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Power Corrupts

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When Congress and the president together enact a statute, they make a promise to the American people that the federal government will, for example, provide social services and support, forgive public servants' educational debt, offer asylum, build infrastructure, or protect against private harm to public interests in the environment, transportation, communication, or the financial system. Administrative agencies, however, bear the principal responsibility for keeping these promises by giving effect to the law in the real world. Reflecting this reality, agencies are the federal institutions that individual citizens are likely to interact with most frequently and directly. The average citizen's view of the federal government will be shaped by those interactions—by the service provided by the post office, the ease and fairness of receiving Medicare or Social Security benefits, the reliable provision of services at a Veterans Administration (VA) hospital, the transparent and consistent application of regulatory requirements to affected business by the Environmental Protection Agency (EPA), the confidence in needed medications instilled by Food and Drug Administration (FDA) approvals, or the guidance and assistance provided in an emergency by the Centers for Disease Control and Prevention (CDC) or the Federal Emergency Management Administration (FEMA). While citizens vote in federal elections for the president and their representatives in Congress, their view of the federal government surely is shaped more by their direct experience with federal administrative officials.

Public trust in government thus depends on public trust in agencies, and administrative law's overriding goal should be to develop and maintain stable, effective legal rules that ensure the law is fairly and faithfully executed. The field's focus should be on administration, the bulk of which is adjudication, that is, the day-to-day work of administrative agencies giving real-world effect to the federal government's statutory commitments.[1] The lion's share of attention should go to the most common methods of agency decision making: informal, nonhearing adjudication in all its endless variety, from the processing and resolution of complaints of legal violations or applications for benefits or licenses, to investigation and inspection, to correspondence, negotiation, and the settlement of disputes between administrators and affected private parties.[2] A smaller share of attention would be paid to the less common but more procedurally uniform activities of rulemaking and formal hearings. With respect to rulemaking, more attention would be paid

to the interconnections between rulemaking and adjudication[3] and less would be paid to major policymaking through legislative rules. Judicial review would receive the modest attention it deserves as an essential tool used rarely but powerfully to ensure that agency action complies with the law: that it is statutorily authorized, nonarbitrary, and procedurally proper. Less attention would be paid to the negative control of administrative action through the courts and more would be paid to the executive, congressional, and administrative tools that are needed to ensure agencies affirmatively can fulfill their statutory responsibilities. If the field's goal was to ensure faithful and effective execution, its lodestar would be a thick concept of administration.

But administrative law today neglects administration, focusing instead on power and the institutions that wield it, particularly the Supreme Court, the president, and Congress. Although adjudication—and especially informal adjudication—remains "the lifeblood of the administrative process,"[4] the legal doctrines that define administrative law as a field mostly ignore it.[5] Over the past half century, the field has moved its focus up and out, away from the day-to-day details of administration and the people it affects to the highest institutions of the federal government and the struggles among them to control the ultimate levers of federal policymaking. Thus, for example, the doctrine and discourse regarding appointments is the locus of an ongoing battle between Congress and the president to control the selection of personnel and the internal structure of the agencies, thereby wielding (albeit indirectly) the statutory authority vested in the federal administrative apparatus.[6] Similarly, the doctrines governing judicial review and statutory interpretation are self-consciously calibrated as a zero-sum allocation of power between the courts and the political branches.[7] Even when agency action is examined directly, administrative law focuses on the development (and not the enforcement) of significant legislative rules and the struggle to regulate the balance of power among private industry, the courts, and political leaders.[8]

This paper argues that administrative law's obsession with power corrupts the field and has led slowly but inexorably to the abandonment of the core work of administration: fairly and faithfully giving effect to the law in the real world.[9] It begins with the New Deal era, identifying the core goal of the Administrative Procedure Act (APA) as that of ensuring due process in administrative adjudication. The political commitment to that goal was shallower than is typically recognized. Efforts to limit the application of the APA's hearing provisions began immediately after the statute's adoption and bore fruit in under a decade. Indeed, it now seems that 1950 was the high-water mark of support for the APA's allegedly grand compromise—by 1955, all three branches of government had contributed to laying the groundwork for a long, slow undoing of the statute's core commitments. In the 1960s and 1970s, administrative law experienced what then professor Antonin Scalia described as "the constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking."[10] This shift from adjudication to rulemaking—a real phenomenon—has been oversimplified and misunderstood. Agencies did not drive this process—scholars, courts, and Congress did—and it primarily licensed a shift *in attention* from agencies to courts and from law execution to policymaking. The shift also made possible the rise, beginning in the 1980s,

of presidential administration and presidential control of administrative policymaking. The emergence during this same period of the *Chevron* doctrine helped to extend and solidify the field's reconception of administration primarily as a matter of policymaking power. Finally, what remained of the APA's core commitment to ensuring fair and impartial adjudication has recently suffered serious setbacks because of both executive policy changes and judicial decisions that have begun to extend a strong model of presidential control into the adjudicatory process, heedless of the potential consequences. The cumulative effect of these developments has been to move the focus up and out, away from the people and the operational needs of administration and toward the highest levels of political power.[11] It is little wonder that public trust in federal institutions has so eroded.

ADMINISTRATIVE LAW'S MISPLACED FOCUS

As a field, administrative law today takes a top-down, court-centered perspective on administrative agencies. The standard administrative law class taught in law schools reflects this perspective. The bulk of the course is devoted to the doctrines governing the availability, timing, and scope of judicial review of administrative action. Other core topics in the course, including the constitutional position of administrative agencies and the procedural requirements for agency action, are examined using the traditional case method. That is, students learn about the structure and constitutional position of administrative agencies by studying judicial opinions resolving constitutional challenges to administrative statutes. Similarly, students learn about how agencies work only shallowly and indirectly, by studying judicial opinions deciding cases challenging agency action. Administrative law casebooks typically devote little attention to the internal perspective of administrative agencies or to the laws, policies, and principles that directly govern the day-to-day operation of administrative agencies.

From this top-down judicial perspective, administrative law is primarily about control—and power. Judicial review doctrines are calibrated to ensure the proper allocation of political power among the institutions of the federal government. Judicial review is conceived primarily as a mechanism for controlling agency action, ensuring that agencies operate within the boundaries of their statutory authority and comply with the procedural requirements imposed by the Constitution, statutes, or regulations. Deference doctrines limit the power of the courts to control agency action, while simultaneously affirming the respective powers of Congress and the president. Take, for example, the *Chevron* doctrine, which (at least for now) provides the standard for judicial review of an agency's interpretation of the statute it administers.[12] *Chevron* is predicated on the idea that when Congress enacts an administrative statute, it delegates to the agency (and therefore *not* to the courts) the authority to interpret and implement the statute.[13] *Chevron* step one provides that if the statute is clear, the agency as well as the court is bound by Congress's determination. If the statute is ambiguous, however, that ambiguity is treated as implicit delegation of authority to the agency to interpret the statute. Thus, at *Chevron* step two, courts must defer to any reasonable agency interpretation of an

ambiguous statute.[14] This approach is calibrated to provide a zero-sum allocation of power: the power of Congress to legislate; the power of the agency to implement its statute; the power of the courts to enforce Congress's law and ensure the agency operates within its statutory mandate.

Administrative law's focus on power and control is a natural consequence of viewing administration through the eyes of the courts and the judicial process. Courts are reactive institutions, designed to decide otherwise intractable disputes that are brought before them by outside parties, including private parties and nonjudicial governmental officials and institutions. As a practical matter, these parties seek recourse to the judicial process only where the law does not give one of them the clear advantage—by power, authority, or right—over the other. The parties use their substantial latitude to define their dispute in a way that focuses the courts narrowly on questions of power and control. The result of litigation—whether by settlement or judicial determination—is to determine the parties' respective rights. These determinations are predominantly retrospective. Courts are well equipped to judge the legal consequences of past events, but poorly suited to make prospective policy determinations. A prudent court, recognizing its limited and external perspective, is thus wise to take a narrow, restrained approach to reviewing administrative action.[15] This viewpoint explains much in administrative law, including deferential review of agency legal interpretation and policymaking, the emphasis on procedural over substantive review of agency rulemaking, the preference for informal process and agency procedural discretion, and the significant limitations on judicial review of agency inaction.

The judicial perspective on administration is also demonstrably narrow. The vast majority of agency action is taken through informal adjudication, with the affected parties' agreement or acquiescence.[16] Disputes are rare and are usually resolved through administrative hearings and appeals. Only a small percentage of administrative decisions are appealed to federal district court. In all other, nonadministrative, cases, district court opinions are often the final word.[17] Most district court decisions are not appealed, and more than 90 percent of those that are appealed are affirmed.[18] The result is that only a very small number of cases reach the U.S. Courts of Appeal. Even fewer administrative cases are taken and decided by the U.S. Supreme Court. A few statistics suffice to demonstrate. Consider, first, the Social Security Administration (SSA), which pays benefits to around sixty million Americans each year. Beneficiaries do not have to file a claim every year to receive their payments. Of those who do have to file a claim in any given year, fewer than 10 percent are denied benefits and receive an administrative hearing, and only a tiny fraction of the claims subject to hearing are ultimately appealed to the courts. Table 1 offers a snapshot of Social Security claims and appeals throughout the system between 2015 and 2020.[19]

A similar pattern is evident in immigration cases, as Table 2 shows, although the picture here is more complex because some types of immigration cases go to district court while others go directly to the Courts of Appeal.[20]

TABLE 1 SSA CLAIMS AND APPEALS, 2015–2020

	SSA Claims*	SSA Hearings†	District Court‡	Appeals Court§
2015	10,129,800	663,129	18,538	681
2016	10,361,900	652,241	18,716	601
2017	10,188,000	685,657	19,020	567
2018	10,159,000	765,554	18,665	560
2019	10,106,900	793,863	17,912	582
2020	9,107,300	585,918	21,110	730

*"SSA Claims" includes the total number of claims processed per fiscal year in the Old-Age and Survivors Insurance (OASI), Disability Insurance (SSDI), and Supplemental Security Income (SSI) programs, as reported by the SSA in Tables 2.F4, 2.F5, and 2.F6, *SSA Administrative Data: Claims Workloads*, in U.S. Soc. Sec. Admin., Annual Statistical Supplement, *available at* https://www.ssa.gov/policy/docs/statcomps/index.html [https://perma.cc/T6FX-RYG9] (selecting the appropriate annual report for the year listed here).

†"SSA Hearings" includes hearing-level dispositions per fiscal year in the OASI, SSDI, and SSI programs, as reported by the SSA in Table 2.F9, *SSA Administrative Data: Hearings and Appeals*, in U.S. Soc. Sec. Admin., Annual Statistical Supplement, *available at* https://www.ssa.gov/policy/docs/statcomps/index.html [https://perma.cc/T6FX-RYG9] (selecting the appropriate annual report for the year listed here).

‡"District Court" data include Social Security cases filed in U.S. District Courts for each year ending September 30, as reported by the U.S. Courts in Table C-3, *U.S. District Courts—Civil Cases Filed, by Nature of Suit and District, During the 12-Month Period Ending September 30, 20xx*, US Courts, *available at* https://www.uscourts.gov/data-table-numbers/c-3 [https://perma.cc/39Y8-6MWF] (selecting the appropriate annual report for each listed year, as reflected by the "20xx" in the citation).

