



6-2023

The Administrative Procedure Act: Failures, Successes, and Danger Ahead

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Recommended Citation

Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 Notre Dame L. Rev. 1873 ().

Available at: <https://scholarship.law.nd.edu/ndlr/vol98/iss5/2>

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SYMPOSIUM

THE ADMINISTRATIVE PROCEDURE ACT: FAILURES, SUCCESSES, AND DANGER AHEAD

*Emily S. Bremer**

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INTRODUCTION

The Administrative Procedure Act (APA) is a profoundly important statute. Enacted in 1946 and rarely amended since that time, it provides the statutory backbone for the field of administrative law.¹ Imbued with quasi-constitutional character, the APA has been recognized as a superstatute.² The standard account of the statute’s emergence, which comes out of revisionist history published in the 1990s, emphasizes the APA’s political dimension, viewing the statute

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1 See Christopher J. Walker, Essay, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 633–38 (2017) (describing the APA’s postenactment evolution).

2 Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363; see also Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209 (2015); Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215 (2014). The theory of superstatutes was developed by Professors William N. Eskridge, Jr. & John Ferejohn. See WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001); William N. Eskridge, Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893 (2023).

principally as a hard-fought compromise to preserve the New Deal.³ This account has overshadowed an account of the APA based on the statute's internal logic and meaning, which was supplied by a rich body of pre-APA administrative law and the actual procedures and practices of pre-APA administrative agencies.⁴ Especially important in understanding the agencies' contribution was the work of the Attorney General's Committee on Administrative Procedure. Convened in 1939 at President Franklin Delano Roosevelt's request, the Committee prepared twenty-seven monographs examining the procedures and practices of existing federal administrative agencies.⁵ These monographs informed a 474-page report to Congress, which included proposed legislation that was introduced into Congress and ultimately became the APA.⁶ These materials provided the "intellectual foundation" for the APA.⁷ Read with this rich context in mind, the statute emerges as a carefully constructed, complex blend of codification, reform, and blueprint for the future.

Despite the deserved regard the APA receives, its procedural provisions have had more mixed success than is commonly acknowledged. By procedural provisions, I mean the parts of the APA that establish minimum procedural requirements for the two principal types of agency action: rulemaking and adjudication.⁸ This Essay focuses on these provisions.⁹ Over the last several years, I have examined these

3 See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); see also McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L., ECON. & ORG. 180 (1999).

4 Reconciling the traditional account of legal scholars with the more recent insights provided by positive political theory (PPT) is a difficult if fascinating endeavor. See, e.g., Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007) (examining the relationship between procedures and politics in the development and operation of administrative law and critiquing the PPT interventions); McNollgast & Daniel B. Rodriguez, *Administrative Law Agonistes*, 108 COLUM. L. REV. SIDEBAR 15 (2008) (responding to Professor Bressman's article).

5 See Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 396–42 (2021) [hereinafter Bremer, *Rediscovered Stages*]; Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 90–94 (2022) [hereinafter Bremer, *Undemocratic Roots*].

6 See COMM. ON ADMIN. PROC., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 191–202 (1941) [hereinafter 1941 ATTORNEY GENERAL REPORT].

7 *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 513–14 (1986) (emphasis omitted) (statement of Professor K.C. Davis).

8 See 5 U.S.C. § 551(4)–(5) (2018) (defining rulemaking); *id.* § 551(6)–(7) (defining adjudication); *id.* § 553 (establishing minimum procedural requirements for rulemaking); *id.* § 554 (establishing minimum procedural requirements for adjudication); *id.* §§ 556–557 (establishing minimum procedural requirements for hearings).

9 This Essay thus does not address, for example, the APA's public information provisions (more commonly referred to as the Freedom of Information Act (FOIA)), see 5 U.S.C. § 552 (2018), or its judicial review provisions, see *id.* §§ 701–706.

provisions and the agency practices that inspired them “in gruesome detail.”¹⁰ I undertook this project after nearly fifteen years of studying contemporary law and agency practices in rulemaking and adjudication. In administrative law, it can be easy to miss the forest for the trees. This Essay takes a step back from the trees, i.e., the technical details of the APA and the processes of individual agencies that are my usual subject of study, to reflect more broadly on the successes, failures, and future of the APA.

