limitations to a greater extent than most past cases had done.

Moreover, Kagan’s conception of an evolving § 706 is consistent with the way that courts have generally interpreted that section, as well as other provisions in the APA.<sup>49</sup> Indeed, much of modern administrative law, nominally attributed to § 706, is in fact entirely different from the law of 1946. The drafters of the Act certainly did not anticipate, for example, that courts would review regulations on the basis of a rulemaking record, nor that they would evaluate those rules using a “hard look.”<sup>50</sup>

Some scholars have criticized the trends in administrative law that underlie Kagan’s model. For example, an article by John Duffy expresses deep skepticism about the legitimacy and desirability of common law reasoning in judicial review of agency action.<sup>51</sup> In his view, the APA sets forth a “comprehensive” scheme for judicial review.<sup>52</sup> He argues that courts have too often flouted the APA by developing judicial review doctrines creatively, without specific reference to the statutory text.<sup>53</sup> Because he reads § 706 as mandating *de novo* review of

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47. *Id.* at 2414 (emphasis added).

48. Compare Aaron L. Nielson, Kisor *Deference*, YALE J. ON REG.: NOTICE & COMMENT (June 26, 2019), <https://www.yalejreg.com/nc/kisor-deference> [<https://perma.cc/A8ME-V97J>] (“[T]he version of ‘Auer’ that the Court created today [in *Kisor*] is so far removed from how *Auer* was understood yesterday that isn’t really accurate to call it *Auer* anymore.”), with Ronald Levin, *Auer Deference—Supreme Court Chooses Evolution, Not Revolution*, SCOTUSBLOG (June 27, 2019), <https://www.scotusblog.com/2019/06/symposium-auer-deference-supreme-court-chooses-evolution-not-revolution> [<https://perma.cc/55N5-WA9L>] (“Kagan’s arguments are ones that have been embraced by judges for decades.”).

49. See, e.g., Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1409, 1420 (1996); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253 (1986).

50. Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 754–55 (1975) (“[T]here is not the slightest indication that the purpose of the notice-and-comment proceeding was to develop a record . . . .”); James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 259 (1979) (“In the past decade the federal courts of appeals have reshaped the structure of informal rulemaking in a series of decisions expanding both the obligations of agencies and the role of the reviewing courts.”).

51. Duffy, *supra* note 21.

52. See *id.* at 130.

53. *Id.* at 141–46. With admirable candor, Duffy provides a thorough discussion of authorities that have endorsed the “New Common Law” that he deplores. *Id.* at 131–38.

legal issues, Duffy regards *Chevron* as a prime example of such judicial overreaching.<sup>54</sup>

In my view, Duffy overstates the extent to which the APA is incompatible with judicial review doctrines rooted in common law reasoning. Indeed, § 559 of the APA states that the Act “do[es] not limit or repeal additional requirements imposed by statute *or otherwise recognized by law*.”<sup>55</sup> Other authors have spelled out reasons why common law doctrines on judicial review are legitimate and, as a practical matter, unavoidable.<sup>56</sup> I will not undertake to replicate their work here. Indeed, in this Article I rely entirely on the methodology and conventions of statutory interpretation—although, as I said earlier, the line that divides statutory interpretation from overt common law reasoning is often blurry and for many purposes inconsequential. Regardless, in subsequent sections I will respond to Duffy’s principal arguments that relate specifically to interpretation of § 706.

In an even more iconoclastic vein, a handful of scholars have taken “originalist” conceptions in a different direction, by broadly calling into question the legitimacy of the evolving nature of APA interpretation.<sup>57</sup> I will explore this line of argument in a forthcoming paper.<sup>58</sup> For the present, I will not dwell on that thesis, because it has no real support outside of academic circles. I very much doubt that Justice Gorsuch or advocacy groups that favor the *de novo* reading of § 706 would have much sympathy for that approach, because it would be quite unsettling, and, more importantly, because their underlying objective is to subject administrative agencies to greater discipline and accountability, not to relax the safeguards that courts have heretofore read into the Act. Accordingly, I presume that Gorsuch and his allies are not opposed in principle to the concept of an evolving APA—rather, they simply think that the first sentence of § 706 imposes a duty of “independent” inquiry that courts have long neglected and should now heed.

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54. *Id.* at 191–92.

55. 5 U.S.C. § 559 (emphasis added); see Davis, *supra* note 34, at 10–11 (emphasizing § 559).

56. See Metzger, *Embracing*, *supra* note 34, at 1320–52; Beermann, *Common Law*, *supra* note 34, at 26–28; Davis, *supra* note 34, at 5–7.

57. Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015).

58. Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3944985](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3944985) [<https://perma.cc/6T9H-QR2D>].

Against this background, my basic claim in this Article will be that the first sentence of § 706 supports Kagan’s flexible approach, and that Gorsuch’s no-deference reading is erroneous.

## II. EVALUATING THE DE NOVO INTERPRETATION

### A. DOES THE FIRST SENTENCE HAVE OPERATIVE EFFECT AT ALL?

In his concurring opinion in *Kisor v. Wilkie*, Justice Gorsuch found it “remarkabl[e]” that “until today this Court has never made any serious effort to square the *Auer* doctrine with the APA.”<sup>59</sup> An explanation for that silence could be that many administrative lawyers have doubted that the first sentence of § 706 was designed to be particularly important—and they have had good reasons for doubting it. When one reads the entire section on its face, the introductory sentence looks like a sort of warmup introduction—a passage that merely identifies some of the *kinds* of questions that would fall within a court’s domain, while the six numbered categories listed in § 706(2) perform the more crucial work of identifying the *grounds for review* of such questions.<sup>60</sup> Specifically, these latter categories address questions of law by stating that a reviewing court must hold an agency action unlawful if it is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” under subsection (2)(C) or “not in accordance with law” under subsection (2)(A).<sup>61</sup> Neither of these latter provisions comes even close to expressing the kind of prohibition on deference that Justice Gorsuch discerned in the opening sentence.<sup>62</sup>

This interpretation of the design of § 706 helps to explain why some of the participants in the deliberations leading up to the Act appeared to pay no particular attention to the first sentence. For example, the “committee print” published by the Senate Judiciary Committee in June 1945 summarized the draft provision that would become § 706 by mentioning its “several categories,” without mentioning the

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59. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., concurring in the judgment).

60. See 5 U.S.C. § 706(2).

61. §§ 706(2)(A), (2)(C).

62. *Kisor*, 139 S. Ct. at 2432. Professor Duffy appears to read § 706(2)(C) more restrictively: “Deference ends when a limitation of law is reached. This is reinforced by § 706(2)(C), which mandates overturning agency actions ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory right’ without any suggestion of deference.” Duffy, *supra* note 21, at 194 n.140. On its face, however, the clause is worded neutrally. Although, as Duffy says, the clause does not *prescribe* deference, he cites no support for his apparent belief that it *prohibits* such deference.

opening sentence at all.<sup>63</sup> During the House proceedings, Representative Springer, a member of the Judiciary Committee, presented a lengthy and evidently carefully prepared discussion of the same provision. He devoted one or more paragraphs to each of the six subcategories in what is now § 706(2), but said nothing about the first sentence.<sup>64</sup> The floor comments of Representative Gwynne, also a Judiciary Committee member, were similar, although briefer. He mentioned the specific review standards but not the “decide all relevant questions of law” language.<sup>65</sup> I do not want to put too much weight on the negative implications that appear to emanate from these fragments of legislative history. However, as will be seen, the legislative history is bereft of any good affirmative support for Justice Gorsuch’s interpretation of § 706, and in that context, these negative implications are at least suggestive as to the legislators’ thinking.

A related point is that the words “decide” and “determine” are not the only ambiguous terms in the first sentence of § 706. The term “questions of law” is not self-defining either. As recently as 2020, the Supreme Court has recognized that judicial review statutes sometimes use that phrase to encompass not only what might be called “purely legal” questions, but also so-called “mixed questions of law and fact.”<sup>66</sup> Some of the participants in deliberations over the APA appeared to use the phrase “questions of law” in a similarly broad sense.<sup>67</sup> Yet these broad definitions would obviously be difficult to

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63. S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON THE ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945) [hereinafter SENATE COMMITTEE PRINT], reprinted in S. COMM. ON THE JUDICIARY, LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 79-248, at 11, 39 (1946) [hereinafter APA LEGISLATIVE HISTORY]. The published legislative history of the APA is available online at <https://www.justice.gov/jmd/lis/administrative-procedure-act-pl-79-404> [<https://perma.cc/V56G-XV57>].

64. 92 CONG. REC. 5657 (1946), reprinted in APA LEGISLATIVE HISTORY, *supra* note 63, at 376–78 (remarks of Rep. Springer).

65. 92 CONG. REC. 5656 (1946), reprinted in APA LEGISLATIVE HISTORY, *supra* note 63, at 375 (remarks of Rep. Gwynne); see also Allen Moore, *The Proposed Administrative Procedure Act*, 22 DICTA 1, 14 (1945), reprinted in APA LEGISLATIVE HISTORY, *supra* note 63, at 327, 335 (quoting verbatim the language that would become § 706(2), which he called the “essential words” of the provision, and adding that “[e]very clause, phrase, and word of this quotation deserves extensive and intensive study to determine its true significance,” but ignoring the language that would become the first sentence of § 706).

66. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068–69 (2020). See generally Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 9–12 (1985) [hereinafter Levin, *Identifying Questions of Law*] (describing longstanding uncertainty about how the term should be interpreted).

67. See SENATE COMMITTEE PRINT, reprinted in APA LEGISLATIVE HISTORY, *supra* note 63, at 39 (“Subsection (e) [now § 706], therefore, seeks merely to restate the several

reconcile with any theory that all “questions of law” must be reviewed *de novo*.<sup>68</sup> Again, these intimations in the legislative history are too sparse to support any firm conclusion that the drafters of the APA contemplated this usage. At the very least, however, the ambiguity that surrounds this elusive term in the first sentence of § 706 counsels against drawing any hasty conclusions about the supposed commands of that sentence.

In subsequent years, judges who have applied the APA have also sometimes appeared to regard the meaning of the first sentence of § 706 as a nonissue. A good illustration is the 1971 decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>69</sup> one of the most familiar and influential cases in the administrative law canon. Justice Marshall, in his opinion for the Court, wrote that

the existence of judicial review is only the start: the standard for review must also be determined. For that we must look to § 706 of the Administrative Procedure Act, which provides that a “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found” not to meet six separate standards.<sup>70</sup>

He then proceeded to survey the six categories, making no mention at all of the first sentence of § 706.<sup>71</sup> Moreover, as recently as 1998, Justice Scalia wrote for the Court in *Allentown Mack Sales & Service, Inc. v. NLRB*<sup>72</sup> that “[s]ubstantive review of an agency’s interpretation of its regulations is governed *only* by that general provision of the Administrative Procedure Act which requires courts to set aside agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”<sup>73</sup> He said nothing about the opening

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categories of questions of law subject to judicial review.”); Pat McCarran, *Improving “Administrative Justice”: Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A. J. 827, 893 (1946) (“[T]he Act expressly provides . . . that every recognized type of question of law—including supporting evidence for findings upon which agency action rests—shall be subject to judicial review.” (footnotes omitted)). Compare Justice Scalia’s formulation quoted *infra* note 78 and accompanying text.

68. See Levin, *Identifying Questions of Law*, *supra* note 66, at 5–6 (contending that the so-called Bumpers Amendment, a legislative proposal that would have expressly added “*de novo*” to the first sentence of § 706, would have proved unmanageably broad and destructive if “questions of law” were construed to include mixed questions).

69. 401 U.S. 402 (1971).

70. *Id.* at 413 (internal citation omitted).

71. *Id.* at 414–15. Justice Marshall must have been aware of the first sentence of § 706, because he quoted the section in full in a footnote accompanying this discussion. *Id.* at 413 n.30.

72. 522 U.S. 359 (1998).

73. *Id.* at 377 (emphasis added); see also *United States v. Caceres*, 440 U.S. 741, 754 (1979) (suggesting that, in an APA case, an agency’s violation of its procedural regulation may be redressed under § 706(2)(A) or § 706(2)(D), but not mentioning

sentence of § 706. Against the background of this body of administrative law opinion, the Court's failure to have examined the first sentence of § 706 closely does not seem so "remarkable."

I myself think that much can be said for the long-held assumption that the first sentence of § 706 was not intended to, and should not, play a significant role in judicial review proceedings. However, the evidence that I have just reviewed is rather sparse. More importantly, one cannot be sure that the Court would be receptive to this theory, and I doubt that this Article should put too much weight on the expectation that it would be. In the remainder of Part II, therefore, I will proceed from the working assumption that the first sentence might well have operative effect, and I will examine the various arguments for and against the *de novo* interpretation of that sentence.

#### B. TEXTUAL IMPLICATIONS: "DECIDE" AND "DETERMINE"

According to Justice Gorsuch, when the first sentence of § 706 instructs the reviewing court to "decide" questions of law and "determine" the meaning of an agency action, it means that the court's ruling must be *de novo*.<sup>74</sup> He was right when he pointed out that quite a few commentators have said that the APA at least *seems* to carry this meaning.<sup>75</sup> Although, in some instances, the statements to which he referred were somewhat more qualified or fleeting than he acknowledges, one can agree that, when considered in the abstract, this is a plausible interpretation of the sentence.

At the same time, the statutory sentence is by no means unambiguous. It has no "plain meaning." After all, the past seventy-five years' experience with the Act demonstrates that the meaning that Justice Gorsuch discerns in the words of § 706 was not at all "plain" to three generations of judges. Presumably, virtually all of them thought, or at least assumed, that they were "deciding" questions of law and "determining" the meaning of agency actions in a manner that the APA allowed. Many of them may have understood it to mean that they should decide questions of law in a manner that would resemble, or at least grow out of, the manner in which courts had been deciding such questions when the Act was adopted—which certainly entailed a measure of deference to agencies' interpretations. That too is a plausible interpretation of the Act. Indeed, I will argue that it is correct.

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the first sentence of the section).

74. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., concurring in the judgment).

75. See *supra* notes 20–21 and accompanying text (listing commentators who have spoken favorably about this interpretation).



Although I think the revisionist interpretation of § 706 that Justice Gorsuch and his allies have propounded is audacious enough, any contention that the APA “plainly” requires de novo review would compound that audacity.

Justice Scalia, who was well known as a careful reader of texts, did not think the words of § 706 were self-explanatory. In his dissenting opinion in *United States v. Mead Corp.*<sup>76</sup> in 2001, he acknowledged that those words might require some interpretation. “There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite.”<sup>77</sup> He quoted the “decide all relevant questions of law” language from the statute and mused that it “would seem to mean that all statutory ambiguities are to be resolved judicially. It could be argued, however, that the legal presumption identified by *Chevron* left as the only ‘questio[n] of law’ whether the agency’s interpretation had gone beyond the scope of discretion that the statutory ambiguity conferred.”<sup>78</sup> By 2015, amid his growing reservations about judicial deference, he found himself lamenting that the Court had propounded deference doctrines “[h]eedless of the original design of the APA.”<sup>79</sup> The ambivalence in these pronouncements at different points in his judicial career is apparent, but at least they suggest that he did not think that the language of the Act, standing alone, could resolve these issues.

Even if we make the assumption that the first sentence of § 706 does not have a “plain meaning,” it does contain language that invites exploration. More specifically, Justice Gorsuch defended his interpretation of the word “determine” by offering several specific arguments based on the text of the sentence, and these arguments deserve discussion.

For one thing, he argued, cases applying *Auer* have held that “even after one court has spoken on a regulation’s meaning . . . an agency is always free to adopt a different view and insist on judicial deference to its new judgment.”<sup>80</sup> Such holdings, he said, deprive the

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76. 533 U.S. 218 (2001).

77. *Id.* at 241 (Scalia, J., dissenting).

78. *Id.* at 241–42 n.2; see also *infra* note 145 and accompanying text (quoting Justice Scalia’s remark that APA drafters who assumed that “questions of law would always be decided de novo by the courts” were “quite mistaken”).

79. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment).