§"Appeals Court" data include Social Security cases filed in the U.S. Courts of Appeals for each year ending September 30, as reported by the U.S. Courts in Table B-7, *U.S. Courts of Appeals – Civil and Criminal Cases Filed, by Circuit and Nature of Suit or Offense, During the 12-Month Period Ending September 30, 20xx*, *available at* https://www.uscourts.gov/data-table-numbers/b-7 [https://perma.cc/9FP5-K786] (selecting the appropriate annual report for each listed year, as reflected by the "20xx" in the citation).

Left out of Tables 1 and 2 are the number of Social Security and immigration cases heard each year by the Supreme Court. Those figures undoubtedly are minuscule: between 2015 to 2020, the Supreme Court typically decided fewer than eighty cases *total* per year.[21]

One would be hard pressed to find a worse way to understand administration than to look at it through the tiny, warped lens of Supreme Court precedent. And yet administrative law focuses obsessively on judicial review and gives prime importance to the exceptionally narrow view of administration that is available through Supreme Court opinions. Now, it is undoubtedly true that judicial precedent shapes agency and litigant behavior. The decisions issued in the few administrative appeals that reach the Supreme Court shape legal doctrine and will have downstream effects on many cases that never reach the courts. These are reasons to pay attention to those decisions.[22] But the attention should be more proportionate to and complemented by vastly expanded attention to the

TABLE 2 IMMIGRATION HEARINGS AND APPEALS, 2015-2020

	Immigration Court*	District Court†	Appeals Court‡
2015	199,358	1,991	5,901
2016	207,495	2,771	5,215
2017	204,730	3,313	5,210
2018	215,880	3,435	5,158
2019	299,406	3,507	5,112
2020	258,050	4,849	6,067

*The "Immigration Court" data in Table 2 are taken from the Transactional Records Access Clearinghouse (TRAC) database of annual case closures. *See Outcomes of Immigration Court Proceedings by State, Court, Hearing Locations, Year, Charge, Nationality, Language, Age, and More*, TRAC, SYRACUSE U., https://trac.syr.edu/phptools/immigration/closure/ [https://perma.cc/QH54-RYR4?type=image] (last visited May 15, 2023) (figures isolated by selecting All Cases, All States, All Outcomes, by Fiscal Year).

†The "District Court" data combines (1) "Habeas Corpus—Alien Detainee" filings in U.S. District Courts as reported in Table C-3 (see table 1, note b) with (2) "Total Immigration" filings (which is composed of "Naturalization Applications" and "Other Immigration Actions") as reported in Table C-2A, *U.S. District Courts—Civil Cases Filed by Nature of Suit, During the 12-Month Period Ending September 30, 20xx*, U.S. COURTS, *available at* https://www.uscourts.gov/data-table-numbers/c-2a [https://perma.cc/WK9R-MARZ]. The resulting figures may be over-inclusive, under-inclusive, or both, but further granularity is not required to support the point for which these data are offered.

‡The "Appeals Court" data include appeals from the Board of Immigration Appeals (BIA), as reported in Table B-3*, U.S. Courts of Appeals–Sources of Appeals, Original Proceedings, and Miscellaneous Applications Commenced, by Circuit, During the 12-Month Periods Ending September 30, 20xx*, *available at* https://www.uscourts.gov/data-table-numbers/b-3 [https://perma.cc/2YPH-SNXW]. These appear to be the only immigration cases in the Courts of Appeal that are separately counted in the U.S. Courts' statistics.

day-to-day operations of federal agencies and the perspectives of the people directly affected by agency action.[23]

There is a deep irony here. The administrative state emerged in part as a response to dissatisfaction with courts and the judicial process. Although most legal implementation at the federal level is today carried out through administration, the field of administrative law has continued to define itself from a top-down, court-centered perspective. This reflects a failure of the legal profession to reorient itself to the institutional importance of administrative agencies. The rise of the administrative state should not have ushered in *law's* abnegation but rather *courts'* abnegation or, more to the point, law's transfer from courts to agencies.[24] Nearly a century after the New Deal, the legal profession has yet to orient itself accordingly.

Some administrative law scholars recently have recognized that administrative law's obsession with courts is problematic and have sought to expand inquiry

into administrative law from the agency perspective. For example, professor Christopher Walker has argued that administrative law misses much because it fixates on the courts and has urged that scholars should expand the scope of their inquiries to include the bulk of administrative activity that is invisible from the judicial perspective.[25] Professors Gillian Metzger and Kevin Stack have sought to recover the internal law that governs administrative action.[26] Professor Eloise Pasachoff has examined how the president influences administrative policymaking through the budget process.[27] Professors Robert Glicksman and Richard Levy have published a casebook that focuses more on administrative action by giving students a deep dive into five representative agencies.[28] Other examples could surely be offered, including a great many that have emerged from studies commissioned by the Administrative Conference of the United States (ACUS) since its rebirth in 2010.[29]

This is not so much a new endeavor as it is the recovery of an earlier approach to administrative law, one that proved crucially important to the APA's adoption.[30] Legislative efforts to regulate administrative procedure began as early as 1929 and continued for years with more rancor than success.[31] Much of the energy behind the effort was supplied by the American Bar Association (ABA), which convened a Special Committee on Administrative Law that took a critical and conservative approach to the subject and produced annual reports urging legislative action. A significant criticism of its work—and of the case for reform more broadly—was that it was based more on supposition than on any knowledge of what agencies were actually doing. The ABA's efforts nonetheless nearly succeeded with Congress's passage of the Walter-Logan Act in 1940, which would have broadly judicialized administrative law. But President Roosevelt vetoed that bill, in part to afford the time necessary for the Attorney General's Committee on Administrative Procedure to complete a comprehensive study of the actual administrative process. The resulting study, which included twenty-seven monographs examining the procedures used in individual agencies and a 474-page Final Report to Congress with proposed legislative reforms, helped to break the political stalemate and enormously influenced the content of the resulting legislation: the APA.[32]

Can administrative law recover the internal, on-the-ground perspective that was so crucial to the APA's adoption? To answer that question, we must first understand how administrative law came to neglect administration.

HOW ADMINISTRATIVE LAW CAME TO NEGLECT ADMINISTRATION

Over the past seventy-five years, administrative law has shifted its perspective up and away from the on-the-ground needs of administration to the more politically salient struggles for power among the highest institutions of the federal government: Congress, the president, and the Supreme Court. The result has been a long, slow undoing of the government's fundamental obligation—embodied in the APA—of ensuring due process and faithful execution in administration.

THE APA'S SHALLOW POLITICAL COMMITMENT

The APA is commonly understood as a quasi-constitutional statute reflecting a deep political commitment to preserving New Deal administrative structures by subjecting them to regulation, particularly through judicial review and the establishment of minimum procedural requirements for agency action.[33] This common understanding is too rosy. The fight continued after the APA's 1946 enactment. Within a decade, that fight would produce substantial evidence that the political commitment to the APA was in fact somewhat shallow.

The APA was principally driven by concerns for the procedural integrity of administrative adjudication and was crafted through a process of creative codification of pre-APA administrative practices and judicial precedent that had begun to flesh out the minimum requirements of constitutional due process in administrative proceedings.[34] Pre-APA due process principles manifested in the APA in two ways that are particularly relevant to this paper's analysis. First, the APA established definitions of agency action that substantially codified the pre-APA distinction between quasi-legislative and quasi-judicial government activity that is today most readily identified with the twin cases of *Londoner* and *Bi-Metallic*.[35] The APA divides the universe of agency action into the mutually exclusive categories of adjudication (quasi-judicial) and rulemaking (quasi-legislative).[36] Notably absent from this structure is a third category of agency action that might have been defined according to its executive properties. As I have argued elsewhere, this omission reflects the dominant understanding in the New Deal era that administrative action was, by definition, exclusively quasi-legislative and quasi-judicial and fundamentally *not* executive.[37] Second, the APA's procedural provisions—and particularly its formal hearing requirements—codified and also built upon pre-APA due process caselaw and the agency practices that had emerged in response to the caselaw.[38] Especially influential in this regard was the Supreme Court's 1936 decision in *Morgan v. United States*,[39] which imposed procedural due process limitations on the secretary of agriculture's authority to overrule an initial ratemaking decision made on the basis of an adjudicatory hearing.[40] The decision significantly affected administrative hearing procedures, most notably by establishing the principle that a final agency decision in an adjudicatory hearing must be based exclusively on the hearing record.[41] This principle is reflected in the APA's definition of formal hearings as "on-the-record" hearings.[42] In other respects, too, the Supreme Court's decision in *Morgan* echoes through the APA's hearing provisions.

The attorney general, having participated in the APA's legislative process and supported the statute's ultimate passage, began almost immediately to advocate in court for limitations on the reach of the APA's hearing provisions.[43] In 1950, these efforts reached the Supreme Court in *Wong Yang Sung v. McGrath*.[44] In that case, the government argued that the APA's hearing provisions did not apply to deportation hearings.[45] The APA, in what is now codified as 5 U.S.C. § 554(a), provides that its hearing provisions apply only in cases of "adjudication required *by statute* to be determined on the record after opportunity for an agency hearing." In deportation proceedings, however, a hearing was required not by statute but rather by constitutional due process as determined in pre-APA judicial decisions.[46]

In an opinion that seems to represent the high-water mark of commitment to the APA's core compromise, the Supreme Court rejected the government's argument, holding that deportation proceedings were subject to the APA's hearing provisions.[47] Writing for the Court, Justice Robert Jackson reached beneath the APA's text to draw upon background principles and understandings. He began his analysis in *Wong Yang Sung* by explaining that the APA "is a new, basic, and comprehensive regulation of procedures in many agencies, more than a few of which can advance arguments that its generalities should not or do not include them. Determination of questions of its coverage may well be approached through consideration of its purposes as disclosed by its background."[48] Justice Jackson then provided a concise but thorough description of the political process that led to the APA's adoption in 1946, including by describing the role of the Attorney General's Committee and its work in informing the final legislation.[49] He concluded this discussion with a classic paragraph that describes the APA in terms consistent with the contemporary definition of the APA as a "superstatute."[50]

> The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.[51]

Justice Jackson rightly recognized that *Wong Yang Sung* implicated the APA's most important remedial goal: "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."[52] To explain the nature and central importance of this goal, Justice Jackson quoted extensively from the Report of the President's Committee on Administrative Management,[53] as well as from a 1940 Secretary of Labor study of administrative procedure in the INS[54] that the Attorney General's Committee on Administrative Procedure had also relied upon.[55] He explained that the Attorney General's Committee, "which divided as to the appropriate remedy, was unanimous that this evil existed," and had recommended reform to ensure a separation of functions and the independence of those who preside over adjudicatory hearings.[56] When it enacted the APA, Congress included a robust set of provisions to effectuate this goal.[57] In short, what we today would call the APA's administrative law judge (ALJ) regime was the statute's most central reform. Justice Jackson recognized this and saw that "[i]t is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act, to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns."[58] Judicial fidelity to the APA is also necessary to support another remedial purpose of the APA, "to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other."[59] That purpose is undermined whenever an agency is exempted from the APA, which is why Congress included in the statute a requirement that a "subsequent statute may not be held to supersede or modify" the APA "except to the extent that it does so expressly."[60] Turning to the

deportation hearings at issue in *Wong Yang Sung*, Justice Jackson observed that they were "a perfect exemplification of the practices so unanimously condemned" by Congress and that, in the absence of an express statutory exemption from Congress, the Court was bound to enforce the APA's remedial measures.[61]