This Essay argues that the APA has failed in adjudication but succeeded spectacularly in rulemaking. In both contexts, the APA’s goal was to establish uniform minimum procedures, which would reform existing agency practices and provide a framework for the future. In adjudication, that goal has not been realized. Most adjudicatory hearings are not conducted under the APA’s hearing provisions, uniformity is wholly lacking, and what today remains of the APA’s hearing regime in practice appears to be collapsing.¹¹ In rulemaking, by contrast, the APA’s informal, notice-and-comment process has been firmly established as *the* procedure for the development, modification, and repeal of administrative regulations. Agency-specific rulemaking procedures are exceedingly rare and widely despised, and the APA has supplied a foundation for the development of a robust body of administrative common law.¹² While there are challenges in rulemaking, they are relatively minor compared to the problems in agency adjudication, and they can be addressed through the application of a uniform legal regime.

This Essay’s principal aim is to explore *why* the APA has been more successful in rulemaking than in adjudication. Uncovering these reasons may help to illuminate the conditions necessary for a framework statute to succeed, as well as the circumstances that may limit or prevent its success.

First, Part I of this Essay argues that the APA’s success in adjudication was limited because the statute did not, as is typically assumed, settle deep-seated disagreement about the need for or essential

10 GARY LAWSON, *TEACHER’S MANUAL TO FEDERAL ADMINISTRATIVE LAW* 113 (9th ed. 2022).

11 See generally Bremer, *Rediscovered Stages*, *supra* note 5; Emily S. Bremer, *Reckoning with Adjudication’s Exceptionalism Norm*, 69 DUKE L.J. 1749 (2020) [hereinafter Bremer, *Reckoning*]; Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351 [hereinafter Bremer, *Exceptionalism Norm*]; Jill E. Family, *A Lack of Uniformity, Compounded, in Immigration Law*, 98 NOTRE DAME L. REV. 2115 (2023).

12 See Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1 (2011); Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

content of uniform minimum procedural requirements for adjudicatory hearings. Moreover, opponents of the APA's hearing regime were aided in resisting the law because of underappreciated difficulties associated with the project of reforming pre-existing law and practice. These difficulties included: (1) the inherent messiness of the drafters' use of creative codification to construct the APA; (2) the ambiguity produced by Congress's failure to make conforming amendments to pre-APA statutes that conflicted with the APA's new regime; and (3) the extraordinary force of institutional inertia. The result was a complex legal regime with sufficient uncertainty to afford space for a long-simmering preference for procedural informality to persist and take root within the executive establishment, Congress, and the private bar. Over decades, as I have documented elsewhere, the result has been the emergence of a norm of adjudicatory exceptionalism that is fundamentally at odds with the APA's goal of establishing a uniform procedural regime for adjudicatory hearings.¹³

Next, Part II argues that the APA was more successful in rulemaking because in this context it was prescient, establishing a framework several decades before it was widely needed. Here, the APA codified best practices in an area in which the development of both the law and administrative practices was nascent. When rulemaking became the preferred mode of agency policymaking in the 1960s and '70s, the APA's notice-and-comment requirements were attractively minimalist in comparison to its hearing regime. This helped to entice agencies to shift from adjudication to rulemaking and, over time, the APA's provisions proved successful in providing a statutory substrate necessary for the development of both agency practice and a robust body of administrative common law.

Finally, Part III offers a warning for the future interpretation of the APA. Over the last several years, my deep dive into the statute's research foundation has clarified to me that much—maybe most—of the APA's meaning is supplied by background principles and the institutional context from which the statute emerged. When the statute was first enacted, the core principles grounded in this rich context were well understood within the legal profession. In recent decades, however, that underlying knowledge has been lost and replaced with new background understandings that would have been foreign at the time the APA was enacted.¹⁴ In today's textualist era, this presents a

13 See Bremer, *Exceptionalism Norm*, *supra* note 11; Bremer, *Reckoning*, *supra* note 11, at 1758.

14 This phenomenon has contributed substantially to the APA's failure in adjudication—and has made that failure invisible to most administrative lawyers. See generally Bremer, *Rediscovered Stages*, *supra* note 5.

real and increasing danger that a shallow textualist approach to interpreting the APA will continue to warp the statute's meaning.