80. *Kisor*, 139 S. Ct. at 2433 (Gorsuch, J., concurring in the judgment).

first court's interpretation of "the force that normally attaches to precedent."<sup>81</sup> Under these circumstances, he asked, "how can anyone honestly say the court, rather than the agency, ever really 'determine[s]' what the regulation means?"<sup>82</sup> As he explained, these assumed implications of *Auer* can be traced back to the Court's 2005 decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.<sup>83</sup> Under *Brand X*, when a court has upheld one interpretation of an ambiguous statute, an agency can later adopt a different reading of the statute and receive *Chevron* deference for that interpretation.<sup>84</sup> Lower courts have applied the same basic principle to interpretations of regulations.<sup>85</sup>

The analysis in Kagan's opinion suggests a straightforward answer to Gorsuch's argument: the term "determine" in § 706 can be understood to mean that a court should make its determination according to prevailing principles of administrative law.<sup>86</sup> In this instance, the holding of *Brand X* constitutes one of those principles; the case itself specifies what Gorsuch called "the force that normally attaches to precedent." This inference from Kagan's opinion corresponds, in substance, to the way in which reviewing courts have in fact applied *Brand X* for the past fifteen years in the *Chevron* context.<sup>87</sup> To be sure, Justice Gorsuch has made clear for several years that he himself disapproves of *Brand X*.<sup>88</sup> But it has by now become a recognized part of administrative law. So long as it remains in effect, I do not think Justice

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81. *Id.*

82. *Id.*

83. 545 U.S. 967 (2005).

84. *Id.* at 982–84. Gorsuch somewhat exaggerated the holding of *Brand X*, which does not come into play if the prior court found that the text being interpreted was unambiguous, or if the agency's subsequent interpretation is unreasonable. *Id.* For present purposes, however, I will ignore those qualifications, which have no direct bearing on the issue that Gorsuch raised.

85. See *Kisor*, 139 S. Ct. at 2433 n.51 (Gorsuch, J., concurring in the judgment) (citing cases).

86. See *supra* notes 44–48 and accompanying text.

87. See, e.g., *United States v. Eurodif, S.A.*, 555 U.S. 305 (2009); *Szonyi v. Whitaker*, 915 F.3d 1228, 1233 (9th Cir. 2019); *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 731 (5th Cir. 2018); *Medina-Nunez v. Lynch*, 788 F.3d 1103, 1105 (9th Cir. 2015); *United States v. McGee*, 763 F.3d 304, 312 (3d Cir. 2014); *Metro. Hosp. v. Dep't of Health & Human Servs.*, 712 F.3d 248, 255–56 (6th Cir. 2013).

88. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150–51 (10th Cir. 2016) (Gorsuch, J., concurring). More recently, Justice Thomas, the author of *Brand X*, has disavowed his previous support for that case (and for *Chevron* itself). *Baldwin v. United States*, 140 S. Ct. 690, 690–95 (2020) (Thomas, J., dissenting from denial of certiorari).

Gorsuch's lament adds any special weight to his interpretation of § 706.<sup>89</sup>

Continuing, Justice Gorsuch derided the plurality's interpretation of "determine" in § 706 by asking what would happen if it were extended to the limit of its logic. What if a court's statutory duty to "determine" a criminal sentence, or to "determine" whether a proposed settlement in a civil antitrust suit is in the public interest, were construed to mean that the court must accept any reasonable view the government proposes?<sup>90</sup> If the APA were a newly enacted statute, such warnings about floodgates might be credible. But we have had decades of experience in which courts have interpreted the APA in roughly the manner that Kagan advocates. They have never had difficulty with the concept that the word "determine" (or "decide") in § 706 can be applied differently in varying contexts. In that light, Justice Gorsuch's tendentious hypotheticals do not seem fearsome.

Then he offered another *reductio ad absurdum* argument: "If it were really true that the APA has nothing to say about *how* courts decide what regulations mean, then it would follow that the APA tolerates a rule that 'the agency is always right.'"<sup>91</sup> One might again reply by simply saying that this farfetched scenario has never come to pass. On another level, however, the challenge implicit in Gorsuch's gibe does seem rather fair. In effect, it frames up the question of whether, indeed, § 706 is completely unbounded.

Upon reflection, however, that question isn't difficult. I noted above that the APA presupposes a common law background.<sup>92</sup> Concomitantly, subsequent elaborations on its judicial review requirements must bear at least a reasonable relationship to prevailing principles as of 1946. Modern judicial review principles—including the *Chevron* doctrine, as I will discuss below<sup>93</sup>—do meet that rather lenient test, but Justice Gorsuch's hypothetical "anything goes" standard of review obviously does not. A regime in which courts may not review agency legal interpretations at all would be fundamentally incompatible with administrative practice as of the time of the APA, as the advocates of *de novo* review are among the first to insist.<sup>94</sup> And we

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89. In a statutory context, the same reasoning could be used to explain how courts can apply *Brand X* without contravening the § 706 directive to "decide all relevant questions of law."

90. *Kisor*, 139 S. Ct. at 2433–34 (Gorsuch, J., concurring in the judgment).

91. *Id.* at 2434.

92. *See supra* Part I.

93. *See infra* Part III.

94. *See infra* Part II.E.2.

needn't even look at that history, because the text of the statute also belies that interpretation: A "government is always right" standard of review would hardly be compatible with the APA's explicit provision for judicial review of statutory issues in § 706(2)(C).

### C. SURROUNDING TEXT

If, as the preceding section maintained, the language of the first sentence of § 706 does not, when read in isolation, justify a conclusion that judicial review of questions of law must be *de novo*, shorn of deference, we can go on to ask whether the context of the statute sheds any light on that issue. A standard step in statutory interpretation methodology, particularly favored by textualists,<sup>95</sup> is to look to related provisions in the same Act. Statutory interpretation is, in other words, a holistic endeavor.<sup>96</sup> On the other hand, inferences based on the interrelationship of various parts of a statute are, by their nature, only indirect evidence, so arguments of this nature need to be evaluated critically.

One of Gorsuch's arguments falls into this category. He wrote that the legislature "knew perfectly well how to require judicial deference when it wished—in fact Congress repeatedly specified deferential standards for judicial review *elsewhere* in the statute,"<sup>97</sup> in contrast to its supposed mandate that courts must "determine" the meaning of regulations without deference. As examples of such deferential standards, he cited to clause (2)(A) ("arbitrary, capricious, [or] an abuse of discretion") and clause (2)(E) (unsupported by "substantial evidence in [specified cases]").<sup>98</sup> But how, exactly, does Justice Gorsuch know that these clauses require deference? Their language does not clearly say so. The reason he knows this, of course, is that he recognizes the legal context in which these terms of art have long been understood.<sup>99</sup>

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95. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167–69 (2012).

96. *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (plurality opinion); *Caraco Pharm. Lab'ys., Ltd. v. Novo Nordisk*, 566 U.S. 399, 412 (2012); *Wash. State Dep't of Social & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 384 n.7 (2003).

97. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432–33 (2019) (Gorsuch, J., concurring in the judgment).

98. *Id.* at 2432–33 n.48.

99. Actually, Justice Gorsuch's characterization of the language of § 706(2) was an overgeneralization at best. I have already mentioned that, according to *Allentown*, the validity of a regulation is assessed under § 706(2)(A), and obviously Gorsuch doesn't think that such review should be deferential. Another difficulty with his observation is that the dividing line between legal review and review for abuse of discretion is not always sharp. For example, the leading case on § 706(2)(A) states that "an agency rule would be arbitrary and capricious if [inter alia] the agency has relied on factors

Such context is a perfectly appropriate source of guidance on such an interpretive issue. By the same token, the APA terms “decide” and “determine” should not be evaluated in a vacuum, either.

Moreover, Gorsuch did not mention clause (2)(C) in this connection. As I noted above, there is a fair argument that clauses (2)(A) and (2)(C) overlap with the first sentence of the section (as Gorsuch reads it).<sup>100</sup> Thus, instead of revealing a meaningful contrast *among* the categories of § 706(2), a holistic reading of the section casts doubt on whether its first sentence prescribes a standard of review for legal issues at all.

Meanwhile, an entirely separate holistic argument that supposedly favors the *de novo* interpretation of § 706 focuses on the fact that its first sentence directs a reviewing court to “interpret constitutional and statutory provisions.” Thus, the argument runs, since everyone takes for granted that judicial review of constitutional interpretations is nondeferential,<sup>101</sup> the statute must contemplate that judicial review of agencies’ statutory interpretations will also be nondeferential. Although Justice Gorsuch did not rely on this argument in *Kisor*, Justice Thomas mentioned it briefly in a recent solo opinion.<sup>102</sup> Several scholars have also seemed to take the argument seriously.<sup>103</sup> Usually, these references are very fleeting, but Aditya Bamzai seems particularly

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which Congress has not intended it to consider.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). But that test essentially requires an inquiry into congressional intent, so it has more in common with other “questions of law” than with the other inquiries prescribed elsewhere in § 706(2)(A). See Lisa Schultz Bressman & Glen Staszewski, *Judicial Review of Agency Discretion*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 195, 200 (Michael E. Herz et al. eds., 2d ed. 2015) [hereinafter ABA JUDICIAL REVIEW GUIDE] (“The caselaw often describes this ground [reliance on improper factors as defined by law] as an element of the ‘arbitrary and capricious’ test, although it seems more properly understood as a component of the court’s legal analysis.”).

What this example illustrates is that administrative law doctrine on the scope of review of agency action is far too complex and nuanced to be fully captured within the spare language of § 706. That is why, as I remarked above, interpretation of that provision in light of a substantial common law gloss is not only historically well justified (as this article argues), but also a practical necessity. See *supra* note 56 and accompanying text.

100. See *supra* note 62 and accompanying text.

101. But cf. Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890 (2016) (arguing that courts should defer to judgments of agencies on procedural due process issues). For a critique of that article, see Ronald M. Levin, *Administrative Procedure and Judicial Restraint*, 129 HARV. L. REV. F. 338 (2016).

102. *Baldwin v. United States*, 140 S. Ct. 690, 692 (2020) (Thomas, J., dissenting from denial of certiorari).

103. See Duffy, *supra* note 21, at 194; Farina, *supra* note 20, at 473 n.85.

fond of the argument, having relied on it in multiple articles.<sup>104</sup> For present purposes, therefore, I will call it the Bamzai argument.

In my view, the argument is flawed on multiple grounds. It reads too much into a juxtaposition that could easily mean nothing more than what the statute actually says: the reviewing court “shall . . . interpret constitutional and statutory provisions,” but not necessarily in the same manner. After all, it is not hard to find other provisions in the APA that contain manifestly unrelated terms that evidently have been brought together for drafting convenience but have never been thought to call for parallel interpretations above and beyond what the text itself provides.<sup>105</sup> The very next sentence of § 706 is one example. The various clauses of § 706(2) combine legal and factual issues, but obviously courts apply them using a variety of review standards. Indeed, clauses (B) and (C) of that subsection separate the very issues that Bamzai’s argument would conflate.

Actually, one could turn the Bamzai argument on its head by arguing that the same methodology supports the plurality’s position in *Kisor*. The terms “arbitrary,” “capricious,” and “abuse of discretion” are deferential standards. Does this mean that the phrase “not in accordance with law,” which is found in the same statutory clause, and which is the basis for judicial review of regulatory interpretations according to *Allentown Mack*,<sup>106</sup> triggers a similar level of deference? If so, *Auer* deference must be valid after all! The argument is tempting, but I will resist temptation and adhere to my central point: The evidence underlying the argument based on juxtaposition is not probative.

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104. See, e.g., Bamzai, *Origins*, *supra* note 21, at 985; Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 194 (2019); Aditya Bamzai, *Justice Scalia and the Evolution of Chevron Deference*, 21 TEX. REV. L. & POL. 295, 300 (2016); see also Aditya Bamzai, *Henry Hart’s Brief, Frank Murphy’s Draft, and the Seminole Rock Opinion*, YALE J. ON REGUL.: NOTICE & COMMENT, (Sept. 12, 2016), <https://www.yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai> [<https://perma.cc/5FNZ-FS3W>] (extending the argument to the entire first sentence of § 706, so that it applies to interpretations of regulations as well).

105. See, e.g., 5 U.S.C. § 553(a)(2) (providing a rulemaking exemption for matters relating to “agency management or personnel or to public property, loans, grants, benefits, or contracts”); § 553(b)(A) (providing that notice and comment obligations do not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”); § 554(d) (providing an exemption from separation of function requirements for initial licensing applications, rate proceedings, and agency heads); § 557(b) (providing that a recommended decision “in rule making or determining initial applications for licenses” need not be made by an administrative law judge).

106. See *supra* notes 72–73 and accompanying text.

Finally, on a substantive level, the Bamzai argument appears to prove too much. As thoughtful commentators have argued, judicial review of constitutional issues is similar in some ways to judicial review of statutory issues, but in other ways these inquiries stem from different traditions and serve different purposes.<sup>107</sup> Some of these authors' theories may be well taken and others less so, but the assumption that Congress casually overrode all such differences and prescribed uniformity between constitutional review and statutory review is counterintuitive, and courts have understandably avoided holding that the APA requires such an equation. Yet, if the parallel construction in the phrase "interpret constitutional and statutory provisions" requires equal degrees of judicial deference in these two contexts, why would it not erase other distinctions as well? The absence of a logical stopping point in Bamzai's argument tends to indicate that the effort to extract guidance from the parallelism is not well founded in the first place.<sup>108</sup>

#### D. LEGISLATIVE HISTORY

Another source of potentially illuminating data regarding the meaning of § 706 is the record of congressional deliberations on the Act. In examining that record, we will need to keep in mind the usual caveats about reliance on legislative history. One hazard is that advocates have a propensity to cherry-pick the quotes that best serve their

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107. See, e.g., Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1 *passim* (2004); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 889 (1996); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744–45 (1982).

108. Looking further afield, Professor Duffy has suggested that *Chevron* review is foreclosed by § 9(a) of the APA, which, as codified, provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b); see Duffy, *supra* note 21, at 198. On its face, however, this provision is irrelevant to the issue of judicial deference. It merely states the self-evident proposition that an agency must not act in excess of its jurisdiction or authority. Nothing in its legislative history indicates that Congress intended it to be any less banal than it seems to be. See, e.g., S. REP. NO. 79-752, at 25 (1945) [hereinafter SENATE REPORT], reprinted in APA LEGISLATIVE HISTORY, *supra* note 63, at 187, 211 (declaring, not very surprisingly, that "[a]n agency authorized to regulate trade practices may not regulate banking, and so on. Similarly, no agency may undertake directly or indirectly to exercise the functions of some other agency."); H.R. REP. NO. 79-1980, at 40 (1946) [hereinafter HOUSE REPORT], reprinted in APA LEGISLATIVE HISTORY, *supra*, at 235, 274 (same). Section 558(b) is silent about the standard of review by which a court should determine the scope of the agency's jurisdiction or authority; nor does it say that the jurisdiction or authority must be conferred expressly rather than implicitly. Indeed, the provision is addressed to agencies, not to courts.

own side in the interpretive dispute. A well-known quip by Judge Harold Leventhal sums up the problem: The use of legislative history is “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”<sup>109</sup>

Moreover, one cannot rule out the possibility that some of the quotes were deliberately uttered for the purpose of giving the impression that Congress as a whole subscribed to positions that were only the views of a few. Although we now associate skepticism about legislative history documents with Justice Scalia’s longtime crusade against judicial reliance on them, doubts about the reliability of the APA’s legislative history in particular have a much longer vintage. Immediately after the Act was adopted—when the future Justice Scalia was still in elementary school—Alfred Conard published a critique that claimed that legislative and executive actors had each sought to sprinkle the legislative history of the Act with language favoring their respective interests.<sup>110</sup> As illustrations, he pointed to disagreements between the Attorney General and members of Congress regarding the effect of the Act on the availability of judicial review.<sup>111</sup>

Notwithstanding these cautionary admonitions, proponents of the *de novo* interpretation of § 706 have frequently invoked the legislative history of the APA in support of their cause. Thus, I do not think I can ignore this dimension of the interpretive challenge. In fact, I propose to show that the legislative history supports the analysis that I have been advancing in the preceding pages.

#### 1. The APA as a Restatement

At the *Kisor* cocktail party, Justice Kagan’s best “friend” proved to be a statement in the *Attorney General’s Manual on the Administrative Procedure Act*,<sup>112</sup> an explanatory document that the Department of

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109. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (quoting Leventhal).