Wong Yang Sung is not only a robust defense of the APA's core compromise—it also offers a nuanced explication of the role of constitutional due process in both lawful administration and APA interpretation. As to the first and more fundamental point, the opinion recognizes that compliance with constitutional due process is a condition precedent to the lawful exercise of legislative and administrative authority. Thus, "the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such hearing, there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body."[62]

To save the immigration statutes from a finding of unconstitutionality, then, the Court had previously interpreted them to require the agency to provide a person with notice and an opportunity to be heard before ordering their deportation.[63] This pre-APA precedent, however, was modest. The Court had held that due process demands an opportunity to be heard—to protect individual rights and prevent arbitrary administrative decision making—but also concluded that this need "not necessarily [be] an opportunity upon a regular, set occasion, and according to the forms of judicial procedure."[64] The required hearing needed only to be sufficient to "secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which [administrative] officers are required to act."[65]

By enacting the APA, Congress provided the procedural detail that pre-APA judicial decisions had not, fleshing out the basic constitutional requirements of notice and of the opportunity to be heard. In other words, the APA's hearing provisions are best understood as a legislative specification of the minimum procedural requirements of constitutional due process in an adjudicatory hearing. The Court recognizes this in *Wong Yang Sung*, explaining that

> [w]hen the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.[66]

Adhering to these requirements would "[o]f course" impose "inconvenience and added expense to the Immigration Service."[67] "But the power of the purse belongs to Congress, and Congress has determined that the price for greater fairness is not

too high."[68] The Court accordingly recognized—and fulfilled—its duty to enforce Congress's specification of the minimum requirements of due process in deportation hearings.

Unfortunately, unlike the Supreme Court, the political branches lacked the courage of the APA's convictions. The Department of Justice responded immediately to its loss at the Court by asking Congress for relief from *Wong Yang Sung*.[69] The effort was successful. Within six months, Congress enacted an appropriations rider explicitly exempting deportation proceedings from the APA's adjudication provisions.[70] When Congress enacted the Immigration and Nationality Act of 1952 (INA), it repealed the rider's bold exemption, enacting a more nuanced displacement of the APA's procedural regime.[71] Section 242(b) of the INA contemplated that "special inquiry officers"[72] should make determinations of deportability and order deportation through proceedings governed by the INA and regulations that would be adopted by the attorney general under the statute.[73] The statute mandated the separation of the special inquiry officers' prosecutorial and adjudicatory functions[74] and instructed the attorney general to adopt procedural regulations that would include various discrete requirements.[75] An early version of the legislation would have expressly exempted the proceedings from the APA's hearing provisions. But there were objections to this, and the reference to the APA was ultimately removed.[76] As enacted, Section 242(b) contained the somewhat enigmatic instruction that "[t]he procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."[77] Notably, however, none of the INA's tailored procedural requirements conflicted with the ALJ provisions that were so central to the APA or to the conflict in *Wong Yang Sung*.

When the issue returned to the Supreme Court in *Marcello v. Bonds*, the Court acquiesced in Congress's judgment, to an extent that unnecessarily undermined the APA and its due process commitments.[78] There were two basic options available to the Court: (1) interpret the INA as a tailored procedural regime intended to wholly displace the APA's hearing provisions and ALJ structure; or (2) enforce the APA's regime except to the extent necessary to give effect to the INA's tailored procedural requirements. A majority of the Supreme Court chose the first option, in an opinion authored by Justice Tom C. Clark. The opinion catalogued the various conflicts between the procedural requirements of the INA and the APA[79] and concluded that the legislative history "amply demonstrated" that Section 242(b)'s "sole and exclusive procedure" language was a "clear and categorical direction . . . meant to exclude the application of the [APA]."[80] Although acknowledging the APA's provision requiring exemptions to be express, the Court concluded that "[u]nless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the [APA], we must hold that the [INA] expressly supersedes the hearing provisions of the APA."[81] The decision "apparently put to rest the broader due process implications of *Wong Yang Sung*."[82]

This episode strongly suggests that the political commitment to the APA's "fierce compromise" was weaker than is often assumed in administrative law's standard account.[83] What is particularly striking is that the episode involved many of the *very same people*

continuing to fight over the procedural requirements for adjudicatory hearings, long after the APA had supposedly settled the matter. Consider the following cast of characters:

- *Robert H. Jackson*: The author of the Court's opinion in *Wong Yang Sung*. Immediately before his 1941 appointment to the Supreme Court, Justice Jackson had served as attorney general when the Attorney General's Committee on Administrative Procedure was finishing its work. Indeed, he was the attorney general who transmitted the Committee's Final Report to Congress in 1941.[84] Before his appointment as attorney general, when he was in the solicitor general's office, Jackson had also served as one of early members of the Attorney General's Committee on Administrative Procedure.[85] Justice Jackson died in 1954 and so was no longer on the Court when *Marcello* was decided.

- *Tom C. Clark*: The author of the majority opinion in *Marcello*. Justice Clark was on the Court in 1950 but took no part in the decision of *Wong Yang Sung*, presumably because he was the defendant in the case when the petition for certiorari was filed.[86] He had been the named defendant because, like Justice Jackson, Justice Clark had served as attorney general immediately before he was appointed to the Supreme Court. Indeed, he was the attorney general when the APA was enacted in 1946,[87] and the Attorney General's Manual on the Administrative Procedure was completed during his tenure.[88]

- *Robert W. Ginnane*: Mr. Ginnane argued both *Wong Yang Sung* and *Marcello* before the Supreme Court, as counsel then in the solicitor general's office.[89] Mr. Ginnane had previously served on the staff that supported the work of the Attorney General's Committee on Administrative Procedure, and he later participated in drafting the Attorney General's Manual on the APA.[90] The interpretation of § 554(a) that the government urged in *Wong Yang Sung* had previously been put forward in the Manual,[91] as well as in a law review article that Mr. Ginnane published in 1947.[92]

- *Pat McCarran and Francis E. Walter*: The sponsors in the Senate and House, respectively, of *both* the APA and the INA.[93]

As I have explained elsewhere, the deportation saga was only the beginning of the long, slow decline of the APA's adjudication provisions. In the decades since, Congress has often ignored the APA's hearing provisions, creating unique "informal" hearing requirements for new adjudicatory programs.[94] Meanwhile, agencies have assiduously avoided adjudication under the APA, largely to avoid the costs and hassles associated with the APA's all-important ALJ regime.[95] More recently, for reasons that will be explained below, judicial unwillingness to enforce the APA's hearing requirements has ratcheted up,[96] while political support for the APA's regime has waned in the executive branch.[97] The result of these developments has been a steady expansion of adjudicatory hearings conducted "outside" the APA.[98] While the APA was intended to establish uniform minimum procedures for adjudicatory hearings, administrative law has instead embraced a paradoxical norm of exceptionalism in administrative adjudication.[99]

THE MISUNDERSTOOD SHIFT FROM ADJUDICATION TO RULEMAKING

Administrative law has not only rejected the APA's uniform procedural requirements for adjudicatory hearings—it has also rejected adjudication as the primary procedural tool in administration. Or so goes the story. According to this story—one of the most dominant, powerful narratives in modern administrative law—administrative agencies in the 1960s and 1970s broadly shifted from adjudication to rulemaking as the preferred form of agency policymaking.[100] This narrative's starting premise is the principle, ordinarily associated with the Supreme Court's decision in *Chenery II* (1947), that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."[101] The standard story is that "[i]n the 1950s and 1960s, most administrative agencies implemented their statutes by deciding individual cases; by the 1970s, a detectable shift had occurred and most administrative agencies pursued their mandates by promulgating legislative rules."[102]

This narrative suggests to the student of administrative law several related but distinct propositions. First, that individual agencies, empowered to choose between adjudication and rulemaking, shifted to the latter as their preferred method of statutory implementation. Second, that the shift resulted in a significant *reduction*—in volume and importance—of administrative adjudication. Third, and correspondingly, that the shift resulted in a significant *increase*—in volume and importance—of administrative rulemaking. The shift narrative also has a normative dimension, supplied by the approval, even triumph, with which the story is typically conveyed. The student of administrative law is taught not just that rulemaking is more common and important than adjudication, but also that it is a categorically superior procedural device: more flexible, transparent, fair, efficient, and democratic than its outdated, procedurally encumbered counterpart.

The narrative's normative dimension reflects the reality that observers of the administrative state have long been enamored with administrative rulemaking and comparatively critical of administrative adjudication. Beginning in the 1930s, observers argued that agencies should use rulemaking more frequently and urged Congress to enact statutes that would require it.[103] The basic theory was that expanding rulemaking could make more transparent—to Congress, regulated parties, and the public—the general policies and principles that would otherwise emerge (if at all) in drips and drabs through ad hoc adjudication. Proponents of increased rulemaking thus had two goals: (1) to improve transparency by shifting policymaking to general, prospective rules; and (2) to reduce the need for case-by-case adjudication. These ideas had significant purchase in the New Deal era's most influential arenas. For example, in its 1937 report, the President's Committee on Administrative Management opined that "[i]f policies for the guidance of individual conduct are to be determined by regulatory bodies, it is desirable that such policies be embodied increasingly in carefully drawn rules that all may read and understand, rather than being pricked out point by point in *ad hoc* decisions."[104] Building on this judgment a few years later, the conservative minority of the Attorney General's Committee on Administrative Procedure recommended that Congress should by statute declare that all agencies "shall, as a fixed policy, prefer and encourage rule making in order to reduce to a minimum the necessity for case-by-case administrative

adjudications."[105] The legislation Congress enacted—the APA—was heavily influenced by the conservative minority's recommendations, but it did not include a declared preference for rulemaking over adjudication.

While calls for increased rulemaking activity continued over the two decades following the APA's enactment, in the absence of a corresponding legislative command, most agencies continued to rely upon adjudication.[106] Thus, writing in 1965, professor David Shapiro observed that agencies remained reluctant to issue more rules and noted the resulting gulf between what agencies were doing and what external critics thought they should be doing.[107] By 1978, however, then professor Antonin Scalia declared that the shift from adjudication to rulemaking was substantially completed.[108] What changed between 1965 and 1978? What evidence suggested that a shift from adjudication to rulemaking had occurred? And what, precisely, did the evidence suggest about the scope and nature of that shift?