I. A FAILED EFFORT TO REFORM ADJUDICATORY HEARINGS

The APA's adjudication provisions codified existing best practices, with the goals of reforming inefficient and detrimental practices and (in the process) securing uniformity in the minimum procedural requirements observed in adjudicatory hearings. The APA's drafters were able to craft a statute that incorporated these two components—codification and reform—only because they were equipped with extensive research into pre-APA law and the actual procedures and practices of a wide selection of administrative agencies. That research was provided predominately by the Attorney General's Committee on Administrative Procedure.¹⁵ Although the APA is a *blend* of codification and reform, it is worth considering each of these elements independently.

First, codification. In adjudication before the APA's enactment, there was quite a bit of established law that provided a structure within which agencies had developed fairly well crystallized procedures and practices. Each agency had a pre-APA statute that required it to fulfill a specified mission by taking certain actions, such as inspections, investigations, negotiations, and hearings.¹⁶ Under the auspices of the Due Process Clause, federal courts had elaborated upon the minimum procedural requirements of a "hearing" in an adjudicatory proceeding.¹⁷ Adjudicating agencies had fleshed out the applicable statutory requirements and responded to the judicially developed administrative law with agency-specific procedures and practices. Cumulatively, these statutes, judicial precedents, regulations, and agency practices formed a body of law that supplied a relatively robust procedural framework for agency adjudication. Examining the operation of this body of law across twenty-seven individual agencies and regulatory programs, the Attorney General's Committee was able to discern clear, cross-cutting principles regarding the purpose, timing, and essential procedural

15 See *supra* notes 5–7 and accompanying text. I say "predominately" because the legislative process was also informed by the work of other persons and institutions. The Bremer-Kovacs Collection, available on HeinOnline, offers a comprehensive collection of these materials. See Emily S. Bremer & Kathryn E. Kovacs, Essay, *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).

16 This is a nonexhaustive list of functions that fit the APA's broad definition of "adjudication." See 5 U.S.C. § 551 (2018); Bremer, *Rediscovered Stages*, *supra* note 5, at 402–03.

17 See *Morgan v. United States*, 298 U.S. 468, 480–81 (1936); see also *The Japanese Immigrant Case*, 189 U.S. 86, 100–01 (1903) (holding that due process required a hearing before a person was deported from the United States).

elements of adjudicatory hearings.¹⁸ The APA's hearing provisions codified these principles.¹⁹

Second, reform. The research underlying the APA also revealed common problems across adjudicating agencies, especially with respect to the conditions necessary for ensuring the impartiality and competence of the officers who presided over adjudicatory hearings. In many agencies, the functions of investigation and prosecution were undertaken by the same officers who presided over the hearings.²⁰ The competence and skill of these officers was also highly variable across the agencies, as was the degree to which the agencies allowed hearing officers to independently conduct hearings and make recommended or initial decisions in the cases they heard. The independent regulatory commissions particularly had a tendency to micromanage their hearing officers—by maintaining interlocutory control of the many decisions that must be made to conduct a hearing and prohibiting or discouraging hearing officers from suggesting how the cases they heard ought to be decided.²¹ These practices were inefficient and contributed to widespread complaints that hearing officers were incompetent and corrupt.²² The APA's hearing provisions—particularly its separation of functions provisions and its regime for creating and protecting the office of what we now call the Administrative Law Judge (ALJ)—were designed to remedy these defects uniformly across the administrative state.²³

Surveying the landscape of administrative adjudication today, it seems clear that the APA failed in its goal of reforming administrative hearings through the establishment of uniform minimum procedural requirements. “Fail” is a strong word. But it fits. Under the APA, there is only one kind of hearing in adjudication: a formal hearing,

18 See Bremer, *Rediscovered Stages*, *supra* note 5, at 412.

19 See 5 U.S.C. §§ 554, 556, 557 (2018).

20 See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41–45 (1950).

21 See, e.g., S. DOC. NO. 76-186, pt. 6, at 16–19, 21–23 (1940) (FTC monograph); S. DOC. NO. 77-10, pt. 13, at 68–70, 83–85, 87–88 (1941) (SEC monograph).