110. Alfred Conard, *New Ways to Write Laws*, 56 YALE L.J. 458, 461 & n.13 (1947).

111. Specifically, the Attorney General contended that the Act did not expand existing rights to judicial review, and statutory preclusion could be implicit rather than explicit; legislators took issue with both contentions. *Id.* The Attorney General’s predictions have been borne out with regard to the second issue but not the first. *See* *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345–46 (1984) (finding implied preclusion under § 701(a)(1)); *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153–54 (1970) (interpreting § 702 in a manner that liberalized the law of standing).

112. ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, U.S. DEP’T OF JUST. (1947) [hereinafter ATTORNEY GENERAL’S MANUAL], <http://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/AttorneyGeneralsManual.pdf> [https://perma.cc/6F94-GUZU].



Justice published in 1947. Kagan noted that the Court “gives some deference to the Manual ‘because of the role played by the Department of Justice in drafting the legislation.’”<sup>113</sup> In this instance, she quoted the manual’s assertion that § 706 “was understood when enacted to ‘restate[ ] the present law as to the scope of judicial review.’”<sup>114</sup>

Initially, one may be inclined to mistrust the manual because of the very risk that Conard and others have warned about: The Attorney General had client agencies and could be expected to have preferred interpretations of the Act that would tend to favor his clients. Under orthodox statutory construction principles, one would think that—if legislative history is to count at all—explanatory material emanating from internal legislative sources should carry more weight than the potentially self-serving explanations of a representative of the very entities that the Act was meant to regulate. Justice Gorsuch drew attention to this concern, echoing some of the modern commentators who favor the no-deference interpretation of § 706.<sup>115</sup>

The fact remains, however, that the Court has frequently relied on the Attorney General’s Manual in APA cases.<sup>116</sup> It’s unlikely that the Court has never noticed the tension between this practice and its usual statutory interpretation premises. Probably, one major reason for the practice is that, in the Court’s view, the Department’s interpretations deserve special weight because of the thought and care that went into the manual’s preparation, as well as the executive branch’s responsibility for putting the Act into practice. In other words, the Court’s high regard for the Attorney General’s Manual may stem from some of same factors that underlie the doctrine of judicial deference to agencies’ statutory interpretations. It maps closely onto Justice

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113. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019) (plurality opinion) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978)).

114. *Id.* (quoting the ATTORNEY GENERAL’S MANUAL, *supra* note 112, at 108).

115. *Kisor*, 139 S. Ct. at 2436 (Gorsuch, J., concurring in the judgment); Duffy, *supra* note 21, at 132–34; Beermann, *End the Experiment*, *supra* note 20, at 790; George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1682–83 (1996).

116. *See, e.g.*, *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–64 (2004) (Scalia, J., for a unanimous Court) (calling the manual “a document whose reasoning we have often found persuasive” (citing *Darby v. Cisneros*, 509 U.S. 137, 148 n.10 (1993); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979); *Vt. Yankee*, 435 U.S. at 546); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (calling the manual “the Government’s own most authoritative interpretation of the APA . . . , which we have repeatedly given great weight” (citing *Steadman v. SEC*, 450 U.S. 91, 103 n.22 (1981), *Chrysler*, and *Vermont Yankee*); K.M. Lewis, *Text (Plus-Other-Stuff)ualism: Textualists’ Perplexing Use of the Attorney General’s Manual on the Administrative Procedure Act*, 1 MICH. J. ENV’T & ADMIN. L. 287, 296–300 (2012).

Cardozo's well-known comment that judicial deference "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."<sup>117</sup>

I will not linger on this theoretical point, however, because in this instance the Attorney General's reading was supported not only by his own comments during the legislative debates,<sup>118</sup> but also by a passage in the committee print published in 1945 by the Senate Judiciary Committee:

A restatement of the scope of [judicial] review, as set forth in subsection (e) [now § 706], is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review. . . . It is not possible to specify all instances in which judicial review may operate. Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review.<sup>119</sup>

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117. *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933). Compare Justice Frankfurter's caustic assessment of congressional rhetoric, during debates on the APA, regarding the courts' supposed abuses of substantial evidence review in NLRB cases: "No doubt some, perhaps even much, of the criticism was baseless and some surely was reckless." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478 (1951). Here the Court cited to an article that had concluded "after an extended investigation that 'the denunciations find no support in fact.'" *Id.* at 478-79 n.6 (citing Walter Gellhorn & Seymour L. Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure*, 39 COLUM. L. REV. 339, 394 (1939)); see also Alfred Long Scanlan, *Judicial Review under the Administrative Procedure Act—In Which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME L. REV. 501, 537 (1948) (attributing the "illusion" of judicial abdication to "reckless and unsubstantiated charges" by disappointed litigants).

118. See, e.g., Letter from Attorney General Clark to Hon. Pat McCarran, (Oct. 19, 1945), in SENATE REPORT, *supra* note 108, at 37-38 (APA LEGISLATIVE HISTORY at 223-224).

119. SENATE COMMITTEE PRINT, *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 63, at 39. Duffy discounts the importance of the committee print by describing it as a mere staff document. Duffy, *supra* note 21, at 132 n.95. However, nothing in the document itself supports that characterization. It referred to itself as having been issued by the committee. APA LEGISLATIVE HISTORY, *supra*, at 11. When the committee subsequently reported out the bill, it clarified that the *staff* had summarized the comments of interested persons for the committee's consideration, but the *committee* had published the ensuing document. SENATE REPORT, *supra* note 108, at 5, *reprinted in* APA LEGISLATIVE HISTORY, *supra*, at 63. Moreover, Senator McCarran, in his foreword to the published legislative history, described the committee print as among the "legislative documents which accompany and explain [the Act's] purpose and operation [and] are of immediate and permanent importance." APA LEGISLATIVE HISTORY, *supra*, at iii. Duffy also emphasizes the word "unduly" in the quotation, suggesting that the committee did, after all, propose to move beyond the extant case law. That puts a lot of weight on a single word; but if the committee did intend for that word to signify anything significant, the most likely explanation is that the committee foresaw its eventual efforts to clarify the

The importance of this passage to the present discussion should be apparent. The term “restatement”—in contrast to, say, “codification”—implies a congressional acknowledgement that the courts had been, and could remain, the traditional norm-definers in this area.<sup>120</sup> The goal of § 706, under this reading, was “merely” to summarize judicial doctrine without being too confining. The remainder of the committee’s quotation fortifies this reading. The message seems to have been that they needed to say *something* about scope of review, lest the Act be taken as changing the law when that was not its purpose. The doctors’ precept “first, do no harm” seems to have been their guiding spirit.

Indeed, a little reflection confirms that this interpretation is the most logical explanation for what actually happened. The APA sponsors do not seem to have had much, if any, concern about the courts’ disposition of legal issues. Or, if they did have a range of views on the subject, they “agreed to disagree.” Certainly they supported the principle of judicial review of legal issues as a general matter, but they were evidently content to refrain from giving courts specific directions about how to fulfill that task. That is the most straightforward way to explain the fact that the APA ultimately passed Congress with the Justice Department’s support and by unanimous votes in both the House and Senate (including the votes of loyal New Dealers). This reading is also consistent with this Article’s suggestion that the authors of the Act were willing to provide courts with the kind of latitude that would allow for doctrinal development over time.

Just after mentioning the “several categories of questions of law subject to judicial review,” the committee added that “[e]ach category has been recognized,” having been “constantly repeated by courts in the course of judicial decisions or opinions.”<sup>121</sup> Here the committee

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meaning of the substantial evidence test. *See infra* notes 127, 139 and accompanying text. In contrast to that target of overt congressional concern, nothing in the legislative record explicitly declares an intention to depart from then-prevailing case law regarding judicial review of legal issues. *See infra* Parts II.D.2, II.E.4.

120. As Professor Duffy points out, the terms “restate” and “restatement” carried “unmistakable connotations,” bringing to mind the Restatements of the Law published by the American Law Institute (ALI). Duffy, *supra* note 21, at 131. He notes that the ALI had always made clear that its restatements were designed to be applied flexibly; “even if part of a restatement were enacted as law, the Institute suggested treating the statute as a common-law precedent.” *Id.* To be sure, Duffy himself maintains that the APA should not be interpreted in that manner. *See supra* notes 51–56 and accompanying text. I think he is right, however, about the implications of the language that the Attorney General and the Senate committee used.

121. SENATE COMMITTEE PRINT, *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 63, at 39.

cited to the *Final Report of the Attorney General's Committee on Administrative Procedure*.<sup>122</sup> That committee had been appointed by President Roosevelt for the purpose of building a record that Congress could use in drafting administrative procedure legislation. Its report outlined some of the complexities of the case law, including the limited review that courts sometimes gave to legal questions:

Even on questions of law [independent judicial] judgment seems not to be compelled. The question of statutory interpretation might be approached by the court de novo and given the answer which the court thinks to be the "right interpretation." Or the court might approach it, somewhat as a question of fact, to ascertain, not the "right interpretation," but only whether the administrative interpretation has substantial support. Certain standards of interpretation guide in that direction. Thus, where the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body. Again, the administrative interpretation is to be given weight—not merely as the opinion of some men or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it. This may be particularly significant when the legislation deals with complex matters calling for expert knowledge and judgment.<sup>123</sup>

It is understandable that the committee, being thus advised, seems to have concluded that it should not undertake to codify the subtle and elusive doctrines in this area.

Further evidence of the consensus that had developed around the committee's approach was the attitude of the American Bar Association (ABA). During most of the years of deliberation and debate that led up to the final statute, the ABA had been a principal voice for stringent controls on agencies.<sup>124</sup> But that assertive posture apparently did not extend to the issue of judicial review of legal questions. Even the Walter-Logan bill, which the ABA had drafted and pushed through Congress prior to its veto by President Roosevelt, addressed that issue only with a truism: "Any decision of any agency or independent agency shall be set aside if . . . the decision is beyond the jurisdiction of the agency or independent agency."<sup>125</sup> The ABA's unconcerned attitude toward this issue was still discernible as of the time of the hear-

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122. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. Doc. No. 77-8 (1941) [hereinafter FINAL REPORT].

123. *Id.* at 90-91 (footnotes omitted). See generally Sunstein, *Chevron as Law*, *supra* note 23, at 1646-48 (discussing the background of the report); Shepherd, *supra* note 115, at 1632-36 (same).

124. See Shepherd, *supra* note 115, at 1569-79, 1588-93.

125. H.R. 6324, 76th Cong. § 5(a) (1940). The bill was reprinted as an appendix to Roosevelt's veto message. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. No. 76-986, at 15 (1940) [hereinafter VETO MESSAGE].

ings on the bills that led directly to enactment as the APA. Carl McFarland, the chairman of the ABA's committee on administrative procedure, was evidently on the same page as the Justice Department, as far as scope of review was concerned. He remarked during the House's hearings that "we do not believe the principle of review or the extent of review can or should be greatly altered," and "the scope of review should be as it now is."<sup>126</sup>

It's true that the "restatement" language was omitted from the final reports in 1946. This omission probably does not bespeak a sea change in the drafters' intentions regarding deference, as it is hardly likely that legislators would have altered their attitude from "restating" case law to radically transforming it, while making no change in the actual language. To be sure, it is possible that the omission was a direct result of a growing feeling that they were not entirely satisfied with current case law. If so, however, the most reasonable inference is that they wanted to distance themselves from the status quo in relation to substantial evidence review. To this extent, the commentators' charge that the Attorney General's "restatement" talk was spin, or at least diverged from the legislators' own expectations, may have been well taken.<sup>127</sup> Yet nothing in the legislative history indicates that the

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126. Duffy dismisses McFarland's remark by suggesting that Congress had little if any respect for Supreme Court case law. He quotes Representative Walter's response to McFarland as follows: "You say [the scope of review should be] 'as it now is.' Frankly, I do not know what it now is . . . . [T]he Supreme Court apparently changes its mind daily." Duffy, *supra* note 21, at 132–33 (quoting *Administrative Procedure: Hearings Before the H. Comm. on the Judiciary*, 79th Cong. 38 (1945) [hereinafter *House Hearings*], reprinted in *APA LEGISLATIVE HISTORY*, *supra* note 63, at 45, 84). Read in context, however, this remark, and the colloquy of which it was a part, pertained exclusively to judicial review of *facts* under the substantial evidence standard. *House Hearings*, at 37–40, reprinted in *APA LEGISLATIVE HISTORY*, *supra* note 63, at 83–86. The congressmen in the colloquy evinced no particular concern about review of legal issues. Indeed, if Duffy had not edited down Walter's statement with an ellipsis, the latter's focus would have been apparent. In the omitted passage, Walter said: "I do not know whether the rule as laid down in the Consolidated Edison case is the law, or what the law is." *Id.* at 38. He was referring to *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938), a leading substantial evidence case.

127. Actually, subsequent case law has fully supported the Attorney General's expectation that the APA codified "present law" on substantial evidence. The preferable reading of the Act, and the Court's subsequent interpretation of it in *Universal Camera*, is that the "whole record" proviso added during legislative deliberations amounted to an admonition to apply prior doctrine more conscientiously, but it did not alter that doctrine. Post-APA case law has uniformly continued to treat pre-APA doctrine on substantial evidence as authoritative. See Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Reform*, 94 CHI.-KENT L. REV. 487, 535–38 (2019). Recall the Court's intimation that Congress's perceptions about the supposed abuses of substantial evidence review were mistaken. See *supra* note 117.

standard of review of agencies' statutory and regulatory interpretations was particularly controversial. In the next section, I will critically examine the passages that commentators have cited to demonstrate otherwise.

## 2. Countervailing Claims

Of course, the Senate Judiciary Committee's "restatement" language must be read together with other legislative history language. Proponents of the *de novo* interpretation of the first sentence of § 706 also had "friends" at the figurative cocktail party. Some of the quotations on which Justice Gorsuch relied in *Kisor* might be better described as "party crashers": they may have contained colorful language, but they did not belong at this social gathering, because they were not really discussing judicial review of questions of law. Or, to switch metaphors, they were raspberries rather than cherries.<sup>128</sup> On the other hand, Gorsuch and other supporters of the *de novo* interpretation have also relied on certain other legislative history materials that do at least address the relevant subject matter. In this subsection I will discuss four such passages.

*a.* Justice Gorsuch relied on assertions in the House and Senate committee reports that "[§ 706] provides that questions of law are for the courts rather than agencies to decide in the last analysis and it also lists the several categories of questions of law."<sup>129</sup> That statement

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128. Those passages, which Gorsuch quoted in *Kisor*, 139 S. Ct. at 2436–37, included the following: (a) Senator Pat McCarran, the Chairman of the Judiciary Committee, did write that it would be "hard . . . for anyone to argue that this Act did anything other than cut down the 'cult of discretion' so far as federal law is concerned." McCarran, *supra* note 67, at 893 (1946). In context, however, the senator used this remark to sum up a passage that mainly dealt with judicial review of *discretion* (as his words did say). *Id.* McCarran said nothing in this passage about review of legal questions, except for the self-evident observation that, "[o]f course, [agencies] may not proceed in disregard of the Constitution, statutes, or other limitations recognized by law." *Id.*

(b) Justice Frankfurter did write that "courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951). But the Court's opinion in *Universal Camera* dealt exclusively with fact review and the substantial evidence test. (And even at that, the better reading of the opinion is that it did not interpret the APA as having changed existing law. *See supra* note 127.)

(c) Finally, when Representative Walter declared that he did not know what the scope of judicial review was, due to vacillation by the Supreme Court, he too was referring to substantial evidence review of facts, not review of legal issues. *See supra* note 126.

129. HOUSE REPORT, *supra* note 108, at 44, *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 63, at 278; SENATE REPORT, *supra* note 108, at 28, *reprinted in* APA LEGISLATIVE HISTORY, *supra*, at 214.

would give stronger support to his side if it had not included the very revealing phrase “in the last analysis.” That phrase suggests a sharing of responsibility between the judicial and executive branches, while hedging on the question of how much influence the agency’s view might legitimately carry. In this respect, it seems directly comparable to the statement in *Chevron* itself that “[t]he judiciary is the final authority on issues of statutory construction,”<sup>130</sup> or to the statement in *Mortgage Bankers* that “[e]ven in cases where an agency’s interpretation receives *Auer* deference, . . . it is the court that ultimately decides whether a given regulation means what the agency says.”<sup>131</sup> Similar language—including “in the last analysis”—appeared in pre-*Chevron* case law as well.<sup>132</sup> All of these formulations, including those in the APA committee reports, raise the issue of deference, but they appear to be essentially neutral on the question of how that issue should be resolved in various contexts.<sup>133</sup>

*b.* Proponents of the *de novo* interpretation of the initial sentence of § 706 also point to an explanation on the House floor by Representative Walter, a Judiciary Committee member who chaired the subcommittee that was handling the bill: “[s]ubsection (e) of section 10 [now § 706] requires courts to determine *independently* all relevant questions of law, including the interpretation of constitutional or stat-

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130. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

131. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1208 n.4 (2015); *see also Kisor*, 139 S. Ct. at 2420 (plurality opinion) (quoting much of the same language from *Mortgage Bankers*, and adding that “the meaning of a legislative rule remains in the hands of courts, even if they sometimes divine that meaning by looking to the agency’s interpretation.”).

132. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (“[W]hile informed judicial determination is dependent upon enlightenment gained from administrative experience, *in the last analysis* the words ‘deceptive practices’ set forth a legal standard and they must get their final meaning from judicial construction.” (emphasis added)); *see also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (“[Courts are] final authorities on issues of statutory construction.”); *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (same).

133. In the concluding section of its report, headed “General Comments,” the Senate committee did say that the courts would be responsible for “the enforcement of the bill, by the *independent* judicial interpretation and application of its terms.” SENATE REPORT, *supra* note 108, at 31, *reprinted in APA LEGISLATIVE HISTORY*, *supra* note 63, at 217 (emphasis added). That remark was unsurprising, because courts have never deferred to agencies’ interpretations of the APA, which is not administered by any single agency. *See, e.g., Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997); *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 236 n.6 (1973); *Air N. Am. v. Dep’t of Transp.*, 937 F.2d 1427, 1436–37 (9th Cir. 1991).

utory provisions and the determination of the meaning or applicability of any agency action.”<sup>134</sup> At first glance, the word “independently” seems to give direct support to Justice Gorsuch’s thesis. It is no wonder that some proponents give special prominence to Walter’s comment.<sup>135</sup>

This use of Walter’s statement has some difficulties, however. In the first place, its authoritative value is open to question. Even during the era when objections to legislative history arguments were not as prominent as they are today, statements by individual legislators were regarded as among the least reliable sources of insight into congressional intentions.<sup>136</sup> Such skepticism is certainly warranted in this instance. As discussed above, some fellow members of Walter’s committee seemingly did not share his expansive understanding of the first sentence of § 706. Two of them gave floor speeches, apparently less than an hour after Walter had spoken, in which they summarized the standards of review that § 706 would prescribe; they did not mention the first sentence of § 706 at all.<sup>137</sup> To say the least, these mixed signals would justify some doubts about the extent to which Walter’s views were held by the entire enacting Congress.

There is also a more fundamental problem with the proponents’ use of Representative Walter’s statement that courts must resolve questions of law “independently.” The statement appears not to have the meaning that they ascribe to it. Immediately after making this statement, Walter went on to recite the other provisions of § 706. Then he said: “[t]he term ‘substantial evidence’ as used in this bill means evidence which on the whole record as reviewed by the court *and in the exercise of the independent judgment of the reviewing court* is material to the issues, clearly substantial, and plainly sufficient to support a finding or conclusion . . . .”<sup>138</sup> Walter knew perfectly well, of

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134. 92 CONG. REC. 5654 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 63, at 370 (emphasis added).

135. NELSON, *supra* note 20, at 707 n.26; Duffy, *supra* note 21, at 193–94; Beermann, *End the Experiment*, *supra* note 20, at 789. Justice Gorsuch himself cited the statement without quoting it. *Kisor*, 139 S. Ct. at 2436 n.64.

136. See, e.g., *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Zuber v. Allen*, 396 U.S. 168, 186 (1969) (“A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen.”); Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia’s Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1028–30 (2020) (citing numerous cases and commentators).

137. See *supra* notes 64–65 and accompanying text.

138. 92 CONG. REC. 5654 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 63, at 370. The House and Senate committee reports likewise instruct courts to apply



course, that courts do not find facts *de novo* when they conduct substantial evidence review. At most, it is review for reasonableness.<sup>139</sup> When he said that such review must be “independent,” he must have meant something more modest—presumably, that the courts must conduct this reasonableness review while remaining mindful that they are part of a separate branch of government, not beholden to the executive branch. This reasoning strongly implies that Walter’s use of “independently” in the preceding paragraph meant the same thing. He was making a valid point about checks and balances, but he was not necessarily trying to specify the extent to which courts may or may not rely on administrative views on questions of law when they seek to fulfill that function.

c. Another congressional remark that has found its way into this legislative history debate stemmed from the Senate Judiciary Committee’s account of the thinking behind one of the exemptions in the APA’s provision on agency rulemaking. Subsection 553(b)(A) of the APA permits an agency to issue “interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice” without resorting to notice-and-comment procedure.<sup>140</sup> In its 1945 committee print, the committee mentioned several justifications for this exemption and then added: “[a]nother reason, which might be added, is that ‘interpretative’ rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas ‘substantive’ rules involve a maximum of administrative discretion.”<sup>141</sup> Some proponents of the *de novo* interpretation of the first sentence of § 706 have cited the committee’s reference to “plenary judicial review” as evidence supporting their position.<sup>142</sup>

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the substantial evidence test “in the exercise of their independent judgment.” HOUSE REPORT, *supra* note 108, at 45, *reprinted in* APA LEGISLATIVE HISTORY, *supra*, at 279; SENATE REPORT, *supra* note 108, at 30, *reprinted in* APA LEGISLATIVE HISTORY, *supra*, at 63.

139. Like other members of Congress, Walter insisted that substantial evidence should be understood to mean that an agency’s fact findings must be *reasonable*, as prescribed in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). They worried that the Court sometimes seemed to favor a *more deferential* standard (the so-called *scintilla* test). See *supra* note 126; see also 92 CONG. REC. 5656 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 63, at 375–76 (colloquy among Reps. Voorhis, Gwynne, and Springer) (agreeing that the bill would require a finding to rest on substantial evidence, not just a *scintilla*). Ultimately, the APA settled that question in favor of the interpretation that they preferred.

140. 5 U.S.C. § 553(b)(A).

141. SENATE COMMITTEE PRINT, *supra* note 63, *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 63, at 18.

142. See, e.g., NELSON, *supra* note 20, at 707 n.26; Duffy, *supra* note 21, at 194 n.406.

In an earlier article about the rulemaking exemption, I noted that this sentence in the report “reads like an afterthought, tacked on at the end of a series of policy arguments that were intended to apply to all nonlegislative rules (and procedural rules).”<sup>143</sup> I also said that this claim, which does not appear anywhere else in the APA’s legislative history, was poorly reasoned as a rationale for the exemption.<sup>144</sup> Moreover, as Justice Scalia pointed out in a well-known lecture on the *Chevron* doctrine, the sentence’s premise that questions of law would always be decided *de novo* by courts was itself a “quite mistaken assumption.”<sup>145</sup> Referring back to the description of then-current law in the report of the Attorney General’s Committee,<sup>146</sup> Scalia concluded that the committee print’s characterization “is not true today, and it was not categorically true in 1945.”<sup>147</sup>

The most critical point about the committee’s reference to plenary review is that it did not purport to be an explication of the meaning of § 706. Rather, as just stated, it was a descriptive generalization used as a partial justification for an entirely separate provision of the APA.<sup>148</sup> Whoever wrote it may not have been paying attention to the then-proposed language of § 706. Moreover, this passage could easily have been overlooked by other participants in the legislative debates—both inside and outside Congress—who may have had a better informed or more nuanced view on the judicial review issue. (That is, they may not have been aware of the assertion about plenary review before the committee print was published. Afterwards, they may have been in a better position to know about it—a fact that could explain why the assertion was never repeated anywhere in the legislative history.)

Even lawyers who are generally sympathetic to the use of legislative history in statutory interpretation tend to emphasize that inter-

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143. Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 323 (2018).

144. *Id.* at 327–28 (noting that, under established law, the absence of required procedural safeguards justifies a relatively intrusive standard of judicial review, and it is circular to claim that the opposite should also be true).

145. Scalia, *supra* note 38, at 514.

146. See *supra* note 123 and accompanying text (quoting Attorney General’s Committee).

147. Scalia, *supra* note 38, at 514.

148. The fact that the committee language did not purport to explain the meaning of § 706 helps to explain why Justice Scalia felt free to probe its argument, notwithstanding his well-known aversion to relying on legislative history to ascertain statutory meaning.

preters should pay careful attention to whether any particular quotation was rendered under circumstances that would tend to attest to or cast doubt on its reliability.<sup>149</sup> In this instance, the circumstances surrounding the committee's assertion about plenary review of agency interpretations in its discussion of § 553(b)(A) suggest that the claim is not reliable evidence as to what § 706 means.

d. When the Attorney General's Committee released its report in 1941, a minority of its members proposed a bill that later became the direct precursor of the APA legislation. One section of the bill resembled the current § 706 but also included this proviso: "[t]hat upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it."<sup>150</sup> By the time Congress actually got around to considering administrative procedure bills, however, the proviso had been dropped from the scope-of-review section. Some commentators have interpreted this omission as a sign that the drafters intended to repudiate such deference.<sup>151</sup>

Once again, standard statutory construction doctrine militates against this argument. Even in the years of widespread reliance on legislative history materials, courts were typically wary of putting much stock in the legislature's *failure* to adopt particular proposals.<sup>152</sup> There was no ironclad prohibition on such reliance, but courts generally agreed that an unusually powerful showing would be necessary in order to accord significance to the rejection of proposed language. They often pointed out, in rejecting such arguments, that there were simply too many other possible explanations for failure to enact a proposal.

The controversy over the *de novo* interpretation of the first sentence of § 706 aptly illustrates the force of this objection. After all,

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149. See, e.g., George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 41.

150. FINAL REPORT, *supra* note 122, at 246–47.

151. Bamzai, *Origins*, *supra* note 21, at 986; John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 517–18 n.40 (1947).

152. *Caraco Pharm. Lab'ys., Ltd. v. Novo Nordisk*, 566 U.S. 399, 422 (2012) ("Novo's argument highlights the perils of relying on the fate of prior bills to divine the meaning of enacted legislation. 'A bill can be proposed for any number of reasons, and it can be rejected for just as many others.'" (quoting *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001)); *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947)); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988); see also *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950) (applying the same principle to an unenacted APA amendment).

when the committee minority had described the scope-of-review section in an explanatory note, it had suggested that it expected the proviso to make no substantive difference. It said that the section “is simply the recognized measure of judicial review now obtaining in the courts and . . . should be recognized by clear and unmistakable legislative definition.”<sup>153</sup> Perhaps, therefore, the APA drafters’ only disagreement with the committee minority was that, in contrast to the latter’s view, they thought that the proviso’s message was so clearly right, or so well recognized, that it did not need to be spelled out. Alternatively, some APA drafters may have agreed with the substance of the minority’s language but have thought that, as a drafting matter, the proviso did not fit very well into its proposed context. The section is otherwise written in bare-bones fashion, and the proviso would have been conspicuously out of harmony with that approach. Still other drafters may have wanted to avoid tying the courts’ hands, or may simply have had no opinion about this deference question. Thus, even assuming some disparity of views among the drafters, there does not seem to be any foundation for the inference that some significant number of legislators wanted to omit the committee minority’s proviso because they disagreed with it.<sup>154</sup>

#### E. PRIOR CASE LAW

The state of case law in the years leading up to the enactment of the APA has been a prominent locus of attention in the debate over the meaning of the first sentence of § 706. In the abstract, the use of this reference point for interpretation accords with standard statutory construction doctrine. As the Supreme Court has said, it will “look to ‘the state of the law at the time the legislation was enacted’ for guidance in defining” a statutory term.<sup>155</sup> More recently, Justice Scalia maintained that

[t]he meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage, and . . . (2) most compatible with the surrounding body of law into

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153. FINAL REPORT, *supra* note 122, at 246. Indeed, as the APA drafters would have known, the minority report was written by some of the most conservative members of the committee. Shepherd, *supra* note 115, at 1632. They were unlikely to have been trying to shift the law in the agencies’ favor.

154. See Green, *supra* note 24, at 690 n.209 (rejecting Bamzai’s contention on the ground that “[l]egislative silence is often a difficult way to prove a thesis of drastic change”).

155. *Randall v. Luftsgaarden*, 478 U.S. 647, 662 (1986) (quoting *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378 (1982)).

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which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.”<sup>156</sup>

As with other statutory construction principles, this mode of reasoning should not be applied inflexibly. Interpreters should not overlook the possibility that legislators were not paying attention to prior case law, or deliberately intended to override it. Moreover, it is sometimes difficult to characterize what the prior case law actually was. Nevertheless, as I have shown above, the legislative record of the APA’s enactment contains few if any indications that Congress intended to bring about a departure from the courts’ existing practices of taking account of agencies’ interpretations of administrative statutes and regulations. Accordingly, we should carefully examine what courts had been saying about those practices as of 1946.

### 1. The Case Law of the Early 1940s

As it happens, the early 1940s were a particularly fertile period in the development of doctrines of judicial deference to administrators on legal issues. The Court established a number of precedents that have continued to loom large in modern case law and secondary literature.<sup>157</sup> One reason for this transformation was that President Roosevelt had appointed a crop of Justices who would be sympathetic to protecting New Deal programs from judicial assault. Another reason, intertwined with the first, was the Court’s growing recognition that it needed to reckon with the burgeoning body of federal legislation in which Congress had entrusted broad discretionary authority to agencies. To some degree these precedents built upon earlier case law,<sup>158</sup> but the 1940s decisions articulated their message in bolder, and more enduring, terms.

One of the first judicial milestones in this line of authority was *Gray v. Powell*.<sup>159</sup> The Court spoke of deference in broad terms:

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156. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment).

157. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 575 (1965).

158. See *id.* (“[P]roperly understood the doctrine of *Gray v. Powell* is as traditional as it is sound.”).

159. 314 U.S. 402 (1941); see Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 *FORDHAM L. REV.* 73, 76–77 (1950) (stating that *Gray* was “[a]mong the important cases of this type” and “seem[ed] to mark a definite break with earlier doctrine”); see also BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 10.31 (2d ed. 1984) (stating years later that *Gray* is “generally considered the leading case” for the “rule of review under the reasonableness test of findings involving application of legal concepts to facts”).

Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. . . . Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director. . . . It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action.<sup>160</sup>

*Gray* was soon followed by *NLRB v. Hearst Publications, Inc.*,<sup>161</sup> another venerable casebook staple that has been prominent in the scholarly literature down to modern times. The Court's opinion in *Hearst* suggested—at least when broadly read—that an agency's decision that applied its organic statute to a particular set of facts should be upheld if it had “‘warrant in the record’ and a reasonable basis in law.”<sup>162</sup>

Other opinions explored variations on this basic theme. In *Dobson v. Commissioner*,<sup>163</sup> the Court announced that it would apply the *Hearst* “warrant in the record” test to certain tax cases.<sup>164</sup> A distinctive feature of the opinion was that the Court seemed to distance itself from the analytic meanings of “law” and “fact.” Instead, the Court justified this deferential standard of review on purely practical grounds, including especially the Tax Court's superior qualifications in handling complex questions at the intersection of law and accounting.<sup>165</sup> As I will discuss later, this particular line of reasoning elicited strenuous criticism in the literature and is no longer authoritative.<sup>166</sup> For several years prior to its demise, however, *Dobson* did have some credibility as a leading precedent.<sup>167</sup>

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160. *Gray*, 314 U.S. at 412.

161. 322 U.S. 111 (1944).

162. *Id.* at 131. I add the qualifier “when broadly read” because the opinion also contained language that could be reconciled with a more robust concept of judicial review of legal questions: “Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving *appropriate weight* to the judgment of those whose special duty is to administer the questioned statute.” *Id.* at 130–31 (emphasis added). In practice, however, this nuance has often been overlooked, so that *Hearst* has been widely regarded as simply standing for the proposition that an agency's legal determinations should be reviewed only for reasonableness. *See, e.g.*, Schwartz, *supra* note 159, at 78; L.B. Lea, Comment, 47 MICH. L. REV. 675, 677–80 (1947); *cf.* JAFFE, *supra* note 157, at 575 (lamenting that the nuance is often overlooked).