To begin, although it is typically understood that *agencies* shifted from adjudication to rulemaking, the evidence of that shift was found first and foremost in judicial opinions (particularly opinions of the Supreme Court and the D.C. Circuit) and not primarily in any study of agency practices or proceedings.[109] The near-exclusive focus on courts as the source of evidence for changing administrative practice is evident even from the title of Scalia's influential article on the subject: *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*.[110] Neither Scalia nor other scholars writing about the phenomenon filled out the picture with a direct examination of agency practice.[111] The few scholars who expanded their view beyond the courts, to include some examination of agency practice and the effects of Congress's creation of new agencies, presented a much more nuanced and complex picture of the shift from adjudication to rulemaking.[112]

This judicialized focus introduced misconceptions into the story, including an erroneous premise that agencies were not permitted before the 1950s to use rulemaking to streamline adjudication. They were, provided they had the requisite statutory authority. The contrary misconception is particularly stark with respect to the scholarly treatment of the Supreme Court's opinion *United States v. Storer Broadcasting Co*.[113] In that case, the Court affirmed the adoption by the Federal Communications Commission (FCC) of a rule limiting the number of stations a broadcaster could own. On the same day, the agency issued the rule and relied upon it to dismiss (without a hearing) Storer's then pending license application.[114] The case is often cited as blessing a novel principle that agencies can use rules to conclusively decide issues that would otherwise need to be decided in individual adjudications.[115] But that principle was established long before 1956 with respect to the FCC's licensing functions. Indeed, the first attempt to regulate use of the radio spectrum by federal licensing failed in 1926 precisely because the licensing authority (then the secretary of commerce) lacked the authority to issue the regulations necessary to make the licenses legally effective.[116] "These developments led Congress to act fairly quickly in making it clear that no station had the right to transmit radio signals as against the regulatory power of the United States."[117] When Congress

enacted the Communications Act of 1934, creating the FCC and transferring to it the function of radio licensing, Congress included the necessary statutory authority for the agency to use regulations (as well as adjudications) to define what the broad statutory standard of "the public interest, convenience, or necessity" meant.[118] In its early years, the FCC often developed policy first through adjudication before reducing its crystallized policy determinations to rules.

This is precisely the story of how the FCC's multiple ownership rules (the ones at issue in *Storer*) emerged.[119] Concerns about the effects of multiple ownership on competition first emerged in FCC opinions in 1937, and "[i]n the late thirties[,] the Commission took such multiple ownership into account whenever it appeared" in individual licensing proceedings, which was often.[120] In 1941, the Commission proposed to reduce its precedent on the subject to a rule, which was finally issued in 1943.[121] The FCC used a similar blend of adjudication and rulemaking to develop and implement licensing policies addressing many issues besides just multiple ownership. In its monograph on the FCC, the Attorney General's Committee on Administrative Procedure explained that "[t]he entire process of licensing, both of stations and operators, is to be dealt with by Commission regulations."[122] Indeed, because the FCC had numerous statutory provisions authorizing it to issue regulations, the FCC devoted more time and attention to rulemaking than did most of the other federal agencies included in the Committee's study.[123]

Here is a striking example of how the field's tendency to view administration indirectly—through the tiny, warped lens of the Supreme Court—led it to erroneous conclusions about the actual legal authority and practices of federal agencies. Those conclusions were then used to urge further expansion of rulemaking. The approach appears to have blunted the importance of actual agency statutes, by making the "shift" to rulemaking more a matter of general trend or policy and less a matter of the legal authority and the actual practices of individual agencies. The established use of rulemaking by agencies (such as the FCC) that had the requisite statutory authority was used to urge and defend the same activity by other agencies (such as the Federal Power Commission and Federal Trade Commission) that lacked it.[124]

Eventually, agencies began to respond to calls for more aggressive use of rulemaking and, when challenged in court, it became clear that many judges shared the scholarly preference for rulemaking. The resulting judicial decisions began to work a change in the conventions for interpreting statutory provisions authorizing agencies to issue rules. Although the story is more complex, the bottom line is that a presumption *against* reading statutes to convey authority to issue legally binding regulations flipped and became a presumption *in favor* of such a reading.[125]

If scholars and courts were first to prefer rulemaking to adjudication, in the 1960s and 1970s, Congress also embraced that preference. As agencies pressed the outer limits of their rulemaking authority—and courts began to sustain those efforts—Congress occasionally responded by granting the agencies new rulemaking authority.[126] During

the same time, outside of these contentious episodes, Congress also extended rulemaking authority to other, historically quasi-judicial agencies such as the Interstate Commerce Commission.[127] A number of new agencies were also created during this time (such as the EPA and the Consumer Products Safety Commission) and were granted statutory authority to fulfill new health and safety missions through legislative rulemaking.[128]

The primary effect of the shift to rulemaking—understood as a real and nuanced phenomenon and not as the oversimplified creature of administrative law's mythology—was to move the field's focus away from the dry realities of adjudication and toward the more salient task of legislative rulemaking. Importantly, this was *not* so much a shift *away* from adjudication. Many agencies with important statutory responsibilities kept right on adjudicating, as required by their statutes. But the field of administrative law embraced the opportunity to ignore that activity and to focus instead on the more interesting—and powerful—domain of rulemaking. Within the field, and perhaps in public perception, administration came to be more about generalized policymaking and less about individualized law execution.

THE PREFERENCE FOR INFORMAL PROCEDURES PREVAILS

The shift to rulemaking was accompanied by a shift to informal procedures, for at least two interrelated reasons. First, in some instances, avoiding formal hearings was a principal reason for using rulemaking instead of adjudication.[129] Second, under the APA, informal procedures and rulemaking are practically synonymous.[130]

The APA does provide a formal and an informal procedural mode for rulemaking, but the shift to rulemaking offered the opportunity for a long-simmering preference for informality to become firmly entrenched.[131] Formal rulemaking is a procedural approach that has been long and widely maligned. It entails a formal hearing and typically has been required for functions, such as ratemaking, that have a correspondingly quasi-judicial aspect.[132] During its shift to rulemaking, Congress experimented with some "hybrid" rulemaking statutes that required agencies to blend some elements of a formal hearing with the APA's informal, notice-and-comment rulemaking process.[133] The courts (and particularly the D.C. Circuit), perhaps sharing Congress's instinct, also experimented during that time with requiring agencies to use certain quasi-judicial procedures (such as cross-examination or prohibitions on ex parte communications) in rulemakings that Congress had not subjected to a statutory hearing requirement. These experiments—in both their legislative and judicial manifestations—were unpopular and short-lived.[134] The Supreme Court famously put a stop to the D.C. Circuit's innovations in the 1978 case of *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*.[135] In Congress, it became the norm to assume the applicability of the APA's informal notice-and-comment provisions whenever an agency was granted statutory authority to issue regulations. The consequence of these developments was to usher in the hegemony of informal, notice-and-comment procedures in administrative rulemaking.

Over time, the preference for informal procedures migrated from rulemaking to adjudication. The precise mechanism is difficult to pinpoint, but the Supreme Court's 1973 decision in *Florida East Coast Railway* seems to have played a pivotal role.[136] To summarize aggressively, the Supreme Court held that unless a statute includes the magic words "on the record," it should not be interpreted to require an agency to conduct a formal hearing in a rulemaking proceeding. The decision has been widely celebrated for its result—effectively eliminating formal rulemaking—but denigrated for its reasoning.[137] As I've argued elsewhere, the opinion could have been clearer, but it reached the right result.[138] Under the APA, when interpreting a statutory "hearing" requirement, courts were expected to use diametrically opposed presumptions depending on whether the agency action was quasi-legislative (rulemaking) or quasi-judicial (adjudicatory). The Court properly characterized the agency action at issue in *Florida East Coast Railway* as the former and applied the right presumption, that is, a presumption *against* a formal hearing under §§ 556–57.[139] Some courts have improperly applied this presumption—and not the opposite and appropriate presumption *in favor* of a formal hearing—in adjudication.[140] More broadly, the field seems to have deeply internalized the procedural structure of rulemaking and somewhat unthinkingly extended it to the adjudication context.[141] This has contributed to the long, slow undoing of the APA's core compromise.

THE RISE OF PRESIDENTIAL ADMINISTRATION AND THE CHEVRON DOCTRINE

The shift to rulemaking precipitated another important development: the rise of presidential administration. Since at least the New Deal era, presidents have struggled to control the policymaking functions that Congress has entrusted to individual federal agencies. The difficulty was the absence of a single, effective strategy for getting a centralized grip on legal authority that is dispersed among the many entities that make up the executive branch of government.[142] This dispersal or decentralization of federal authority resulted from Congress's tendency to grant statutory authority to the heads of individual departments or agencies, instead of granting it directly to the president.[143] The use of adjudication further insulated agency policymaking from presidential control, for much the same reasons that motivated critics to urge the shift to rulemaking. When policy is developed on an ad hoc, incremental basis, the process is less predictable and transparent. Policymaking is atomized into individual decision points that are submerged and diffused among many frontline adjudicators. Larger-scale policy changes typically emerge only over time, across many individual adjudications, with controversy channeled through the tighter evidentiary and procedural controls of an adjudicatory hearing. In this context, agency rulemaking (when it occurs) predominantly has the effect of consolidating and making more transparent policy decisions that are already a fait accompli.[144] Early presidential efforts to steer this federal policymaking apparatus accordingly sought to leverage available centralized processes that were necessarily a step (or more) removed from the direct levers of agency decision making. For example, FDR sought to use centralized authority over the budget process to exercise control over the agencies. It is perhaps unsurprising that his efforts provoked agency objections and were minimally effective.[145]

The shift to rulemaking concentrated agency decision making into fewer, more transparent, higher-profile decision points that the president could use to assert more effective centralized control over the once-unwieldy federal policymaking apparatus. The new agencies created by Congress in the 1960s and 1970s were given broader authority to develop policy through legislative rules, with the result that bigger, more salient decisions were being made by administrative agencies. At the same time, the APA's informal rulemaking procedures offer a uniform procedural pattern that requires agencies to make their policymaking intentions transparent ex ante.[146] If adjudication atomizes and submerges policymaking, rulemaking concentrates and lifts it up. This insight makes it unsurprising that executive review arose in tandem with the shift to rulemaking, first emerging in the 1970s in the Carter administration, beginning to crystallize in the 1980s during the Reagan administration,[147] and becoming firmly established in the 1990s with President Clinton's issuance of Executive Order 12866.[148] The shift to rulemaking delivered to U.S. presidents the "grip" on agency decision making that had previously proven so elusive. The regime is headed by the Office of Information and Regulatory Affairs (OIRA), an agency within the Office of Management and Budget that Congress created for other purposes,[149] and has remained remarkably stable across presidential administrations of both political parties.[150]

The structure of executive review of regulation thus mirrors the APA's procedural structure for informal rulemaking and prioritizes high-level policymaking decisions. The fact that executive review is possible only because of the shift to rulemaking is evident in the review process itself, which is designed to take advantage of the transparency and advanced notice required by the APA's notice-and-comment process. In brief, § 553 of the APA requires agencies to publish a proposed rule, accept public comment, and then publish a final rule that is effective no sooner than thirty days after publication.[151] Executive review of significant regulatory actions is required before the proposed rule is published and before the final rule is published.[152] This structure has also entailed the development of additional tools that have both entrenched executive review and increased the amount of notice that agencies must give to the president of planned regulatory actions. For example, the Unified Agenda, also known as the Semiannual Regulatory Agenda, is published twice a year and ensures that agencies give regular and advanced notice of anticipated rulemakings.[153]

This structure adds a lot of process, but in service to very different goals or principles than those that motivated the APA's enactment. The executive review structure is not designed primarily or directly to ensure either fidelity to legislative directives or the protection of individual rights or interests in the administrative process. Instead, its primary effect is to facilitate presidential control over agency policymaking. Executive Order 12,866 subjects to review by OIRA any "significant regulatory action," which is defined to capture administrative rules that have the greatest economic and policy effects.[154] The regime thus ensures that the most powerful agency decisions receive centralized executive review, leaving more minor actions to the agencies alone. This effect is entirely in accord with the modern focus on political accountability as the

primary means of legitimating administration.[155] It has also dramatically expanded the president's power, which in turn has deepened the field's (and probably the public's) perception that administration is about high-stakes policymaking.