22 In 1938, the FCC “abolished its Examining Department,” S. DOC. NO. 76-186, pt. 3, at 26 (1940) (FCC monograph), and shifted to a process in which the attorney that had handled a matter from the start would preside over the hearing, the proposed findings of fact were supplied by the parties rather than by the presiding official, and the decisions were made by the Commission based on recommendations and memoranda supplied by the staff, *see id.* at 22–23, 26–27, 31–32. The Attorney General’s Committee reported that “it [was] generally conceded that, under the old system, there was something radically wrong with the Commission’s functionings.” *Id.* at 27. The “common gossip” was that some members of the Commission wanted to fire “several examiners” but were unwilling to do so “upon stated charges” and concluded that “[t]he only other way that the elimination of these individuals could be effectuated was by the abolition of the Examining Department.” *Id.* at 27 n.3.

23 See 5 U.S.C. §§ 556, 557, 3105, 5372 (2018); *Wong Yang Sung*, 339 U.S. at 41–42.

conducted by an ALJ according to the APA's minimum procedural requirements.²⁴ The APA's goal was to ensure cross-agency uniformity in the use of this regime. But as I and others have documented extensively, most adjudicatory hearings today are conducted informally, "outside the APA," according to agency-specific procedures, by non-ALJ adjudicators of various stripes.²⁵ Adjudication under the APA is the ever-shrinking exception to the prevailing norm of exceptionalism in agency adjudication.²⁶ Attacks on the APA's core compromise began immediately after the APA's adoption, with the government's ultimately successful effort to exempt deportation hearings from the APA's adjudication provisions.²⁷ Since then, every branch of government has contributed to displacing the APA: Congress has consistently ignored the APA in favor of creating unique procedural structures to suit the needs of individual agencies and hearing programs, agencies have avoided appointing ALJs and adjudicating under the APA's hearing provisions, and the courts have been increasingly reluctant or unable to enforce the APA.²⁸ What is left of the APA's hearing regime is now collapsing. In 2018, President Trump by executive order dismantled the centralized ALJ hiring process.²⁹ In 2020, the Social Security Administration (SSA), which is by far the largest employer of ALJs,

24 See Bremer, *Rediscovered Stages*, *supra* note 5, at 395.

25 See, e.g., MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2019); Emily S. Bremer, *Designing the Decider*, 16 GEO. J.L. & PUB. POL'Y 67 (2018); Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65 (1996).

26 See Bremer, *Exceptionalism Norm*, *supra* note 11, at 1362, 1372; Bremer, *Reckoning*, *supra* note 11, at 1758.

27 After first being rebuffed by the Supreme Court, see *Wong Yang Sung*, 339 U.S. at 53, the government secured relief from Congress, see *Marcello v. Bonds*, 349 U.S. 302, 307 (1955), and the Supreme Court interpreted that relief more broadly than was necessary. See *id.* at 316, 319 (Black, J., dissenting).

28 "Unable" because the APA's structure has become less comprehensible as the legal profession and the courts forgot adjudication's staged structure. See *infra* Part III.

29 See Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018). The initial reaction to this order was negative, with many viewing it as a threat to ALJ independence, impartiality, and competence. See Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 54 (2020); Paul R. Verkuil, *Presidential Administration, the Appointment of ALJs, and the Future of for Cause Protection*, 72 ADMIN. L. REV. 461, 465 (2020); Jeffrey Lubbers, *The Regulatory Accountability Act Loses Steam but the Trump Executive Order on ALJ Selection Upturned 71 Years of Practice*, 94 CHI.-KENT L. REV. 741, 747-49 (2019); Jennifer Nou, *Dismissing Decisional Independence Suits*, 86 U. CHI. L. REV. 1187, 1187 (2019); Peter M. Shane, *Trump's Quiet Power Grab*, THE ATLANTIC (Feb. 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/trumps-quiet-power-grab/607087>

[<https://perma.cc/2Z24-HM66>]. President Biden notably has left Executive Order 13,843 in place.

suggested that its statutes may not require APA adjudication after all.³⁰ The Supreme Court seems poised to hold unconstitutional the APA's structure for protecting the impartiality and independence of ALJs.³¹ Whatever political will there once was to sustain the APA's hearing regime, it seems now to have dissipated.