163. 320 U.S. 489 (1943).

164. *Id.* at 501.

165. *Id.*

166. *See, e.g.*, JAFFE, *supra* note 157, at 579–82; Randolph E. Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753 (1944).

167. *See, e.g.*, Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 567–69 (1950) [hereinafter Davis, *Scope*]; Schwartz, *supra* note 159, at 74.

Also decided during this period was *Skidmore v. Swift & Co.*,<sup>168</sup> which arose in the context of a private damage suit under the Fair Labor Standards Act. Congress had not authorized any administrative agency to adjudicate such claims, but the Court said that courts should nevertheless heed advisory rulings by the Wage-Hour Administrator. Such rulings, “while not controlling on the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>169</sup> One other landmark precedent handed down during this period was *Bowles v. Seminole Rock & Sand Co.*,<sup>170</sup> which originated what later came to be known as *Auer* deference.<sup>171</sup> As such, it remained for many years the leading case authority encouraging courts to defer to agencies’ interpretations of their own regulations.

I have discussed here the most widely known of the Court’s cases on the scope of review of agency interpretations of law during the early 1940s, but several other decisions, less familiar to modern readers, projected a similarly deferential attitude.<sup>172</sup> In addition, the Court’s new jurisprudence elicited extensive discussion in the law review literature.<sup>173</sup>

All of this activity in the Court and the secondary literature served to confirm and reinforce the overview of the case law set forth in the report to Congress by the Attorney General’s Committee on Administrative Procedure. As noted earlier in this Article, the committee called Congress’s attention to situations in which “the administrative interpretation is to be . . . given weight . . . as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it. . . [especially] when the legislation deals with complex matters calling for expert knowledge and

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168. 323 U.S. 134 (1944).

169. *Id.* at 140.

170. 325 U.S. 410 (1945).

171. *Id.* at 414.

172. *See, e.g.*, *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535–36 (1946) (using language similar to that of *Hearst*); *ICC v. Parker*, 326 U.S. 60, 65 (1945) (following *Gray*); *Billings v. Truesdell*, 321 U.S. 542, 552–53 (1944) (following *Gray*); *Fed. Sec. Adm’r v. Quaker Oats Co.*, 318 U.S. 218, 227–28 (1943) (applying similar principles in a rulemaking context).

173. *See, e.g.*, C. Herman Pritchett, *The Supreme Court and Administrative Regulation, 1941–44*, 31 IOWA L. REV. 103, 105–08 (1945); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 90–109 (1944); Paul, *supra* note 166; Ray A. Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899 (1943).

judgment.”<sup>174</sup> A straightforward application of the precedents mentioned at the beginning of this Part would seem to suggest that the APA should be construed to allow courts to continue to use the same approach. As the next section will show, however, proponents of the *de novo* interpretation of § 706 have reached a different conclusion.

## 2. The Rollback Analysis

An ambitious article by Professor Bamzai<sup>175</sup> has dominated academic discussion of the historical record regarding the pre-APA case law on this issue. Justices Gorsuch<sup>176</sup> and Thomas<sup>177</sup> have relied heavily on his account, and the article has been widely praised and cited as authoritative.<sup>178</sup> Thus, it calls for a serious and careful analysis.

Bamzai recognizes that courts and commentators have generally supposed that the case law on judicial deference to agency interpretations of law was in considerable disarray prior to *Chevron*, but he discerns much more orderliness in those precedents.<sup>179</sup> To develop this thesis, he focuses on two statutory interpretation canons that he says originated in English law at least four centuries ago.<sup>180</sup> One of these canons was *contemporanea expositio est optima et fortissimo in lege*—or “a contemporaneous exposition is the best and most powerful in law.”<sup>181</sup> The other was *optimus imterpres legum consuetudo*—“usage is the best interpreter of laws.”<sup>182</sup> Bamzai spends fifteen pages tracing the evolution of these canons in English and American law.<sup>183</sup> The

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174. FINAL REPORT, *supra* note 122, at 91; *see supra* notes 121–123 and accompanying text.

175. Bamzai, *Origins*, *supra* note 21.

176. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 nn.5–6, 2433 n.49 (2019) (Gorsuch, J., concurring in the judgment).

177. *Baldwin v. United States*, 140 S. Ct. 690, 693–94 (2020) (Thomas, J., dissenting from denial of certiorari).

178. *See, e.g.*, Bernick, *supra* note 57, at 826–27, 850; Richard Epstein, *Leviathan’s Apologists*, L. & LIBERTY (Sept. 16, 2020), <https://lawliberty.org/book-review/leviathan-administrative-state-sunstein-vermeule> [<https://perma.cc/77EX-9XV6>]; Pojanowski, *supra* note 57, at 885–86; Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 9 n.31 (2017); Christopher Walker, *Chevron’s Origin Story*, ADMIN. L.: JOTWELL (Oct. 5, 2016), <https://adlaw.jotwell.com/chevrans-origin-story> [<https://perma.cc/HHV3-AJZE>] (reviewing Bamzai).

179. Bamzai, *Origins*, *supra* note 21, at 915–16.

180. *Id.* at 933–34.

181. *Id.*

182. *Id.* at 937.

183. *Id.* at 931–44.



thrust of his argument is that contemporaneously adopted, longstanding interpretations of constitutional and statutory texts carried considerable weight in the court decisions of the nineteenth and early twentieth centuries.

What makes Bamzai's account especially interesting, and relevant to the present Article, is his claim that, until the modern era, courts had no deference doctrine that we would recognize today. They frequently followed administrative interpretations if (and only if) they were rendered contemporaneously with the interpreted statute, or had been consistently followed for a long time, or both. But the "respect" that the Court showed was simply because of their contemporaneity or consistency, not because they were administrative interpretations. He repeats this claim several times in the article.<sup>184</sup>

Bamzai acknowledges some limitations on the breadth of this thesis. In mandamus proceedings, he reports, the Court displayed great restraint in challenging agency interpretations. But this restraint, he continues, was not a product of judicial willingness to put stock in the agencies' views as such. Rather, it occurred because of the historical traditions of mandamus, a prerogative writ that would issue only in cases of blatant abuses.<sup>185</sup> The importance of the mandamus line of cases faded after 1875, when Congress created general federal question jurisdiction in the district courts. Persons who wished to challenge agency action increasingly invoked the court's equity jurisdiction, in which judges were allowed to exercise independent judgment in resolving questions of law.<sup>186</sup> A second complication was that the courts' domain of independent judgment applied only to "questions of law," as distinguished from "questions of fact."<sup>187</sup> In practice, the line between these two types of questions was indistinct.<sup>188</sup> Despite these refinements, however, Bamzai contends that, as of the turn of the century, there was "no general rule of statutory construction

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184. *Id.* at 916 ("[T]he prevailing interpretive methodology of nineteenth-century American courts was not a form of judicial deference, . . . [but rather was] part of a practice of deferring to longstanding and contemporaneous interpretations *generally*. . . . [T]he fact that the interpretation had been articulated by an actor within the executive branch was relevant, but incidental."); *id.* at 941 ("[C]ourts' repeated assertions that certain executive interpretations of legal text should receive 'respect' were in fact applications of the theory that an ambiguous legal text should be given its contemporaneous and customary meaning"); *id.* at 943 ("Judges 'deferred' to or 'respected' executive statutory constructions because they were contemporaneous to enactment or customary, not because they were executive as such.").

185. *Id.* at 947–55.

186. *Id.* at 95–558.

187. *Id.* at 960.

188. *Id.* at 960–62.

requiring ‘deference’ to executive interpretation *qua* executive interpretation.”<sup>189</sup>

In the early decades of the twentieth century, Bamzai continues, the tradition of contemporaneity and continuity as the key to acceptance of administrative interpretations became less stable. Courts made occasional departures from that baseline,<sup>190</sup> although these deviations were only temporary.<sup>191</sup> Moreover, scholars who had absorbed the teachings of the legal realism movement seemed to become increasingly aware of the flexibility inherent in the law-fact distinction. This line of thinking meant that “mixed questions of law and fact” with a substantial legal component could be reviewed deferentially if a court were inclined to do so.<sup>192</sup> Eventually, this reasoning would open the door to the type of deferential review of legal questions epitomized by *Chevron*. Yet, Bamzai argues, the tradition of focusing on contemporaneous and continued interpretation, or its absence, remained substantially intact up through the early New Deal period.<sup>193</sup>

Bamzai recognizes that Supreme Court cases of the 1940s, such as *Gray*, *Hearst*, and *Skidmore* “effectively abandon[ed] the traditional interpretive methodology.”<sup>194</sup> Although the Court was by no means consistent in the manner in which it implemented the “jurisprudential phenomenon of the 1940s,” he continues, the common theme in these cases was that they were “departures from the traditional interpretive

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189. *Id.* at 965; *see id.* at 962–65.

190. *Id.* at 966–68 (discussing *Bates & Guild Co. v. Payne*, 194 U.S. 106 (1904), a deferential case, but asserting that it “swung in a relatively narrow arc”).

191. *Id.* at 971 (discussing *Burnet v. Chi. Portrait Co.*, 285 U.S. 1 (1932), as “[a]n example of the continued vitality of the [contemporary and customary] canons of construction”).

192. *Id.* at 971–75. Bamzai properly emphasizes the role of John Dickinson in stimulating this trend. *Id.* (discussing JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* (1927)). *See generally* Jeffrey A. Pojanowski, *Neoclassical Administrative Common Law*, *NEW RAMBLER* (Sept. 26, 2016) <https://newramblerreview.com/book-reviews/law/neoclassical-administrative-common-law> [<https://perma.cc/RL8L-N2DL>] (book review evaluating Dickinson’s legacy). Ironically, Dickinson later became a stern critic of functionalist tendencies in the case law on deference. *See infra* Part II.F.2.

193. Bamzai, *Origins*, *supra* note 21, at 969 (“[C]ourts in the first few decades of the twentieth century generally hewed to the traditional interpretive formulations.”); *id.* at 976 (noting that James Landis anticipated the *future* advent of deferential review of legal questions but also acknowledged that “judicial deference to executive interpretation was not the law, circa 1938”).

194. *Id.* at 976–77; *see also id.* at 981 (“[*Hearst* and *Skidmore* were] departures from the traditional interpretive methodology and intellectual framework that privileged contemporary and customary interpretations.”).

methodology and intellectual framework that privileged contemporary and customary interpretations.”<sup>195</sup> But, he maintains, the APA reflected a public or at least congressional backlash against those cases.<sup>196</sup> Congress then responded to that backlash by reinstating and codifying the pre-1940 regime of “independent” review regarding questions of law.<sup>197</sup> This purported resuscitation of seemingly superseded doctrine is a crucial step in Bamzai’s article, and consequently, I refer to his article as a “rollback” analysis. Now, Bamzai concludes, the legal system must come to terms with the fact that our jurisprudence has gotten far out of line with what Congress intended in the APA.<sup>198</sup>

### 3. Critique of the Rollback Analysis: Pre-1940

There is much to admire in Bamzai’s article. His discussion of precedents on judicial review of administrative interpretations over the course of many decades, together with the scholarly literature, is richly detailed and often incisive. For example, his discussion of the limited significance of mandamus may or may not be correct, but it is at least a strong contribution to the literature on that subject. It is especially noteworthy because it takes issue with a contrary claim by Justice Scalia.<sup>199</sup> In addition, Bamzai’s explanation of the manner in which the intellectual trends of the 1920s and 1930s gave rise to the Supreme Court jurisprudence of the 1940s is rewarding and persuasive. However, I completely disagree with his explanation of how early case law on deference relates to § 706 of the APA. Before I get to that point, I will critically examine some aspects of his discussion of that case law on its own terms.

It is certainly true that numerous cases throughout our history have declared that administrative interpretations that were adopted soon after the interpreted text, or that have been in place for a long time, or both, are particularly reliable, and interpretations that lack these attributes carry much less weight, if any.<sup>200</sup> Bamzai’s article amply documents that observation, but his description of the case law is

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195. *Id.* at 979–81.

196. *See id.* at 981–83.

197. *Id.* at 918, 987–88, 990.

198. *See id.* at 1001.

199. *See United States v. Mead Corp.*, 533 U.S. 218, 241–43 (2001) (Scalia, J., dissenting) (arguing that *Chevron* deference is largely a product of the mandamus tradition).

200. *See Ernest H. Schopler*, Annotation, *Supreme Court’s View as to Weight and Effect to Be Given, on Subsequent Judicial Construction, to Prior Administrative Construction of Statute*, 39 L. Ed. 2d 942, §§ 8–9 (1973).

overstated in a few respects. In the first place, the cases that support this proposition have focused specifically on their relationship to administrative interpretations in particular. Despite the impression that Bamzai's article evidently seeks to leave, not a single one of these cases undertook to support these factors on the basis of their recognition in other fields such as civil litigation (and they certainly didn't invoke the Latin canons that Bamzai discusses, nor their English-language equivalents).<sup>201</sup>

More importantly, Bamzai's contention that contemporary adoption and customary usage were the central considerations in this body of case law, with deference concepts being irrelevant or at most "incidental," is far too reductionist. The opinions simply aren't written that way.<sup>202</sup>

For example, immediately after declaring that "[j]udges 'deferred' to or 'respected' executive statutory constructions because they were contemporaneous to enactment or customary, not because they were executive as such," Bamzai remarks that "[t]he leading case for many years was *Edwards' Lessee v. Darby*."<sup>203</sup> In that 1827 decision, the Court wrote: "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."<sup>204</sup> Notice, first, that the Court did not directly refer to the heritage of canons on which Bamzai places such emphasis. Second, although the quoted language did mention that the interpretation in dispute had been a "contemporaneous construction," the quotation also called attention to pertinent facts about the land commissioners who had adopted the interpretation—"those who were called upon to act under the law, and were appointed to carry its provisions into effect." Unless we suppose that the Court included all those latter words for no reason, we have to infer that it thought that the "great respect" to which the interpretation was entitled was in part a function of the perspective that the commissioners possessed as implementers of the statute. At best, the *Edwards'* opinion was ambiguous as to the relative weight of these factors in the Court's thinking.

Before the nineteenth century came to an end, the Court was writing opinions that suggested much more strongly that the principle

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201. See Green, *supra* note 24, at 682–83.

202. See generally Schopler, *supra* note 200, § 3 (characterizing deference as a general rule, subject to exceptions).

203. 25 U.S. (12 Wheat.) 206 (1827); see Bamzai, *Origins*, *supra* note 21, at 943.

204. *Edwards' Lessee*, 25 U.S. at 210.

of administrative deference was an important variable in its own right. For example, in the 1878 case of *United States v. Moore*,<sup>205</sup> the Court said that “[t]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.”<sup>206</sup> Indeed, the Court continued, “[t]he officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.”<sup>207</sup> Although the *Moore* opinion did, as Bamzai notes, also mention that the Navy had always followed the interpretation under discussion, that detail appeared four paragraphs earlier, and the Court did not especially emphasize it.<sup>208</sup> Similarly, in *Hastings & Dakota R.R. v. Whitney*,<sup>209</sup> an 1889 case, the opinion quoted the “able men, and masters of the subject” language from *Moore*, and also stated that “decisions of the Land Department on matters of law [like the present one] . . . are entitled to great respect at the hands of any court.”<sup>210</sup> As in *Moore*, the Court mentioned that the agency had long adhered to the interpretation in question, but it did not suggest that this detail was a *sine qua non* for, or even particularly relevant to, the deference principle that it articulated.<sup>211</sup> And in *Webster v. Luther*,<sup>212</sup> decided in 1896, when the Court did refer to the “important interests [that] have grown up under the [administrative] practice adopted,” it spoke of that factor as *enhancing* the argument for deference but not as a prerequisite for it.<sup>213</sup>

By the early twentieth century, the Court would sometimes rely on the deference principle without mentioning the contemporaneity

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205. 95 U.S. 760 (1878).

206. *Id.* at 763.

207. *Id.*

208. *Id.* at 762.

209. 132 U.S. 357 (1889).

210. *Id.* at 366.

211. *Id.*

212. 163 U.S. 331 (1896).