One other major development in administrative law occurred during the same period as the rise of presidential administration and warrants some acknowledgment: the *Chevron* doctrine emerged.[156] More ink has been spilled about this doctrine, its justifications, and its effects than probably any other subject in administrative law over the last three decades. I can't and won't try to replicate that discussion here. Whatever the merits of *Chevron* deference as a matter of judicial practice, it has had two effects on agency practice that are relevant to this paper's analysis. First, *Chevron* has not operated—and probably could not operate—*only* as an interpretive approach employed by courts on judicial review of agency action. Agencies, private parties, and scholars pay attention to what courts say and do. Inevitably, they have internalized *Chevron* as *the* appropriate framework for interpreting administrative statutes, including outside of the courts. The effect is much the same as in the rulemaking context discussed above—to flip the law from a presumption that agency action is invalid if not authorized by statute to a presumption that agency action is valid if not clearly prohibited by statute. This works a significant shift of power from the courts—and Congress—to agencies and, by operation of the rise of presidential administration, to the president.[157] Second, *Chevron* embraced a sharp divide between law and administration, suggesting that the categories are mutually exclusive and thus negating the importance of law within administration.[158] As I previously suggested, the administrative law field should have reacted to the rise of the administrative state by shifting to the study and development of legal interpretation and execution within administration.[159] Instead, it treated the project as if it were predominately one of getting the courts out of administration. *Chevron* reaffirms and deepens this corrosive impulse, perhaps contributing to the field's neglect of the project of designing administrative institutions to execute the law fairly and faithfully.

THE DEMISE OF THE APA'S CORE COMPROMISE

As administrative law turned its attention toward high-level policymaking through legislative rulemaking and the quest to ensure political accountability for such activity, the task of ensuring fair and faithful fulfillment of the law's promises to the people receded into the background. As I recounted in the section headed "The APA's Shallow Political Commitment," the deportation saga revealed that the APA's core compromise was supported by a weaker will than is typically assumed. After that, and as I have documented elsewhere, came the long, slow undoing of the APA's adjudication provisions.[160] All institutions of the federal government participated in this decline: agencies avoided adjudicating under the APA, Congress routinely created unique hearing structures outside the APA, courts became increasingly unwilling to enforce the APA's hearing provisions, and scholars embraced and championed a turn toward rulemaking and informality and away from formal hearings and case-by-case administration. These actions furthered—and

were furthered by—the field's shift to focusing on the exercise of political power through informal rulemaking. Along the way, the field developed collective amnesia regarding the internal logic and meaning of the APA, which made the statute less coherent and easier to disregard.[161]

Whatever this long process left intact of the APA's adjudication structure and its all-important ALJ regime is now imploding, the result of a combination of executive action and judicial precedent.

In 2018, in response to the Supreme Court's decision in *Lucia v. SEC*,[162] President Trump issued Executive Order 13,843, dismantling a significant component of the structure that was designed to promote ALJ impartiality and competence.[163] The order retracted a longstanding delegation to the Office of Personnel Management (OPM) of the president's authority to regulate the hiring of ALJs. For decades, OPM carried out these responsibilities by establishing qualifications for ALJ candidates, administering an ALJ examination, and maintaining a register of qualified candidates from which agencies wishing to appoint ALJs could select.[164] The immediate reaction among administrative law scholars was negative—the order was viewed as a significant threat to ALJ impartiality and independence (and therefore to the fairness and soundness of ALJ decisions).[165] But although President Biden retracted many of President Trump's regulatory executive orders, he has left Executive Order 13,843 in place. Congress, too, has resisted calls to override Executive Order 13,843 by statute. This suggests a basic lack of political will to reinstate the regime,[166] and it leaves agencies with the latitude to determine their own qualifications for their ALJs and to hire whomever they want, using whatever process they think is best.[167] The danger is that agencies may hire ALJs with background and skills that predispose them to taking the agency's perspective in deciding the cases that come before them. A final development relevant to this discussion is that the SSA, which is by far the largest employer of ALJs in the federal government, has recently suggested that perhaps its statutes don't require formal APA adjudication after all.[168] If SSA were to follow through on that suggestion, most of what remains in practice of the APA's ALJ regime would evaporate.

Meanwhile, the Supreme Court seems poised to invalidate on constitutional grounds a significant remaining component of the APA's ALJ regime: the ALJ's for-cause removal structure. The difficulty is that it is a *double* for-cause removal structure—in which ALJs can be removed only for cause by the Merit Systems Protection Board, whose members also enjoy for-cause removal protection. This seems to be clearly threatened by the Supreme Court's reasoning in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[169] There are reasons why the Court could distinguish administrative adjudication from the agency structure at issue in *Free Enterprise Fund*. Those reasons require an internal perspective that understands deeply the demands of administration in an adjudicatory context, as well as the logic of the APA's hearing structure. Whether scholars—and the Court—can recover that perspective in time to avert the ultimate demise of the APA's core compromise remains to be seen.

CENTERING ADMINISTRATION IN ADMINISTRATIVE LAW

Reorienting administrative law to focus less on power and more on the day-to-day work of administration and the people it serves will require reorientation in the field of administrative law, as well as interdisciplinary collaboration. In this section, I'll offer some preliminary thoughts about what that might entail.

First, legal scholars, who have long criticized courts and judicial methods and urged the primacy of administrative agencies, should expand upon recent efforts to understand administrative law from the bottom up. This means studying and teaching agencies' internal law; devoting less time and attention to the Supreme Court, the president, and Congress; and promoting faithful execution of the law directly and not merely as an assumed byproduct of judicial deference or expanded presidential control. Empirical study of actual agency practices and the experiences of private parties affected by agency action should be more valued and encouraged.[170] While doctrinal analysis should have an important place in the field, a greater share of attention should be paid to the unique realities of legal interpretation and execution within administrative institutions.[171] Recognizing the limits of courts and of the judicial process, more affirmative solutions to improving administrative performance should be studied, recommended, and pursued. The rebirth in 2010 of the Administrative Conference of the United States (ACUS) is an important institutional development in this regard. ACUS is a free-standing federal agency that studies administrative procedure and makes recommendations for improvement to agencies, the president, Congress, and the Judicial Conference.[172] ACUS's work product is an invaluable contribution to knowledge about administration and administrative law,[173] and the agency also performs an essential function by bringing together experts from inside and outside of government to address emerging challenges in administrative procedure.[174] It is a powerful force for connecting administrative law to the actual work of federal agencies.

One objection to this paper's suggested reorientation of administrative law is that administration is fundamentally not the lawyer's domain. This objection sounds in a foundational tension. On the one hand, lawyers had a profound and undeniable influence in creating and shaping the modern administrative state.[175] On the other hand, proponents of administrative governance—including many lawyers—view courts, lawyers, and the legal profession as obstacles to sound and effective administration.[176] Perhaps the critics are right to suggest that lawyers are not trained to contribute productively to fulfilling the government's statutory commitments. But if so, perhaps that is a failure in how law schools train lawyers. As the law has shifted from courts to agencies, law schools have continued to train lawyers using the case method, acculturating them primarily to the judicial process and the decorum of the courtroom. While the judicial process remains central to our legal system and should be a key component of legal education, the legal profession could do more to train new lawyers to practice before and in the shadow of administrative agencies. In curricular terms, as I have previously suggested, the traditional administrative law course should include more direct examination of agencies and the

administrative process. But there are limits here: students must still learn about the constitutional structure and the doctrines that govern judicial review of agency action. Expanded course offerings can provide interested students opportunities to learn about the regulatory process from the agency perspective and to acquire training in how the law is administered without courts. An organized workshop in law and public administration could further expand pedagogical opportunities while also facilitating new scholarship in a reoriented and more interdisciplinary field.

It is also worth acknowledging that centering administration in administrative law in this way may challenge the field's ability to remain a unified field. To do what I suggest here would require administrative law scholars to deepen their study of individual agencies and, therefore, individual fields of regulation. Of course, many who write and teach in administrative law do this today—they are first and foremost experts in immigration, tax administration, energy regulation, environmental regulation, and so forth. My sense is that the primacy of such subject matter expertise was once more prevalent than it is today or, to put it another way, that it used to be relatively uncommon for scholars to be first and foremost scholars of administrative law. This suggests a possibility that appeals to my intuition—that the field's external, judicial focus on power and political accountability has facilitated its solidification as a unified field. When one studies a particular agency and takes seriously that agency's mission and unique challenges, it can become more difficult to see similarities with other agencies that operate differently and have different missions. This tension between agency-specific needs and generalized principles is not new in administrative law. Thus, for example, among the members of the Attorney General's Committee on Administrative Procedure, perhaps the greatest fault line involved the central question of whether it was possible or prudent to generalize across the vast expanse of the administrative state.[177] In early twentieth-century administrative scholarship, one occasionally comes across expressions of skepticism that there is even such a thing as a distinct field of administrative law.

One thing that might help to anchor the field as a field would be to recover the internal account of the administrative state and its quasi-constitution (most notably the APA). In recent decades, administrative law has embraced an external account of the APA that views the statute primarily as the product of a political compromise to save the New Deal.[178] The difficulty is not that this account is wrong, but that it seems to have supplanted rather than supplemented an internal account of the law's meaning and operation. Its widespread acceptance has eroded knowledge and understanding of the law's internal logic and has even led some to reject the notion that the law has any such meaning. This has contributed to administrative law's overemphasis on external, political control and its corresponding neglect of the internal needs of administration. Interdisciplinary work between political scientists and legal scholars to recover an internal account of the APA and integrate it with the external account that has been so influential would do much to ameliorate these effects. It would also help the field to construct an internal, administration-focused account that can support the continued operation of administrative law as a unified field. This might also help to identify new possibilities for APA reform that can better serve the needs of administration.[179]

Finally, the field should redefine administrative "legitimacy" to center administration, taking an internal perspective that is more concerned with ensuring the administrative state's legitimacy in the eyes of the public it is supposed to serve. External accounts of legitimacy, which depend on political accountability and control or are grounded in high democratic theory, are far removed from the day-to-day needs of administration. They seem inevitably to lash administrative law and administrative agencies to the most contentious, high-stakes political debates of the day.[180] This is a recipe for acrimony, instability, and distraction from the work of frontline administrators and the people who depend on agency programs. Sound administration may flourish best in the calm provided by obscurity. An administration-centered account of the legitimacy of administrative action would embrace this possibility and focus on ensuring that agencies effectively and faithfully fulfill the promises that Congress and the president have made in administrative statutes. The core question, which must be evaluated agency by agency, is whether the administrative state is *performing well*. Law and procedure, while crucial, can only do so much—effective administration depends also on promoting competence and a functional culture.[181] For decades, the fields of public administration and administrative law have operated separately, with a perplexing lack of cross-pollination. Healing this rift and promoting collaboration between these two fields may help administrative law to shift its focus from control and restraint to capacity and effectiveness.

CONCLUSION

Administrative law is experiencing a time of upheaval. The Supreme Court is poised to continue issuing decisions that will rebalance the power dynamics among the highest-level institutions of the federal government, and the political branches seem increasingly willing to play constitutional hardball in response. Beneath these rough seas, frontline administration continues, as it must. In this climate, administrative law's obsession with power and neglect of the day-to-day work of administration and the people it serves seems likely only to contribute to further instability and distrust. A better alternative would be to embrace a new paradigm, one that focuses less on power and control and more on the task of keeping the public law's promises. It is time for the field to take seriously the project of building trust in administrative governance from the bottom up.

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NOTES

1. Scholars of public policy and public administration have recognized the imperative of centering the people's experience in evaluating how well government is fulfilling its commitments. *See, e.g.*, Pamela Herd & Donald P. Moynihan, Administrative Burden: Policymaking by Other Means 1–2 (2018).

2. This list is not exhaustive and draws on adjudication's staged structure, in which informal techniques are used first and are typically sufficient for an agency to reach a final decision on "undisputed facts with indisputable legal significance." *See generally* Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 Wash. U. L. Rev. 377, 403 (2021) [hereinafter Bremer, *Rediscovered Stages*]. Only in the rare circumstance in which a private party disputes the agency's action is the matter elevated to the hearing stage. *Id*. This structure persists within agencies, although administrative law doctrine has recently forgotten it. *See id*. at 421–23, 433.

3. For example, the use of rules to streamline adjudication and crystalize incrementally developed policy, as well as the use of adjudication to enforce rules the agency has previously issued.

4. Final Report of the Attorney General's Committee on Administrative Procedure 35 (1941) [hereinafter Final Report].

5. The careless inattention to administrative reality is evidenced by two high-profile cases in which the Supreme Court was so focused on the zero-sum allocation of power between agencies and courts that it misapprehended the agency action before it as rulemaking. *See* City of Arlington v. FCC, 569 U.S. 290, 293, 306–07 (2013); Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 977–78 (2005); *see also* Emily S. Bremer, *The Agency Declaratory Judgment*, 78 Ohio St. L.J. 1169, 1187 (2017). Both cases involved declaratory rulings, a type of adjudication.

6. *See, e.g.*, United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) (determining that if administrative patent judges are to be appointed as inferior officers, their decisions must be reviewable by the director of the U.S. Patent and Trademark Office, a superior officer); Seila Law LLC v. Consumer Fin. Protection Bureau, 140 S. Ct. 2183 (2020) (ruling the Consumer Financial Protection Bureau's single-director structure with for-cause removal protection unconstitutional and interpreting the Constitution to require the president to have the ability to remove a director at will); Collins v. Yellen, 141 S. Ct. 1761 (2021) (holding the Federal Finance Housing Agency's single-director structure similarly unconstitutional under *Seila Law*); Lucia v. SEC, 138 S. Ct. 2044 (2018) (ruling that administrative law judges are "officers" under the Constitution, subject to the Appointments Clause).

7. The recent emergence of the major questions doctrine provides a striking example of the phenomenon and the political controversy it engenders. For a discussion of this doctrine, *see* Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262 (2022).

8. For example, much of the administrative common law is understood as a conscious judicial attempt to counter industry capture of the administrative process. *See, e.g.*, Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 Chi.-Kent L. Rev. 1039, 1043, 1050–52 (1997).

9. *Cf*. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 462–68 (2003) (arguing that administrative legitimacy depends more on ensuring nonarbitrariness than on promoting political accountability).

10. Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 376.

11. Many have observed that the world of administrative law today is radically different from that of the New Deal era. *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 Tex. L. Rev. 1137, 1140–41 (2014) (highlighting inconsistencies in modern administrative practice with agencies' legal obligations under the APA); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 Calif. L. Rev. 141, 143, 146 (2019) (describing contemporary formal adjudication existing outside the APA's process, using the Patent Trial and Appeal Board (PTAB) as a case study); Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 Geo. Mason L. Rev. 733, 735–37 (2021) (providing an "annotated" version of the APA's provisions, noting "substantial mismatches" between the APA's original text and today's evolved APA through court interpretation).

12. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984). The Court recently granted certiorari in Loper Bright Enters. v. Raimondo, No. 22-451, 2023 WL 3158352 (May 1, 2023), a case in which it may reconsider *Chevron*.

13. *See City of Arlington*, 569 U.S. at 296.

14. *See Chevron*, 467 U.S. at 842–43.

15. *See* Jerry L. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims 1, 4–11 (1983).

16. *See* Bremer, *Rediscovered Stages*, *supra* note 2, at 403.

17. The picture is complicated by statutes that send appeals from certain agencies directly to a U.S. Court of Appeal, bypassing the district courts altogether.

18. *See* Thomas D. Rowe Jr., Suzanna Sherry & Jay Tidmarsh, Civil Procedure 304 (5th ed. 2020).

19. The figures in Table 1 are taken from the annual statistics and reports provided, respectively, by the Social Security Administration and the U.S. Courts. For Social Security, the data were pulled from the Annual Statistical Supplement(s) to the Social Security Bulletin for the respective fiscal year listed in Table 1 *infra*, which are available at Soc. Sec. Admin., Research, Statistics & Policy Analysis, *Statistical Compilations*, https://www.ssa.gov/policy/docs/statcomps/index.html [https://perma.cc/27WQ-FT4Z]. For the U.S. Courts, the data were pulled from the statistical tables provided in the annual reports that reflect fiscal year data, which are available at U.S. Courts, Judicial Business of the United States Courts, https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts [https://perma.cc/7UG4-BGK6]. The data offer a snapshot of where cases are within the system during each year. The data from 2020 and later presumably were affected by the pandemic, which is why I have excluded more recent data and concentrated on pre-pandemic statistics.

20. As in Table 1, the figures provided in Table 2 offer a snapshot of where cases are within the system during each year. I have included all types of civil immigration cases tracked by the U.S. Courts, and I have omitted criminal cases involving immigration offenses.

21. *See* Table A-1, *Supreme Court of the United States—Cases on Docket, Disposed of, and Remaining on Docket at Conclusion of October Terms, available at* https://www.uscourts.gov/data-table-numbers/1 [https://perma.cc/B99G-X3BJ].

22. It seems likely that there are other, less defensible reasons for studying agencies indirectly, through the courts. Practically speaking, it's a lot easier to study judicial opinions, which are relatively few and easy to find, than directly to study administrative agencies, whose work is voluminous and often unpublished. Studying (often with the hope of influencing) the courts (and especially the Supreme Court) also offers two additional attractions: power and prestige.

23. This would include the perspective of regulated industry but should also include more attention to the perspective of the people whose interests administration is supposed to protect or serve.

24. *See generally* Adrian Vermeule, Law's Abnegation: From Law's Empire to the Administrative State (2016).

25. *See* Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. Rev. 1620, 1624–25, 1638–39 (2018).

26. *See* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 Mich. L. Rev. 1239, 1242–47 (2017).

27. *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 Yale L.J. 2182, 2188–92 (2016).

28. *See* Robert L. Glicksman & Richard E. Levy, Administrative Law: Agency Action in Legal Context (3d ed. 2020).

29. *See, e.g.*, Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 Harv. J. L. & Pub. Pol'y 131 (2013) (challenging agencies' use of "incorporation by reference"

and detailing potential reforms); Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 MICH. J. ENV'T & ADMIN. L. 1, 1–2, 5 (2012) (noting the ways in which agencies use electronic media during rulemaking and offering ways to enhance these practices); Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REG. 165, 173–76 (2019) (analyzing agencies' use of "guidance" on regulated parties and its effects); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 521, 526–27 (2012) (discussing preemptive rulemaking by federal agencies); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1379, 1381–82 (2017) (highlighting agencies' role in crafting legislation under consideration by Congress). ACUS, which began as an occasionally convened advisory committee, was made permanent by legislation enacted in 1964. In 1995, however, it was defunded and ceased operations until 2010, when Congress reappropriated funds and President Obama appointed professor Paul Verkuil as chairman. *See generally* David M. Pritzker, *A Brief History of the Administrative Conference*, 83 GEO. WASH. L. REV 1708 (2015).

30. My sense, too, is that the detailed examination of administration was a staple of administrative law through at least the 1970s and into the 1980s. Many well-known scholars of administrative law (Ron Levin, Jerry Mashaw, and Paul Verkuil come immediately to mind, although surely there are others) got started with such work, much of it produced for projects commissioned by ACUS. My sense that this kind of work then fell into desuetude for a few decades accords with the story I tell in the sections under the heading "How Administrative Law Came to Neglect Administration."

31. *See generally* Emily S. Bremer & Kathryn E. Kovacs, *Introduction to The Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act of 1946* (HeinOnline 2021), 106 MINN. L. REV. HEADNOTES 218 (2022).

32. *Id*. at 224–25.

33. *See* Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1236–37 (2014) [hereinafter Bremer, *Unwritten*].

34. *See generally* Bremer, *Rediscovered Stages*, *supra* note 2.

35. *See* Londoner v. City of Denver, 210 U.S. 373 (1908); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

36. *See* 5 U.S.C. § 551(4)–(7). As I have explained in prior work, the APA's categories of adjudication and rulemaking were inspired by but are not on all fours with the pre-APA categories of quasi-judicial and quasi-legislative. *See* Emily S. Bremer, *Blame (or Thank) the Administrative Procedure Act for* Florida East Coast Railway, 97 CHI.-KENT L. REV. 79, 96–97 (2022) [hereinafter Bremer, *Blame (or Thank)*].

37. *See* Bremer, *Rediscovered Stages*, *supra* note 2, at 436–47.

38. *See* 5 U.S.C. §§ 554, 556, 557.

39. 298 U.S. 468 (1936).

40. *Id*. at 480–81. The APA defines ratemaking as rulemaking, *see* 5 U.S.C. § 551(4), likely in an attempt to make absolutely clear, beyond all reasonable necessity, that the ICC could proceed with its New Deal–era efforts to streamline its ratemaking proceedings. The classification, combined with the APA's treatment of rulemaking and adjudication as mutually exclusive categories, obscures the more complicated reality that ratemaking has a dual quasi-legislative and quasi-judicial character. *See* Bremer, *Blame (or Thank), supra* note 36, at 94–97.

41. *See Morgan*, 298 U.S. at 480.

42. *See* 5 U.S.C. § 554(a).

43. *See* S. REP. NO. 79-752, at 37–38 (1945) (reprinting, in Appendix B, a letter dated October 19, 1945, from Attorney General Tom C. Clark to Senator Pat McCarran, chairman of the Senate Judiciary Committee, expressing support for the enactment of the Senate's bill); H.R. REP. NO. 79-1980, at 57 (1946) (reprinting, in Appendix B, a letter dated April 3, 1946, from Attorney

General Tom C. Clark to Representative Francis E. Walter, chairman of the Subcommittee on Administrative Law of the House Committee on the Judiciary, approving of changes made to the Senate's bill and recommending its enactment).

44. 339 U.S. 33 (1950).

45. *Id*. at 36.