213. *See id.* at 342 (“The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the Executive Departments of the government, is *always* entitled to the highest respect, and in doubtful cases should be followed by the courts, *especially* when important interests have grown up under the practice adopted” (emphasis added)). For a similar case of somewhat later vintage, see *Estate of Sanford v. Comm’r*, 308 U.S. 39, 52 (1939), stating in dictum that the courts’ willingness to give “persuasive weight” to the views of “those who are expert in the field and specially informed as to administrative needs and convenience, tends to the wise interpretation and just administration of the laws. *This is the more so* when reliance has been placed on the practice by those affected by it.” (emphasis added).

or continuity of the agency's interpretation at all.<sup>214</sup> And in other cases, the Court relied on deference even when the conditions envisioned by the canons were demonstrably not met. One such case, which Bamzai does discuss,<sup>215</sup> was *Bates & Guild Co. v. Payne*,<sup>216</sup> which upheld a ruling of the Postmaster General that directly contradicted the interpretation that the agency had followed for sixteen years prior to its decision in that proceeding. Bamzai regards *Bates* as an outlier; but if so, it was not the only one.<sup>217</sup>

In short, contemporaneity and continuity were important factors in the common law of judicial review, but deference was in various ways an independent and salient variable. In other words, the diffuseness that most commentators have discerned really did exist. That complexity in the case law casts doubt on Bamzai's claim that, in the APA, Congress adopted the narrow conception of deference that his article expounds. In any event, a larger problem with his argument is his account of the relationship between the APA and the case law of the early 1940s, and I now turn to that aspect of the historical record.

#### 4. Critique of the Rollback Analysis: Post-1940

Bamzai's summary of the early 1940s cases is not materially different from the account I set forth in Part II.E.1. He declares that "the

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214. See, e.g., *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 314 (1934) ("[T]he Commission . . . was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected,' and [with terms of office that] would 'give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.'"); *Brewster v. Gage*, 280 U.S. 327, 336 (1930) ("It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons."); *La Roque v. United States*, 239 U.S. 62, 64 (1915) ("While not conclusive, this construction given to the act in the course of its actual execution [by the Secretary of the Interior] is entitled to great respect and ought not to be overruled without cogent and persuasive reasons."); *Boston & Maine R.R. v. Hooker*, 233 U.S. 97, 117-18 (1914) ("This requirement is a practical interpretation of the law by the administrative body having its enforcement in charge, and is entitled to weight in construing the act.").

215. Bamzai, *Origins*, *supra* note 21, at 966-69.

216. 194 U.S. 106 (1904).

217. See *Great N. Ry. Co. v. United States*, 315 U.S. 262, 275 (1942) ("While the first of these circulars followed the Act by 13 years, the weight to be accorded them is not dependent on strict contemporaneity."); *United States v. Reynolds*, 250 U.S. 104, 109 (1919) ("This ruling was made in the year 1910, and may be inconsistent with some previous rulings of the Department . . . . Nevertheless it is entitled to weight as an administrative interpretation of the [1887] act.").

Supreme Court in the early 1940s steadily expanded the zone of interpretive discretion given to administrative agencies, effectively abandoning the traditional interpretive methodology.<sup>218</sup> As he describes, “[t]he opinion in *Gray v. Powell* heralded a new era,” and *Hearst* and *Skidmore* gave further impetus to the Court’s new principles.<sup>219</sup>

But, Bamzai says, Congress attempted to undo this situation when it enacted the APA: “[r]ead against the history of the APA’s adoption, section 706 is best interpreted as an attempt to revive the traditional methodology and to instruct courts to review legal questions using independent judgment and the canons of construction.”<sup>220</sup> Responding to the academic debate about the meaning of § 706, he writes that “[t]he most natural reading of section 706 . . . is that [it] adopted the traditional interpretive methodology that had prevailed from the beginning of the Republic until the 1940s and, thereby, incorporated the customary-and-contemporary canons of construction.”<sup>221</sup> He apparently does not claim that the Act adopted these two canons *as such*. Rather, he seems to argue that the Act sought to revive the pre-1940 regime of “independent” or “de novo” review, and the two canons were “part and parcel” of de novo review.<sup>222</sup>

Regardless of the precise manner in which Bamzai might express his article’s thesis, I do not think it is the “most natural reading” of the statute. To the contrary, it is decidedly unconvincing. In the first place, he offers no explicit evidence that any participant in the legislative debate specifically intended for § 706 to jettison the precedents of the past six years and thereby revive pre-1940s case law. Instead, he infers that purpose from various statutory interpretation arguments, including (a) the fact that the statute refers to constitutional review and statutory review in the same sentence;<sup>223</sup> (b) the fact that Congress did not adopt the pro-deference proviso favored by the minority of the Attorney General’s Committee on Administrative Procedure;<sup>224</sup> and (c) various legislative history quotes.<sup>225</sup> I have addressed all of these arguments earlier in this Article and will not repeat that analysis here.<sup>226</sup>

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218. Bamzai, *Origins*, *supra* note 21, at 976–77.

219. *Id.* at 977–79.

220. *Id.* at 977.

221. *Id.* at 987.

222. *Id.* at 987–88, 990.

223. *Id.* at 985.

224. *Id.* at 985–86.

225. *Id.* at 988–90.

226. See *supra* Parts II.C (constitutional review), II.D.2 (committee minority’s

Moreover, several aspects of the legislative record weigh *against* Bamzai's thesis.<sup>227</sup> If anything, the legislative history points to the opposite conclusion. In a letter to the Senate Judiciary Committee in October 1945, the Attorney General asserted that the APA provision that became § 706 "declares the existing law concerning the scope of judicial review."<sup>228</sup> "Existing law" can hardly be equated with "the law of a half dozen years ago." To be sure, one could be skeptical about the Attorney General's position because he represented his client agencies (although, as I noted earlier, the Supreme Court has not shared that skepticism).<sup>229</sup> Nevertheless, if the APA's legislative sponsors had been pursuing the objective that Bamzai posits, one would have expected them to place their objections to the Attorney General's characterization on the public record, as they did with other issues on which the two sides disagreed.<sup>230</sup> The absence of protest against the Attorney General's position regarding judicial review of legal issues invites an inference that these sponsors had no particular quarrel with "existing law" in this regard.

I also referred earlier to the remark by Carl McFarland, the chairman of the ABA's Committee on Administrative Procedure, that "the scope of review should be as it now is"<sup>231</sup>—*not* "as it was up until six years ago." It would be odd to conclude that legislators undertook a rollback of judicial review doctrine if that move lacked support from the ABA committee, the entity that had principally spearheaded the movement to curb the agencies' power through legislation.

Indeed, McFarland's position highlights what is so inherently implausible about Bamzai's interpretation of § 706. Although the drive for administrative procedure legislation had originated as an initiative that would put strong curbs on agency power, that thrust was progressively diluted during the legislative process in the interest of securing broad support and, ultimately, President Truman's signature.<sup>232</sup> The ABA committee played a crucial role in that process of accommodation. In late stages of the deliberations, its hardline members were largely replaced by moderates, of whom McFarland was

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clause and legislative history quotes).

227. For different versions of a similar critique, see Sunstein, *Chevron as Law*, *supra* note 23, at 1650–52; Green, *supra* note 24, at 686–91.

228. Letter from Attorney General Clark to Senator McCarran, *supra* note 118, at 44. Of course, this is the same as the interpretation in his APA manual two years later. *See supra* notes 112–114 and accompanying text.

229. *See supra* notes 115–117 and accompanying text.

230. *See supra* notes 110–111, 139 and accompanying text.

231. *See supra* note 126 and accompanying text.

232. Shepherd, *supra* note 111, at 1643–57.



one.<sup>233</sup> That committee played a leading role in forging a compromise bill.<sup>234</sup> Eventually Congress adopted the bill with unanimous support. It is unlikely that the New Deal supporters in Congress would have been receptive to as substantial a retrenchment from then-prevailing Supreme Court case law as Bamzai maintains. To the contrary, the compromise that the contending political forces had reached seems to have included taking no action regarding judicial review of legal issues.

A further argument renders Bamzai's thesis even more improbable. To accept that thesis, one would have to suppose that the legislative sponsors decided to use the APA to roll back the law of judicial review of agency legal interpretations *without telling anyone*. The problem with that supposition is not merely that they apparently declined to take issue with the Attorney General. Overturning a half dozen or more well-known Supreme Court cases is not an enterprise that Congress would be at all likely to pursue without any fanfare. Sunstein compares the legislative silence with a dog that failed to bark in the night.<sup>235</sup> I think he is right about that. Indeed, considering how many legislative players participated in debates over the APA, the absence of any overt support for the rollback that Bamzai posits looks like an entire kennelful of silent dogs.

As is well known, exactly that sort of noisy debate did occur in connection with another issue relating to the scope of review that § 706 would prescribe. All administrative lawyers who are familiar with the Supreme Court's leading decision in *Universal Camera Corp. v. NLRB*<sup>236</sup> know this story from Justice Frankfurter's extended narrative in that opinion. Members of Congress became convinced that courts were being too lenient in their application of the substantial evidence test to judicial review of *fact* issues.<sup>237</sup> Senators and Representatives spoke out on this issue, commentators took notice at the time (and afterwards), and in due course Congress "expressed its mood not merely by oratory but by legislation."<sup>238</sup> This vigorous debate was just what one would expect to observe when Congress sets

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233. *Shepherd, supra* note 115, at 1645–46.

234. *Id.* at 1649–50.

235. Sunstein, *Chevron as Law, supra* note 23, at 1650 & n.188 (citing A. CONAN DOYLE, *Silver Blaze*, in MEMOIRS OF SHERLOCK HOLMES 1, 22 (New York, A.L. Burt Co. 1894)).

236. 340 U.S. 474 (1952).

237. *Id.* at 477–82.

238. *Id.* at 487.

out to rectify a problem—or at least perceived problem—with a substantial body of Supreme Court case law. The absence of similar fireworks accompanying what Bamzai claims was a comparable revamping of administrative law doctrine is telling.

Additionally, factions within Congress *have* tried several times in subsequent years to promote legislation that would abolish or sharply curtail judicial deference on legal issues. All of these measures elicited legislative hearings, floor speeches, wide publicity, and scholarly commentary. These proposed measures included the so-called Bumpers Amendment in the late 1970s and early 1980s,<sup>239</sup> and again in the mid-1990s,<sup>240</sup> as well as the Separation of Powers Restoration Act<sup>241</sup> in our own day. The complete absence of such an outcry in the leadup to the APA fortifies the inference that the sponsors of the Act did not seek, let alone achieve, a similar rollback.

Taken as a whole, the legislative record would surely tend to discourage a court from concluding that Bamzai's narrative is true. The Supreme Court has said in the past that "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."<sup>242</sup> In *Kisor*, of course, Justice Gorsuch did endorse Bamzai's argument. But the Justices did not have a full analysis of the legislative record before them. Given more complete briefing, the Court could be much less likely to subscribe to that theory.

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239. S. 1080, 97th Cong. § 5, 128 CONG. REC. 5302 (1982); *see, e.g.*, Levin, *Identifying Questions of Law*, *supra* note 66, at 5–9; Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. (forthcoming 2022) (manuscript at Part II), <https://papers.ssrn.com/abstract=3889828> [<https://perma.cc/G4VS-WQJV>]; James T. O'Reilly, *Deference Makes a Difference: A Study of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739 (1980).

240. S. 343, 104th Cong. § 628 (1995); *see* Ronald M. Levin, *Scope of Review Legislation: The Lessons of 1995*, 31 WAKE FOREST L. REV. 647, 653–55 (1996).

241. H.R. 4768, 114th Cong. (2016); *see Separation of Powers Restoration Act of 2016: Hearing on H.R. 4768 Before the Subcomm. on Regul. Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2016) [hereinafter *SOPRA Hearing*]; Symposium, *The Proposed Separation of Powers Restoration Act of 2016*, 41 ADMIN. & REG. L. NEWS 4 (2016); Elinson & Gould, *supra* note 239, at Part V.B.

242. *Midlantic Nat'l Bank v. N.J. Dep't of Env't Prot.*, 474 U.S. 494, 501 (1986); *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–67 (1979) ("The reports and debates leading up to the 1972 Amendments contain not a word of this concept. This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." (citation omitted)).

## F. POST-APA REACTIONS

One further potential source of data about the meaning of the first sentence of § 706 is the way in which courts and commentators of the era actually interpreted it. The short answer is that the first sentence of § 706 had essentially no impact on the law immediately following its passage. The most straightforward explanation for the continuity of the law in this regard is that the judges and litigants who were closest in time to the Act's passage were well aware of its limited ambitions. In this connection, my conclusions are largely the same as those of Sunstein, although I rely on a somewhat different body of evidence than he does.

Although this Article is not written from a thoroughgoing "originalist" perspective, the preceding paragraph suggests two observations that appear to be pertinent to any effort to identify the "original public meaning" of the first sentence of § 706. First, the most relevant point of reference in such an inquiry would not be the *general* public, because the average citizen would have no occasion to read or apply the APA at all. The Act is addressed to the legal community, and § 706 in particular is implemented by the judiciary. Scalia and Garner have made a similar point about the role of terms of art in statutory interpretation:

Sometimes context indicates that a technical meaning applies. Every field of serious endeavor develops its own nomenclature—sometimes referred to as terms of art. Where the text is addressing a scientific or technical subject, a specialized meaning is to be expected: "In terms of art which are above the comprehension of the general bulk of mankind, recourse, for explanation, must be had to those, who are most experienced in that art." And when the law is the subject, ordinary legal meaning is to be expected, which often differs from common meaning. As Justice Frankfurter eloquently expressed it: "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."<sup>243</sup>

Indeed, the Court has applied this reasoning in the specific context of § 706, by characterizing "substantial evidence" as a term of art.<sup>244</sup> The same logic should apply to other interpretive issues that arise under the same provision.

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243. SCALIA & GARNER, *supra* note 95, at 73 (citing Hugo Grotius, *The Rights of War and Peace* 177 (1625; A.C. Campbell trans., 1901), and Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)); see also *FAA v. Cooper*, 566 U.S. 284, 292 (2012) ("[W]hen Congress employs a term of art, 'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'" (quoting *Molzof v. United States*, 502 U.S. 301, 307 (1992))).

244. *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019); *T-Mobile South, LLC v. Ro-swell*, 574 U.S. 293, 301 (2015).

Second, this discussion highlights one sense in which originalism in the APA context should, or at least can, differ from the way in which it typically plays out in the context of constitutional interpretation. Research into the original public meaning of the Constitution often entails exploration into centuries-old historical materials that are difficult for nonspecialists to uncover and interpret. Legislative and judicial materials from the mid-twentieth century, however, are plentiful and can be retrieved with ordinary methods of legal research. Thus, claims about the Act's original public meaning can readily be subjected to a reality check on the basis of evidence regarding the manner in which the APA actually was interpreted and implemented in the initial years of the Act's life. That track record will be the focus of attention here. Speculation about how the APA's words "would" be understood by a hypothetical 1940s administrative lawyer should be unnecessary.<sup>245</sup>

### 1. Case Law

As Sunstein notes,<sup>246</sup> the case law record is essentially another story of non-barking dogs. The first silent dog was *Unemployment Compensation Commission v. Aragon*,<sup>247</sup> a case that was argued while the APA bill was pending and decided on December 9, 1946. The Court upheld the agency's order denying the respondents' claims for unemployment compensation, with a minor exception,<sup>248</sup> by relying squarely on the language and reasoning of *Hearst*.<sup>249</sup> In another case decided on the same day, *FCC v. WOKO, Inc.*,<sup>250</sup> the Court upheld the Federal Communications Commission's denial of a license renewal to a radio station because of the station's misrepresentations during the renewal proceedings. The Court's language plainly conveys the message of judicial deference: "[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of

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245. Making a more sustained effort to apply originalist theory, Sunstein suggests that "it is possible that with respect to judicial review of agency interpretations of law, courts are in a 'construction zone'—that is, they have nothing to interpret, and so must engage in a form of construction." Sunstein, *Chevron as Law*, *supra* note 23, at 1656 n.224. That observation is at least broadly compatible with the thesis of this article.

246. *Id.* at 1652–56.

247. 329 U.S. 143 (1946).

248. As to one set of charges, the Court found that the record did not support the agency's jurisdiction. *Id.* at 152–53.

249. *Id.* at 153.