46. *See* Yamataya v. Fisher, 189 U.S. 86 (1903); *see also* Wong Yang Sung, 339 U.S. at 50.

47. Wong Yang Sung, 339 U.S. at 50–51.

48. *Id*. at 36.

49. *See id*. at 36–40.

50. Superstatute theory was developed by professors William N. Eskridge Jr. & John Ferejohn. *See generally* William N. Eskridge Jr. & John Ferejohn, A Republic of Statutes (2010); William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L. J. 1215 (2001). For an application of the theory to the APA, *see* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 Ind. L. J. 1207, 1209–11 (2015*); see also Bremer, Unwritten, supra* note 33, at 1218–21.

51. Wong Yang Sung, 339 U.S. at 40–41.

52. *Id*. at 41. As James Landis explained in his 1960 report to John F. Kennedy: "The prime emphasis [in the New Deal era] was placed on the combination of prosecuting and adjudicatory functions within the same agency. It was the concern with this problem that led eventually to the passage of the Administrative Procedure Act of 1946 with its emphasis upon the internal separation of these functions within the agency and the granting of some degree of independence to the hearing examiners." James M. Landis, Report on Regulatory Agencies to the President-Elect 4 (1960).

53. *See* Wong Yang Sung, 339 U.S. at 41–42 (quoting from The President's Committee on Administrative Management, Administrative Management in the Government of the United States 40 (1937)).

54. *See id*. at 42–44 (quoting U.S. Dept. of Labor Committee on Administrative Procedure, The Immigration and Naturalization Service, 77, 81–82 (1940)).

55. The AG's Committee explained in its final report that it did not complete a study on the INS because the Secretary of Labor's had just been completed by a team that included a member of the AG's Committee and a copy of the study was made available to the AG's Committee. *See* Final Report*, supra* note 4, at 4 n.2.

56. Wong Yang Sung, 339 U.S. at 44.

57. *Id*. at 44.

58. *Id*. at 45.

59. *Id*. at 41.

60. 5 U.S.C. § 559 (referring to 5 U.S.C. §§ 551–59 (administrative procedure provisions); *id*. §§ 701–06 (judicial review provisions); *id*. §§ 1305, 3105, 3344, 4301(2)(E), 5372, 7521, and 5335(a)(B) (ALJ provisions)).

61. Wong Yang Sung, 339 U.S. at 45.

62. *Id*. at 49.

63. *See id*. at 49–50 & n.30 (citing Yamataya v. Fisher, 189 U.S. 86 (1903)).

64. Yamataya, 189 U.S. at 101.

65. *Id*.

66. Wong Yang Sung, 339 U.S. at 50–51.

67. *Id*. at 46.

68. *Id*. at 46–47.

69. There is some discussion in *Wong Yang Sung* of then pending proposals in Congress to exempt deportation hearings from the APA, suggesting that the government's lobbying of Congress began before the Supreme Court issued its opinion. *See id*. at 47–48.

70. Marcello v. Bonds, 349 U.S. 302, 306 (1955). The rider stated that "[p]roceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act." Supplemental Appropriation Act, 1951, Pub. L. No. 81-843, 64 Stat. 1044, 1048 (1950).

71. *See Marcello*, 349 U.S. at 316.

72. Today, we call these non-ALJ adjudicators "Immigration Judges" or IJs.

73. 66 Stat. at 209.

74. "No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions." *Id*.

75. *See id*. at 209–10.

76. *See* Marcello v. Bonds, 349 U.S. 302, 316–17 (1955) (Black, J., dissenting).

77. 66 Stat. at 210.

78. 349 U.S. 302. It's hard to imagine a worse vehicle for persuading the Supreme Court to reaffirm the APA's protections. Carlos Marcello was a nationally notorious mafia boss. The story of the government's long and ultimately futile attempt to deport him is fantastical, involving (just for example) allegations that the federal government kidnapped and forcibly relocated him abroad and that Marcello later was involved in JFK's assassination. *See* Daniel Kanstroom, *The Long, Complex, and Futile Deportation Saga of Carlos Marcello*, *in* Immigration Stories 113, 113–14, 133 (David A. Martin & Peter H. Schuck, eds., 2005).

79. *Marcello*, 349 U.S. at 307–08.

80. *Id*. at 309.

81. *Id*. at 310.

82. Kanstroom, *supra* note 78, at 127.

83. The standard account in administrative law is George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557 (1996), although the field has also been deeply influenced by McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. Econ. & Org. 180 (1999).

84. *See* Letter of Submittal from the Att'y Gen.'s Comm. on Admin. Proc., Dep't of Just. to Robert H. Jackson, Att'y Gen. (Jan. 22, 1941), *in* Final Report, *supra* note 4, at IV; Letter of Transmittal from Robert H. Jackson, Att'y Gen. to the Vice President (Jan. 24, 1941), *in* Final Report, *supra* note 4, at III.

85. Louis L. Jaffe, *The Report on the Attorney General's Committee on Administrative Procedure*, 8 U. Chi. L. Rev. 401, 402 n.4 (1941) (listing committee's original members, with Jackson being added "[s]omewhat later" following the Committee's formation); *see also* E. Barrett Prettyman, Trial By Agency 45 (1959) (listing Jackson among committee's members).

86. When the Court granted certiorari, it simultaneously granted a motion to replace Tom C. Clark with J. Howard McGrath as the defendant in the case. *See* 338 U.S. 812, 812 (1949).

87. He was the attorney general who wrote the previously mentioned letters in support of the statute's ultimate passage. *See supra* note 43 and accompanying text.

88. *See generally* Tom C. Clark, U.S. Dep't of Just., Attorney General's Manual on the Administrative Procedure Act (1947) [hereinafter AG's Manual].

89. Wong Yang Sung v. McGrath, 339 U.S. 33, 34 (1950); Marcello v. Bonds, 349 U.S. 302, 303 (1955).

90. *See* Bremer, *Blame (or Thank)*, *supra* note 36, at 90–91, 97.

91. *See* AG's Manual, *supra* note 88, at 41, 109–10.

92. *See* Robert W. Ginnane, *"Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act*, 95 U. Pa. L. Rev. 621, 635 (1947).

93. *See* Marcello, 349 U.S. at 308–09.

94. *See* Bremer, *Rediscovered Stages*, *supra* note 2, at 426–30. When the APA was adopted, an "informal hearing" in adjudication was a contradiction in terms. *See id*. at 426 ("[i]n adjudication under the APA, there is only one kind of hearing").

95. *See* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 Admin. L. J. Am. U. 65, 70–74 (1996).

96. *See infra* "The Preference for Informal Procedures Prevails."

97. *See infra* "The Demise of the APA's Core Compromise."

98. *See generally* Michael Asimow, Federal Administrative Adjudication Outside the Administrative Procedure Act (2019).

99. According to this norm, most adjudicatory hearings are conducted according to unique procedures designed to accommodate the unique needs of the agency or regulatory program. *See generally* Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 Wis. L. Rev. 1351 (2019) [hereinafter Bremer, *Exceptionalism Norm*]; Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 Duke L. J. 1749 (2020) [hereinafter Bremer, *Reckoning*].

100. *See e.g.*, Scalia, *supra* note 10, at 376–77 (highlighting shift from adjudication to rulemaking).

101. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (citing Columbia Broadcasting Sys. v. United States, 316 U.S. 407, 421 (1942)).

102. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383, 1384–85 (2004); *see also id*. at 1398–99 (examining the shift in greater detail).

103. *See* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 922 (1965).

104. Final Report, *supra* note 4, at 225 (quoting President's Committee of Administrative Management, Report of the Committee with Studies of Administrative Management in the Federal Government 230 (1937)).

105. *Id*. (text of proposed code section 200(c)).

106. A minority of the Attorney General's Committee foresaw this possibility, observing that the "the easier administrative course is to make only particular decisions when forced to do so[.]" *Id*.

107. Shapiro, *supra* note 103, at 922.

108. *See* Scalia, *supra* note 10, at 376.

109. *See, e.g.*, Ralph F. Fuchs, *Agency Development of Policy Through Rule-Making*, 59 Nw. U. L. Rev. 781, 781 (1965) [hereinafter Fuchs, *Agency Development of Policy*]; Ralph F. Fuchs, *The New Administrative State: Judicial Sanction for Agency Self-Determination in the Regulation of Industry*, 69 Colum. L. Rev. 216, 216 (1969); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485, 486–87 (1970).

110. *See* Scalia, *supra* note 10. Scalia was not the first to write about the shift from rulemaking, *see, e.g.*, *supra* note 109, but his article discussing the phenomenon has been highly influential.

111. In a 1986 law review article, Alan Morrison identified several different ways one could evaluate empirically whether "the process of making administrative law has shifted from rulemaking to adjudication." Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 Va. L. Rev. 253, 254 (1986). He then explained: "While I have not undertaken any of these research projects, I have little doubt that anyone would disagree with the conclusion reached by . . . Scalia, who observed that 'perhaps the most notable development in federal government administration during the last two decades is the constant

and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking.'" *Id*. at 255 (quoting Scalia, *supra* note 10, at 376).

112. *See, e.g.*, Ralph F. Fuchs, *Development and Diversification in Administrative Rule Making*, 72 Nw. U. L. Rev. 83, 83–84, 92–95 (1977) [hereinafter Fuchs, Development and Diversification]. This is a common occurrence in the field: administrative law has a lot of mythology.

113. 351 U.S. 192 (1956). The other case most cited for the proposition discussed here is Fed. Power Comm'n v. Texaco, 417 U.S. 380 (1974).

114. *See Storer,* 351 U.S. at 202–03. The respondent in the case, Storer, sought judicial review of the rule rather than review of the order dismissing the license application. *See id*. at 197–98.

115. For example, Scalia cites the case to support the proposition that "[n]ot until 1956 was it established that an agency charged with issuing and denying licenses in adjudicatory hearings could establish generic disqualifying factors in informal rulemaking, thereby avoiding adversarial procedures on those issues." Scalia, *supra* note 10, at 375. In the footnote citing *Storer,* however, Scalia acknowledges that "the Court seems to have approved the practice *sub silentio*" in a 1943 opinion. *Id*. at 375 n.131. He then "emphasiz[es]" that "[i]n this and later examples I am not asserting that the judicial decisions necessarily 'changed the law.' Perhaps they did, and perhaps they did not. What they do represent cumulatively, however, is a radically altered agency (and perhaps public) perception of what the law permits, and a willingness on the part of the courts to accommodate that perception." *Id*. at 375–76 n.131.

116. *See* Murray Edelman, The Licensing of Radio Services in the United States, 1927 to 1947: A Study in Administrative Formulation of Policy 2–5 (1950).

117. *Id*. at 4. The response involved the enactment of the Federal Radio Act of 1927, which created the bipartisan Federal Radio Commission, an agency that shared regulatory authority over radio with the secretary of commerce, the Interstate Commerce Commission, the postmaster general, and the president. *See id*. at 5–7.

118. *See id*. at 7, 9.

119. *See id*. at 105–07; *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 530–31 (2002) (discussing the FCC's source of rulemaking authority).

120. Edelman, *supra* note 116, at 105.

121. *Id*. at 105–06.

122. Atty Gen.'s Comm. on Admin. Proc., Monograph of the Attorney General's Committee on Administrative Procedure: Fed. Communications Commission, S. Doc. No. 76–186, pt. 3, at 63 (1940).

123. *See generally* Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 Cornell L. Rev. 69, 97 (2022).

124. *See* Fuchs, *Agency Development of Policy*, *supra* note 109, at 788–89, 796, 802–04.

125. *See generally* Merrill & Watts, *supra* note 119, at 548–70.

126. *See id*. at 549.

127. *See* Bremer, *Blame (or Thank)*, *supra* note 36, at 107–08.

128. *See* Fuchs, *Development and Diversification*, *supra* note 112, at 103, 105–06.

129. *See* Merrill & Watts, *supra* note 119, at 557–65 (discussing the FDA's experience); *see also* Lisa Heinzerling, *Undue Process at the FDA: Antibiotics, Animal Feed, and Agency Intransigence*, 37 Vt. L. Rev. 1007, 1008, 1013 (2013) (arguing that the FDA has continued improperly to interpret certain of its rulemaking statutes to require formal hearings).

130. *See* Fuchs, *Agency Development of Policy*, *supra* note 109, at 789–90 (contrasting rulemaking with "formal adjudication" requirements). Professor Fuchs suggested that the APA's adoption of procedures for informal rulemaking may have changed the meaning of pre-APA statutes, authorizing legislative rulemaking by agencies (such as the Federal Power

Commission) that were not granted such authority by their pre-APA statutes. *See id*. at 797–99. There is more merit to that suggestion than is often recognized, and it does seem that the APA may have changed the way that post-APA grants of rulemaking should be interpreted. *See generally* Bremer, *Blame (or Thank)*, *supra* note 36.

131. *See* 5 U.S.C. §§ 553, 556, 557 (2018).

132. *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L. J. 1463, 1466 (1992).

133. *See e.g.*, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–12 (1975).

134. The Administrative Conference conducted several studies of hybrid rulemaking and issued several recommendations critical of statutorily mandated procedures beyond notice and comment in rulemaking. See, e.g., Admin. Conf. of the U.S., Recommendation 80-1, Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act 2, 4–5 (1980); Admin. Conf. of the U.S., Recommendation 79-1, Hybrid Rulemaking Procedures of the Federal Trade Commission 15 (1979); Admin. Conf. of the U.S., Recommendation 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking 2–3 (1976).

135. 435 U.S. 519, 524–25 (1978).

136. *See* United States v. Florida East Coast Railway Co., 410 U.S. 224, 227–28, 234–35 (1973).

137. *See* Bremer, *Blame (or Thank)*, *supra* note 36, at 79–80.

138. *See id*. at 93, 104.

139. *See id*. at 101–03, 108.

140. *See* City of W. Chi. v. U.S. Nuclear Reg. Comm'n, 701 F.2d 632, 644–45 (7th Cir. 1983).

141. *See generally* Bremer, *Rediscovered Stages*, *supra* note 2.

142. As then professor Neomi Rao put it, the executive branch is a "they," not an "it." *See* Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a 'They' Not an 'It'*, 96 Minn. L. Rev. 194, 197–98 (2011).

143. *Compare, e.g.*, 42 U.S.C. § 7413 (granting authority to the administrator of the EPA to federally enforce state implementation plans under the Clean Air Act) *with* 5 U.S.C. § 3301 (granting the president authority to issue "regulations for the admission of individuals into the civil service in the executive branch").

144. The FCC's development of its multiple ownership rules, discussed above, is a good example. *See supra* "The Misunderstood Shift from Adjudication to Rulemaking."

145. *See* Andrew Rudalevige, By Executive Order: Bureaucratic Management and the Limits of Presidential Power 52–56 (2021).

146. *See* 5 U.S.C. § 553 (2018).

147. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (revoked 1993).

148. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 101–06 (2021).

149. OIRA was created by the Paperwork Reduction Act. *See* 44 U.S.C. § 3503(a) (2018); *cf.* Farber & O'Connell, *supra* note 11, at 1183 ("[M]ost of OIRA's operation is entirely a creature of administrative fiat.").

150. Every presidential administration up to and including the Biden administration has continued the practice of reviewing the agencies' significant regulatory actions. The Biden administration has recently issued its own executive order on the subject, which reaffirms and supplements both Executive Order 12,866 and President Obama's governing executive order, Exec. Order No. 13,563, 3 C.F.R. 215 (2012), reprinted in 5 U.S.C. § 601 app. at 115–16 (2021). *See* Exec. Order No. 14,094, *Modernizing Regulatory Review*, 88 Fed. Reg. 21879 (Apr. 11, 2023). Independent agencies have so far remained outside of this structure, although calls to include them have become more persistent over the last decade or so.

151. *See* 5 U.S.C. § 553(b)–(d).

152. *See* Exec. Order 12,866, *supra* note 148, § 6.

153. See Unified Agenda, GovInfo, https://www.govinfo.gov/collection/unified-agenda?path=/GPO/Unified%20Agenda [https://perma.cc/XAG3-JFF7]. The Unified Agenda is difficult to decipher from an external, nonexpert perspective, and occasional delays in the publication schedule have yielded accusations of political manipulation (to serve presidential interests). If the agenda is understood primarily as a tool for making regulatory action more transparent *to the President* and not to the public, these characteristics become more legible.

154. *See* Exec. Order 12,866, *supra* note 148, § 3(f).

155. The classic articulation and defense of presidential administration is Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001). *See id*. at 2249–52.

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

157. The emergence of the major question doctrine might be understood as the judicial reaction to this perfect storm of executive-empowering phenomena.

158. *See* Cass R. Sunstein, *Law and Administration after* Chevron, 90 Colum. L. Rev. 2071, 2074 (1990) (noting that *Chevron* "is strikingly reminiscent . . . of the New Deal belief in a sharp distinction between the realm of law and the realm of administration."); *cf*. Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology, and Process*, 61 L. & Contemp. Probs. 109, 123 (1998) ("While the Court's explanation is framed in terms of the deficiencies of judges, the holding in *Chevron* nevertheless represents a rather stunning rejection of the value added by lawyers to the administrative process.")

159. *See supra* "Administrative Law's Misplaced Focus."

160. *See generally* Bremer, *Reckoning*, *supra* note 99; Bremer *Exceptionalism Norm*, *supra* note 99; Bremer, *Rediscovered Stages*, *supra* note 2; Bremer, *Blame (or Thank)*, *supra* note 36.

161. *See generally* Bremer, *Rediscovered Stages*, *supra* note 2, at 423–36.

162. 138 S. Ct. 2044, 2049, 2051 (2018). In this case, the Court held that an ALJ had been unconstitutionally appointed by Securities and Exchange Commission (SEC) staff instead by the head of the agency (i.e., the SEC itself).

163. *See* Exec. Order 13,843, *Excepting Administrative Law Judges from the Competitive Service*, 83 Fed. Reg. 32755 (July 13, 2018).

164. For a discussion of how this regime affected agency discretion to appoint ALJs, *see generally* Office of the Chairman, Admin. Conf. of the United States, Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program 27–32 (2014), available at https://www.acus.gov/sites/default/files/documents/FINAL%20EEOC%20Final%20Report%20[3-31-14].pdf [https://perma.cc/94FE-GKDE]. Executive Order 13,843 left in place other ALJ protections, including salary levels, prohibitions on agency supervision, and the for-cause removal structure discussed below.

165. *See e.g.*, Jack Beermann, Lucia *and the Future of Administrative Adjudication*, Harv. L. Rev. Blog (Jul. 13, 2018), available at https://blog.harvardlawreview.org/lucia-and-the-future-of-administrative-adjudication/ [https://perma.cc/A358-VGUV].

166. OPM's implementation of the regime was *abysmal*, so this may reflect a collective judgment about the regime in practice rather than in principle.

167. *See* Jack M. Beermann & Jennifer L. Mascott, Research Report on Federal Agency Hiring after Lucia and Executive Order 13843, at 3–4 (2019), *available at* https://www.acus.gov/sites/default/files/documents/Submitted%20final%20draft%20JB.pdf [https://perma.cc/7QL2-32GE]; *see also* Admin. Conf. of the U.S., Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, 84 Fed. Reg. 38930, 38927, 38930–31 (Aug. 8, 2019) (adoption of Beermann–Mascott recommendations).

168. Social Security Administration, *Hearings Held by Administrative Judges of the Appeals Council*, 85 Fed. Reg. 73138, 73140 (Nov. 16, 2020).

169. 561 U.S. 477, 484 (2010) (holding that "multilevel protection from removal is contrary to Article II's vesting of the executive power in the President").

170. This may require some cultural change within law schools. My sense is that it is not the kind of scholarship that most law faculties or student editors of law journals necessarily value or reward.

171. One example of this kind of work is Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012).

172. *See* 5 U.S.C. § 594(1) (2021).

173. *See supra* note 30 (discussion of ACUS). A special double issue of *The George Washington Law Review* published in 2015 offers a terrific collection of articles highlighting the ways in which ACUS has connected and can connect the field of administrative law to the day-to-day work of administrative agencies. *See generally* David C. Vladeck, *The Administrative Conference at Fifty: An Agency Lives Twice*, 83 GEO. WASH. L. REV. 1689 (2015) (discussing ACUS's history, its "resurrection" in the 2010s, and the impact of its recent recommendations); Richard J. Pierce Jr., *The Administrative Conference and Empirical Research*, 83 GEO. WASH. L. REV. 1564 (2015) (highlighting the ACUS's promotion of empirical research within administrative law); Funmi E. Olorunnipa, *ACUS 2.0: Bridging the Gap Between Administrative Law and Public Administration*, 83 GEO. WASH. L. REV. 1555 (2015) (describing how ACUS serves an important role in unifying the purposes of administrative law with public administration); Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517 (2015) (noting the divide between administrative law and public administration and ACUS's role ameliorating this concern); Michael Herz, *ACUS—and Administrative Law—Then and Now*, 83 GEO. WASH. L. REV. 1217 (2015) (using ACUS's fourteen-year hiatus to run a natural experiment on how administrative law has changed over time).

174. ACUS is structured as a public-private partnership, and its consensus-based recommendations are typically based on research performed by academic consultants. *See* 5 U.S.C. §§ 593, 595 (2021). Although speaking about an ad hoc predecessor of ACUS, Judge E. Barrett Prettyman well described the agency's core mission as that of facilitating "public self-examination of governmental processes by government agents themselves, with private practitioners present as burrs under the official saddle." PRETTYMAN, *supra* note 85, at 47–51.

175. *See generally* DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014); JOANNA R. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL (2012).

176. *See, e.g.*, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 31 (1938); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 380–81 (2019).

177. *See* Bremer, *Rediscovered Stages*, *supra* note 2, at 401; Bremer & Kovacs, *supra* note 31, at 224–25.

178. *See* McNollgast, *supra* note 83, at 201, 203–04; Shepherd, *supra* note 83, at 1558–59.

179. *Cf.* Edward L. Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 96–97 (2003) (calling for revisions to the APA to better reflect contemporary circumstances).

180. This is a different explanation for the apparent resurgence of the New Deal era's fights over the legitimacy of administrative governance. *See generally* Gillian Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

181. *See* Fuchs, *Development and Diversification*, *supra* note 112, at 119.

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