250. 329 U.S. 223 (1946).

judicial for administrative discretion since Congress has confided the problem to the latter.”<sup>251</sup> Both decisions were unanimous, and neither mentioned the APA. Other cases followed the same pattern.<sup>252</sup>

This is not to say that agencies won every case in the years immediately following the APA’s enactment. As one would expect, the Court sometimes ruled against the government, despite dissenters’ reliance on cases such as *Gray* and *Hearst*.<sup>253</sup> If there had been any significant support in those years for the de novo interpretation of § 706, one would have expected the Court to have relied on that section’s supposed abolition of judicial deference on legal questions. But that never happened.

The Court’s famous decision in *SEC v. Chenery Corp. (Chenery II)*<sup>254</sup> illustrates both sides in this equation. Although this 1947 case is best known for its declaration that federal agencies should have broad leeway to use adjudication, rather than rulemaking, in their development of new policies,<sup>255</sup> the Court also upheld on the merits a Securities and Exchange Commission decision that had rejected a holding company’s reorganization plan. The Commission had found that the plan was not “fair and equitable” to security holders, as required by the Public Utility Holding Company Act.<sup>256</sup> Justice Murphy’s opinion for the Court was highly deferential: “The Commission’s conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts.”<sup>257</sup>

Justice Jackson wrote a scathing dissent, arguing in part:

As there admittedly is no law or regulation to support this order, we peruse the Court’s opinion diligently to find on what grounds it [now upholds the Commission]. We find but one. That is the principle of judicial deference to administrative experience . . .

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251. *Id.* at 229.

252. *See* *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947) (following *Hearst*); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 478 (1947) (following *Hearst*).

253. *See, e.g.*, *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951); *id.* at 327–28 (1951) (Douglas, J., dissenting) (relying on *Gray* and *Hearst*); *Bartels v. Birmingham*, 332 U.S. 126 (1947); *id.* at 133 (Douglas, J., dissenting) (relying on *Gray*).

254. 332 U.S. 194 (1947).

255. *Id.* at 203.

256. *Id.* at 204.

257. *Id.* at 209.

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I suggest that administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts . . . Surely an administrative agency is not a law unto itself, but the Court does not really face up to the fact that this is the justification it is offering for sustaining the Commission action.<sup>258</sup>

If § 706 had been thought at the time to contain a strong affirmation of the courts' responsibility for deciding legal questions, one would have expected Justice Jackson to cite to it. He, of course, would have been well aware of the Act. As Attorney General, he had drafted a memo that President Roosevelt had attached to his veto message on the predecessor bill (the Walter-Logan bill).<sup>259</sup> In his opinion for the Court in *Wong Yang Sung v. McGrath*,<sup>260</sup> written a few years after *Chenery II*, Jackson discussed the genesis of the APA in detail, demonstrating his familiarity with the legislation.<sup>261</sup> But Jackson did not rely on the APA to support his argument in his *Chenery II* dissent. The most likely reason is that he, like others, did not suppose that Congress had meant to say anything particularly significant in the APA about judicial review of questions of law.

I could continue to multiply negative examples, but it should suffice for me to note I have found no case that detracts from Sunstein's finding that "[f]rom 1946 to 1960, the Court never indicated that section 706 rejected the idea that courts might defer to agency interpretations of law."<sup>262</sup> Meanwhile, the Court did cite during the same period to other judicial review provisions in the APA. The best known example is *Universal Camera*, with its classic explication of the meaning of substantial evidence,<sup>263</sup> but the Court also relied on the APA in decisions on matters such as preclusion of judicial review,<sup>264</sup> forum selection,<sup>265</sup> and review of constitutional questions.<sup>266</sup>

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258. *Id.* at 212–13, 215 (Jackson, J., dissenting).

259. VETO MESSAGE, *supra* note 125, at 5–12 (appendix). Jackson cited to that message in *Chenery*, 332 U.S. at 218 n.6 (dissent).

260. 339 U.S. 33 (1950).

261. *Id.* at 36–41.

262. Sunstein, *Chevron as Law*, *supra* note 23, at 1654.

263. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

264. *Ludecke v. Watkins*, 335 U.S. 160, 163–64 (1948) (finding that judicial review under the Alien Enemy Act of 1798 was precluded, as authorized by the APA).

265. *United States v. Jones*, 336 U.S. 641 (1949) (recognizing district court jurisdiction, as provided in APA § 10(b) (now 5 U.S.C. § 703)).

266. *Oklahoma v. United States Civ. Serv. Comm'n*, 330 U.S. 127, 138 n.13 (1947) (citing what is now § 706 for the proposition that "[j]udicial review normally includes issues of the constitutionality of enactments and action thereunder").

I do not want to ignore the lower courts. In 1949, a pair of authors undertook to examine all court decisions that had been decided during the first three years since the Act had become effective.<sup>267</sup> Initially, they reported that “[c]areful investigation of Supreme Court decisions since the enactment of the Administrative Procedure Act fails to reveal any affirmative holdings or dicta construing and applying the statutory language of Section [706].”<sup>268</sup> Turning to lower court cases, the authors did find a number of decisions in which courts had concluded that the APA had broadened the *range* of cases that would be judicially reviewable.<sup>269</sup> “On the other hand,” they continued, “there do not seem to be any decisions thus far which would justify a conclusion that courts have been empowered by the Act to conduct any more exhaustive review of a given action, once determined to be reviewable, than previously existed. It is with regard to this aspect of judicial review that the Act appears to be merely declaratory of preexisting law.”<sup>270</sup>

## 2. Commentary

Law review commentary written soon after the APA’s enactment offers raw material for further inquiry as to how the first sentence of § 706 was originally understood. Arguably, the historical record of contemporaneous scholarship does not deserve the same level of credibility that judicial case law does, because any given commentator does not necessarily speak for a wide segment of the legal community. But proponents of the *de novo* interpretation of the first sentence of § 706 have resorted to this source of potential insight, and so I will take it up here.

More specifically, the proponents have relied heavily on an analysis that John Dickinson published in 1947.<sup>271</sup> Considering the article solely on its own terms, that reliance is understandable. He was an eminent scholar whose past writings had exerted enormous influence on administrative law thinking during the preceding two decades.<sup>272</sup>

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267. Clark L. Fauver & A. Stuard Young, Jr., *The Administrative Procedure Act and Judicial Review of Agency Action*, 37 GEO. L.J. 557, 561 (1949).

268. *Id.*

269. *Id.* at 568.

270. *Id.*

271. Dickinson, *supra* note 151.

272. See *supra* note 192. Dickinson’s formalist analysis in this essay was almost the complete opposite of the heavily pragmatic thrust of his earlier work. See JAFFE, *supra* note 157, at 570 n.79 (recognizing this shift); Bamzai, *Origins*, *supra* note 21, at 993 & n.365 (same). People should not be faulted for changing their minds. However, it may be that the practicality of his former approach contributed at that time to its wide ac-

His article on the APA directly challenged the Attorney General's Manual's assertion that the APA made no change in the scope of judicial review of agency action.<sup>273</sup>

The scope of Dickinson's critique was not altogether clear. His main objection to pre-APA case law seemed to be that "[t]he Courts have begun to draw a distinction between two kinds of questions of law: Those which involve what are sometimes spoken of as general law or legal principles, and others which involve the construction of technical terms and the application of knowledge thought to be expert and specialized."<sup>274</sup> In *Dobson v. Commissioner*,<sup>275</sup> the Court had appeared to say that the latter type of questions should be reviewed only for reasonableness, if they could be reviewed at all.<sup>276</sup> Dickinson argued that the APA had disapproved this theory and would thenceforth "require the Court in a review proceeding to look for itself at even those technical questions."<sup>277</sup> To that extent, Dickinson's article stood on solid ground and was not particularly unconventional. Even in that era, the *Dobson* reasoning was harshly criticized by some other scholars as an outlier, and the case was soon overruled by legislation.<sup>278</sup> On the other hand, Dickinson's article also contained broad language declaring that the first sentence of § 706 would "impose a clear mandate that all [questions of law] shall be decided by the reviewing Court for itself, and in the exercise of its own independent judgment." Despite this ambiguity, I will for the sake of argument treat Dickinson as a supporter of the same position that Justice Gorsuch later espoused.

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ceptance, and the reduced flexibility of his subsequent analysis—at least if broadly interpreted—was one reason why his reading of the first sentence of § 706 did not ultimately carry the day in the growth of scope-of-review doctrine.

273. See *supra* note 114 and accompanying text.

274. Dickinson, *supra* note 151, at 516–17.

275. 320 U.S. 489 (1943).

276. See *id.* at 504 ("What, in the circumstances of this case, was a proper adjustment of the basis was thus purely an accounting problem and *therefore* a question of fact for the Tax Court to determine." (emphasis added)).

277. Dickinson, *supra* note 151, at 517.

278. See JAFFE, *supra* note 157, at 581 ("*Dobson* . . . was untenable. It involved the Court in a hopeless morass of decisions, distinctions, and qualifications, in a constant clutter of contradictions inevitably engendered by the opinion's absence of intelligible content. It deserved its subsequent quietus by Congress [in 1948]."). This was strong language, coming as it did from a defender of *Gray v. Powell* and *NLRB v. Hearst Publications, Inc.* See *id.* at 575; see also Paul, *supra* note 166, at 785 ("The more one studies the *Dobson* opinion, the greater the confusion, for the entire opinion seems to 'walk on quicksand.'"). But see Davis, *Scope*, *supra* note 167, at 567–69 (defending the *Dobson* reasoning).



Dickinson justified this reading almost entirely on the basis of his reading of the language of the Act. I have explained above why I think the language is not nearly as self-explanatory as he maintained.<sup>279</sup> A secondary argument, which he deployed only in a footnote, was grounded in Congress's failure to adopt an explicit deference requirement, as the minority members of the Attorney General's Committee had proposed.<sup>280</sup> That argument was also fallacious, for reasons I have discussed earlier.<sup>281</sup> For the moment, however, our concern is not with whether he was right or wrong, but rather with the very existence of his interpretation, as evidence of a contemporaneous interpretation of the first sentence of § 706.

The main problem with putting weight on Dickinson's article is that his view was almost completely isolated. Indeed, my initial research into this issue persuaded me that he was literally the only law review commentator who claimed, during the period immediately following the APA's enactment, that the first sentence of § 706 directed the courts to exercise independent judgment on all questions of law. Eventually, I discovered that this conclusion was not quite accurate. An essay by Frank Hinman Jr. cited to Dickinson's article and endorsed his analysis.<sup>282</sup> Hinman's essay was very brief, and its author was apparently not a lawyer—but still, it existed.

Apart from this one exception, however, the verdict of contemporary scholarship regarding Dickinson's position appears to have been entirely negative. Several commentators *expressly* disagreed with Dickinson's analysis. Among them were a few who would later go on to renown as among the leading voices in administrative law scholarship, including Kenneth Culp Davis,<sup>283</sup> Louis L. Jaffe,<sup>284</sup> and Bernard Schwartz,<sup>285</sup> as well as others whose names are not as well recognized today.<sup>286</sup> One of the points these authors made was that Dickinson had overlooked the APA's recital, elsewhere in § 10, that the section would apply "except to the extent that . . . agency action is committed to

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279. See *supra* Part II.B.

280. See Dickinson, *supra* note 151, at 517–18 n.40.

281. See *supra* Part II.D.2.

282. Frank Hinman Jr., *The Effect of the Administrative Procedure Act on Judicial Review of Administrative Action*, 20 ROCKY MTN. L. REV. 267, 276–77 (1948).

283. Davis, *Scope*, *supra* note 167, at 562.

284. JAFFE, *supra* note 157, at 569–70 & n.79.

285. Schwartz, *supra* note 159, at 83–85 (predicting that, contrary to Dickinson's argument, the APA would bring about no diminution in judicial deference on mixed questions of law and fact, as exemplified by *Gray v. Powell*).

286. See Scanlan, *supra* note 117, at 529–32; S. Walter Shine, *Administrative Procedure Act: Judicial Review "Hotchpot"?*, 36 GEO. L.J. 16, 29–31 (1947).

agency discretion by law.”<sup>287</sup> Modern authorities on administrative law would probably not rely on that specific textual argument, because in today’s world that clause in the APA is construed narrowly. But their analysis still rings true to the extent that they concluded that the APA does not turn over all legal interpretation to judicial hands. As Jaffe put it, “[a] court must . . . decide as a ‘question of law’ whether there is ‘discretion’ in the premises, and once the discretion is established, its exercise if ‘reasonable’ is free of control.”<sup>288</sup> Aside from disputing the specific analysis in Dickinson’s article, all of these authors appeared to share Davis’s conclusion about the first sentence of § 706: “The APA provision probably does not change the scope of review.”<sup>289</sup>

There were other authors who did not take issue with Dickinson by name, but nevertheless made clear that they did not share his viewpoint. I am referring here to authors who expressly stated that they did not foresee any changes in the courts’ approach to review of legal (or mixed) questions,<sup>290</sup> as well as authors who specifically examined § 10 without any indication that they thought the provision had done anything noteworthy with regard to review of issues of law.<sup>291</sup> For example, Nathaniel Nathanson quoted the Attorney General’s Manual as stating that the APA restates current law on judicial review.<sup>292</sup> Although Nathanson did not flatly say that he agreed with that assessment, he certainly did not take issue with it. In discussing the effect of the Act upon judicial review, he discussed reviewability, the substantial evidence debate, and judicial control of undue administrative delay—but not the standard of judicial review for legal questions.<sup>293</sup> Another interesting contribution in this category was an article by

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287. 5 U.S.C. § 701(a)(2).

288. JAFFE, *supra* note 157, at 570.

289. Davis, *Scope*, *supra* note 167, at 562 (citing to legislative history sources).

290. See Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 587 (1950) (“Nor has the Act diminished the force of the most recent judge-made administrative legal doctrine, giving preponderant weight to agency holdings involving both so-called mixed questions and the agency’s qualified experience.”); Herbert Kaufman, *The Federal Administrative Procedure Act*, 26 B.U. L. REV. 479, 500–01 (1946).

291. Ray A. Brown, *The Federal “Administrative Procedure Act,”* 1947 WIS. L. REV. 66, 83–87 (1947); Note, *The Impact of the Federal Administrative Procedure Act on Deportation Proceedings*, 49 COLUM. L. REV. 73, 85 (1949).

292. Nathaniel L. Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 414 (1946).

293. *Id.* at 416–18; see also Comment, *The Federal Administrative Procedure Act: Codification or Reform?*, 56 YALE L.J. 670, 689–91 (1947) (“[I]t would seem that the Act merely codifies the pre-existing law of judicial review,” except perhaps with regard to availability of review, substantial evidence, and de novo trials).

Frederick Blachly and Miriam Oatman.<sup>294</sup> In contrast to most commentators, Blachly and Oatman were overtly hostile to the Act, regarding it as a sellout to the ABA and a disastrous attack on administrative governance.<sup>295</sup> Judicial review was one of the targets of this polemic. They attacked § 10 for subjecting the full range of administrative actions to the set of review standards that are now found in § 706(2).<sup>296</sup> In their view, this step was insensitive to the variety of statutory provisions that Congress had written in particular subject areas.<sup>297</sup> For all of their vitriol, however, they did not identify an expansion in judicial power over review of questions of law as among the Act's offenses. If, in these authors' view, the first sentence of § 706 had been as much of a departure from the status quo as Dickinson maintained, their failure to mention it would be difficult to explain.

In sum, one might say that academic commentary in Dickinson's era was "divided" regarding the issue he raised. With only one exception, however, that would be true only in the sense that some commentators *expressly* disagreed with Dickinson, and others only *tacitly* disagreed with him. The overall verdict of more than a dozen contemporaneous commentators was clear: the first sentence of § 706 did not alter the scope of review on issues of law. That verdict was, indeed, in accord with the reactions of the courts themselves.

### III. CHEVRON AND SECTION 706

The thrust of the foregoing analysis is that the first sentence of § 706 of the APA does not require reviewing courts to decide issues of law without any judicial deference. I have argued here that, on the contrary, the sentence leaves open a range of possible interpretations. At the same time, however, I have disavowed the notion that the APA's commands are infinitely elastic. Thus, there is room to ask whether modern courts may have strayed outside the permissible range. To put the issue more concretely, is the *Chevron* doctrine compatible with

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294. Frederick F. Blechly & Miriam E. Oatman, *Federal Administrative Procedure Act*, 34 GEO. L.J. 407, 428–31 (1946); see also Julius Cohen, *Legislative Injustice and the Supremacy 'of Law': An Appraisal of the Federal Administrative Procedure Act*, 26 NEB. L. REV. 323, 339–44 (1947) (objecting to the APA's expansion of access to the courts and of substantial evidence review, but not mentioning judicial review of legal issues).

295. Blechly & Oatman, *supra* note 294, at 408.

296. *Id.* at 416.

297. *Id.*

the first sentence of § 706? After all, that standard of review didn't exist in its modern form before 1984, and obviously the drafters of the APA didn't specifically intend to codify it.<sup>298</sup>

I will maintain in this Part that the *Chevron* doctrine, as we understand it today, is a defensible interpretation of the APA. I use the relatively restrained word “defensible” because the debate over the merits of *Chevron* implicates a host of hotly contested prudential factors that are well beyond the scope of this Article.<sup>299</sup> But I propose to show, at least briefly, that, whatever one thinks about whether the doctrine is desirable, the APA need not be construed to prohibit it.

Cass Sunstein addresses this issue in the article that I have cited recurrently in earlier sections.<sup>300</sup> He notes that Congress knew about cases like *Hearst* and *Gray* and did not disapprove them.<sup>301</sup> Thus, although he maintains that “[w]e do not know what Congress wanted,”<sup>302</sup> one possible answer is that § 706 could be “taken as a codification of preexisting law, which allowed courts to defer to agency interpretations of law—sometimes. *Chevron* is a reasonable rendering of the meaning of ‘sometimes,’ fairly close to what the Supreme Court was doing in the decade before the APA was enacted.”<sup>303</sup> I tend to agree with Sunstein's historical argument as far as it goes, but he seems to have developed it less fully than he might have. I will use this Part to expand on his analysis by presenting a fuller account as to how *Chevron* can be reconciled with § 706.

In order to develop this argument, I will need to break down the *Chevron* standard analytically into two discrete components. The test is generally understood to mean that when a court perceives, at “step one,” that the statute to be interpreted is ambiguous in relation to the precise question at issue, the court should presume that Congress

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298. A similar question could be asked about *Auer* deference. Although that standard of review was largely based on *Seminole Rock*, which predated the APA, it has undergone considerable evolution since its initial articulation. Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 647–67 (2015). Nevertheless, the Court's inconclusive encounter with that doctrine in *Kisor* may make the Justices reluctant to revisit the merits of *Auer* deference any time soon.

299. For what it is worth, I have taken a stand in support of *Chevron*. See *SOPRA Hearing*, *supra* note 241, at 64 (statement of Ronald M. Levin).

300. Sunstein, *Chevron as Law*, *supra* note 23.

301. *Id.* at 1649.

302. *Id.* at 1664; *see id.* at 1663. Sunstein's cautious approach to this point seems to rest on his perception that Bamzai's account of the historical meaning of the Act is just as persuasive as the more deferential reading that tends to justify *Chevron*. As should be apparent from the discussion in Part II.E.2–4 of this Article, my evaluation of the persuasiveness of Bamzai's account is much less favorable.

303. *Id.* at 1664.

chose to leave that question to the agency's discretion.<sup>304</sup> If the agency's interpretation survives that inquiry (i.e., if the court has not found that the statute unambiguously negates that interpretation), the court should consider, at "step two," whether the interpretation is reasonable and should uphold it if it meets that relatively undemanding test. For expository purposes, it will be convenient to discuss those steps in reverse order.

Instead of discussing the *Chevron* formula in the abstract, however, I will defend it in light of the manner in which the doctrine operates in the real world. Litigants manage with some frequency to convince courts that a regulatory statute has a "clear" meaning that overcomes the presumption at step one, or that an agency's interpretation is too "unreasoned" or "unreasonable" to pass muster under *Chevron's* second step.<sup>305</sup> Also, pursuant to what is known as "step zero," a number of types of cases are categorically excluded from *Chevron's* "domain."<sup>306</sup> The best known source of exclusion is *United States v. Mead Corp.*,<sup>307</sup> which largely limits *Chevron* deference to interpretations reached through notice-and-comment rulemaking or formal adjudication. When one puts all of these limiting factors together, the overall picture is a fairly nuanced regime. This mixed picture does not mean, in my view, that the *Chevron* doctrine is rife with inconsistency; rather, these opportunities for judicial control are integral features of the doctrine. The regime is comparable to the one that Justice Kagan set forth in *Kisor* in the context of agency interpretations of regulations,<sup>308</sup> although in the *Chevron* context the Court has been developing these limiting factors for decades.

A good starting point for appraisal of the step two component of *Chevron* is Sunstein's argument that the drafters of the APA were aware of cases such as *Gray* and *Hearst* and can be taken as having acquiesced in them by not taking action to disapprove them. That observation is relevant to *Chevron*, because the second step of the *Chevron* formula is best understood to be equivalent to the proposition that

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304. For case law supporting this presumption, see *supra* note 35 and accompanying text.

305. See Emily Hammond, Elizabeth Garrett, & M. Elizabeth Magill, *Judicial Review of Statutory Issues Under the Chevron Doctrine*, in ABA JUDICIAL REVIEW GUIDE, *supra* note 99, at 66.

306. See Steven Croley & Richard Murphy, *The Applicability of the Chevron Doctrine—“Chevron Step Zero,”* in ABA JUDICIAL REVIEW GUIDE, *supra* note 99, at 101; Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

307. 533 U.S. 218 (2001).

308. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019).

questions of *law application* are primarily for the agency that administers the statute.<sup>309</sup> At various times in our history, such questions have gone by other names, such as “questions of fact” or “mixed questions of law and fact.”<sup>310</sup> In our more positivist age, courts more often characterize issues of law application in terms of the review of the exercise of delegated authority. But these are essentially equivalent names for the same underlying type of issue. In this sense, one can draw a straight line from the deference prescribed in the early 1940s cases to the deference contemplated in the second step of the *Chevron* test. Indeed, in the *Chevron* opinion, Justice Stevens specifically highlighted the importance of delegation, whether express or implied.<sup>311</sup>

There should be no serious doubt about the legitimacy of deferential review in this context, because if Congress directed that the agency should decide a given issue, judicial deference is simply acquiescence in the legislature’s choice. It is not inconsistent with the judicial responsibility to say what the law is, because, by virtue of the delegation itself, the law is (within reasonable limits) what the agency says it is. This theory had been articulated as far back as the era in which the APA was adopted,<sup>312</sup> and it had become a salient theme in administrative law even before *Chevron* emerged as a new paradigm.<sup>313</sup> Even Justice Thomas, despite his emerging view that *Chevron* is unconstitutional, appears to accept the legitimacy of deference under these circumstances.<sup>314</sup> Moreover, it is widely recognized that

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309. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHICAGO L. REV. 1253, 1266–69 (1997) [hereinafter Levin, *Anatomy*].

310. See, e.g., Levin, *Identifying Questions of Law*, *supra* note 66, at 9–12; Stern, *supra* note 173, at 95–99. I take it that Bamzai agrees with this descriptive claim, despite our disagreements about related normative issues. See *supra* note 188 and accompanying text.

311. *Chevron*, 467 U.S. at 843–44.

312. Stern, *supra* note 173, at 99–109.

313. The most influential exposition of this reasoning was set forth in Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983). For a contemporaneous, parallel treatment, see Levin, *Identifying Questions of Law*, *supra* note 66, at 16–22. For recent treatments that reach similar conclusions, see Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689, 703–06 (2020); Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 959–61 (2018); Kristin E. Hickman & Nicholas R. Bednar, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1443, 1453–56 (2017).

314. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (noting that, despite his view that the constitutionality of *Chevron* should be reconsidered, he would join the Court’s opinion because “the provision of the America Invents Act at issue contains an express and clear conferral of authority to the Patent Office to promulgate rules governing its own proceedings[,] . . . [and] by asking whether the Patent Office’s preferred rule is reasonable, the Court effectively asks

*Chevron* step two is analytically similar to, and perhaps largely coextensive with, review to determine whether an action is “arbitrary, capricious [or] an abuse of discretion” under § 706(2)(A) of the Act.<sup>315</sup> Abuse of discretion review is self-evidently deferential rather than independent (although it can be a significant source of judicial control, especially when applied with a “hard look”).

The foregoing analysis is incomplete, however, because *Chevron* did more than merely acknowledge the necessary consequences of delegation. According to the prevailing interpretation, it also decided that when, at step one, a court perceives the statute to be ambiguous in relation to the precise question at issue, it should *presume* that Congress chose to leave that question to the agency’s discretion.<sup>316</sup> This aspect of the test did not exist before 1984. Here the reader should recall my earlier claim that § 706 need not be read to mean that the exact rules that were prevalent in 1946 must persist indefinitely.<sup>317</sup> In that light, the question to ask about the *Chevron* presumption is not whether it is the same as the legal principles that the courts applied in 1946, but rather whether it is a reasonable extrapolation from them.

The *Chevron* regime has some similarities with the case law that prevailed at the time of the APA’s enactment, but also some differences. The similarities lie in the prudential policy factors that have been commonly cited as justifications for judicial deference to administrators’ views on legal issues, such as their technical expertise, experience in dealing with the subject matter, and responsibility for implementing their mandates effectively on a concrete level. Those factors were prominent in the early case law,<sup>318</sup> as well as in post-APA cases prior to *Chevron*.<sup>319</sup> The Court in *Chevron* echoed these themes, although it added a focus on the agencies’ political accountability.<sup>320</sup>

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whether the rulemaking was arbitrary [or] capricious under § 706(2)(A)”).

315. Levin, *Anatomy*, *supra* note 309, at 1267–69; Hickman & Hahn, *supra* note 26, at 656–69; Herz, *supra* note 38, at 1882–85. For case law illustrating the overlap, see *Judulang v. Holder*, 565 U.S. 42, 52–53 n.7 (2011) (citing *Mayo Found. for Educ. & Rsch. v. United States*, 562 U.S. 44, 53 (2011)); *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 510 n.27 (2002).

316. *See supra* note 35 and accompanying text.

317. Indeed, there would have been no reason to distinguish between static and dynamic interpretations of “restatement” in 1946, because, by hypothesis, any future developments could not have been foreseen at the time.

318. *See supra* notes 203–17 and accompanying text.

319. *See* Ronald M. Levin, *Judicial Review and the Bumpers Amendment*, 1979 A.C.U.S. 565, 576–79, <https://www.acus.gov/sites/default/files/documents/Levin%20ACUS%20Bumpers%20report.pdf> [<https://perma.cc/UDX5-B93N>].

320. *Chevron*, 467 U.S. at 865–66.

On the other hand, the *Chevron* doctrine differs from its antecedents in that, instead of treating these factors merely as relevant considerations that should be taken into account along with other statutory construction arguments, it has transmuted them into a presumption or default principle. Justice Scalia has explained that choice on the basis that it makes the law in this area more predictable and consistent.<sup>321</sup> Probably it also reflects the Court's belief, during *Chevron's* ascendancy, that a relatively structured, formal approach promotes adherence to the pro-deference policies underlying the doctrine.

Although the courts' continued support for these goals in future years may be open to doubt, the fact that the doctrine is expressed as a presumption is not an anomaly within the sphere of administrative common law. The presumption is comparable to canons of statutory interpretation that the Court has adopted in many areas of the law,<sup>322</sup> including but not limited to administrative cases, such as the presumptions against retroactive or extraterritorial applications of regulatory statutes, disfavoring federal encroachments on traditional state powers, etc.<sup>323</sup>

Putting all of these considerations together—*Chevron's* nominal strong stand in favor of deference, as well as its flexibility in practical application—the net result seems to be that agency interpretations are more likely to prevail on judicial review when *Chevron* applies than when it does not, but the changes that courts have wrought in this area are essentially a matter of degree.<sup>324</sup> Thus, if the consideration that courts gave to deference factors in the 1940s could reasonably be described as falling within the meaning of “deciding” a legal

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321. Scalia, *supra* note 37, at 516–17.

322. Many commentators do describe *Chevron* as essentially a canon of construction. See Hickman & Hahn, *supra* note 26, at 634–39 (collecting sources). These authors themselves believe *Chevron* can be better understood as a standard of review, see *id.* at 655, but they also say that these categories overlap, and the distinction makes no difference for most purposes. *Id.* at 615–16.

323. See, e.g., *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) (federalism); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (extraterritoriality); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (retroactivity); Hammond et al., *supra* note 305, at 88–93; Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64 (2008); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

324. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 5–6 (2017) (finding, in a survey of a decades' worth of court of appeals cases, that agencies won 77.4% of the time when *Chevron* was applied, compared with a 56% win rate when *Skidmore* was applied).



question, or “determining” the meaning of a regulation, the same can be said of the manner in which courts utilize such factors today.

It can be argued, of course, that *Chevron* brings about an excessive intrusion on judicial independence, notwithstanding the qualifying factors that I have discussed above. Revisionist scholars can make a case for that proposition on the basis of our legal traditions, including constitutional values. This Article does not undertake to evaluate the doctrine on that level. My thesis here is simply that such an assertion cannot be derived from the APA.

A point to keep in mind, in connection with the broader issue of *Chevron*'s validity, is that the judiciary has essentially imposed the doctrine on itself (even if it is phrased as a presumption about congressional intent). That point tends to blunt the force of the argument, advanced by Justice Thomas among others,<sup>325</sup> that *Chevron* violates the constitutional separation of powers by intruding on the exclusive province of the judiciary. It is doubtless true that *Chevron* and *Auer*, in practical operation, call for more deference to executive authority than Justice Thomas and some other jurists would individually choose to give. Surely, however, it is not unconstitutional for the Court to adopt principles of interpretation and to prescribe a framework for applying those principles. Judges are expected to adhere to that framework, but it is the Court that originated it and can modify it over time (as it indeed does). The wisdom of these principles is of course up for debate; but, because the judiciary itself is the source of the principles, I do not see their existence as an illegitimate intrusion on judicial independence. In other words, “independent judgment” does not have to mean “independent of the Court’s jurisprudence on scope of review.” The fact that the force and breadth of the presumption remains within the courts’ control helps to explain why the Court has continued to insist that the *Chevron* test is consistent with judicial independence.<sup>326</sup>

In sum, I believe that the evolution of judicial review of legal issues under the APA falls well within the scope of administrative common lawmaking (even if nominally phrased in terms of what the Court says Congress “would expect”). What the House and Senate Judiciary

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325. See, e.g., *Michigan v. EPA*, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring); cf. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1219–20 (2015) (Thomas, J., concurring in judgment) (making a similar point in the context of *Auer* deference).

326. See *supra* notes 130–133 and accompanying text.

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Committees said about § 706 in the 1940s is also defensible as a characterization of the *Chevron* regime: “questions of law are for the courts rather than agencies to decide in the last analysis.”<sup>327</sup>

#### CONCLUSION

One might have thought that seventy-five years of experience with various APA deference standards, including more than thirty-five years of applying *Chevron*, would make it unnecessary to inquire very deeply into whether the APA allows judicial deference to agencies on issues of legal interpretation. Indeed, an article that asserts that “the courts have been getting it right for decades” is not usually considered to possess a very compelling message, especially within a profession that often prizes contrarianism.<sup>328</sup> Yet the advent of a radical critique of longstanding doctrine, endorsed by influential jurists and well-respected scholars, among others, seems to require just such a treatment.

I have contended here that the text of § 706 is essentially non-committal on the issue of what deference, if any, courts should display when they review agency legal interpretations. Moreover, the legislative history of the Act confirms that, despite vigorous disagreements about other issues, the participants in the legislative deliberations were not particularly concerned about the standard of review for legal issues. They were content to leave the operative law on that subject as it stood. Nearly all contemporary observers understood that decision. Thus, they very properly proceeded without any supposition that the APA had made any change in the applicable law. In short, the purported *de novo* mandate of the Act has not been “forgotten”; it never existed in the first place.

One has to expect that, even if the conclusions of this Article were to be broadly accepted, the campaign to dislodge judicial deference to agencies on issues of law would continue on other fronts. Proponents of that campaign, however, should at least be called on to defend it on its intrinsic merits, rather than on the basis of a dubious APA argument. If this Article serves to provide ammunition against the latter argument, or perhaps to discourage the proponents from relying on it in the first place, it will have served its purpose.

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327. See *supra* note 129 and accompanying text.

328. See Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) (chiding legal academe for its undue fondness for articles with counterintuitive theses).