The question is, why did the APA fail to achieve its principal aim? The bottom line is that the APA did not, contrary to administrative law's standard narrative, quell the deeply held views that generalizations across administrative agencies are imprudent, that hearing procedures should be tailored to the needs of individual agencies and regulatory programs, and that procedural informality was preferable in administration. Moreover, several underappreciated difficulties in the APA's approach and the institutional context it governed provided space for opponents to resist the statute's intended reform.

A good place to begin to understand the APA's failure is by recognizing that Congress's approach—one of cross-cutting reform through creative codification³²—was a messy blend. In the abstract, it seemed promising as a way of crafting workable solutions to documented problems. By codifying the best practices of existing agencies, the statute could offer solutions that had already proven to be workable. By targeting for reform well-documented pathologies in existing agencies, it illuminated the problems the legislature aimed to remedy and avoided the unintended consequences of "solving" nonexistent problems. But the approach is easiest to understand in the abstract and harder to evaluate and implement concretely. How can you know which parts of the APA's hearing provisions are reforms and which are codification? At a minimum, understanding the APA's text requires knowledge of the voluminous research that informed the statute's drafting. But this is not enough. The APA's text, once understood, must be applied to individual agencies to discern which practices required change. Both tasks—understanding the APA's text and also how it applies to individual agencies—is especially difficult for agencies and programs that were not included in the study that was conducted by the Attorney General's Committee on Administrative Procedure.³³ One of the APA's greatest strengths is that it was designed to be cross-cutting: to

30 See Hearings Held by Administrative Appeals Judges of the Appeals Council, 85 Fed. Reg. 73,138, 73,140 (Nov. 16, 2020) (to be codified at 20 C.F.R. §§ 404, 408, 411, 416, 422).

31 See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010); Transcript of Oral Argument, *Axon Enter., Inc. v. FTC*, No. 21-86 (U.S. argued Nov. 7, 2022); Transcript of Oral Argument, *SEC v. Cochran*, No. 21-1239 (U.S. argued Nov. 7, 2022).

32 See Bremer, *Exceptionalism Norm*, *supra* note 11, at 1365.

33 A few examples include the Immigration Service, the Patent Office, and the Food and Drug Administration. See 1941 ATTORNEY GENERAL REPORT, *supra* note 6, at 3–4, 4 n.2.

apply to all agencies across the government. Paradoxically, this was also one of the statute's greatest weaknesses, for it unavoidably created plenty of reasonable uncertainty about the statute's meaning and effect.³⁴

Another headwind against the APA's success was the flawed expectation that reform could be accomplished without Congress needing to make conforming amendments to pre-APA administrative statutes. As noted above, the agency practices Congress sought to reform by enacting the APA were not exclusively the product of administrative creativity. Statutes shaped the existing processes: administrative regulations, procedures, and practices were predominately interstitial. When it enacted the APA, however, Congress did not make conforming amendments to preexisting statutes. Expecting that agencies and courts would enforce the APA and ignore conflicting agency-specific statutes was unrealistic. It ran directly against the "elementary [principle] that repeals by implication are not favored," which is rigorously applied "where the prior law is a special act relating to a particular case or subject and the subsequent law is general in its operation."³⁵ This doctrine gave an edge to agency arguments that the APA did not apply to them.³⁶ To overcome it, courts had to find a clear and irreconcilable conflict between the APA and the agency's statute.

And these statutes were often written in earlier eras, structuring agency action in ways that were inconsistent with or at least different from the APA's conceptual structure for "administration." For example, some agencies were created by statutes enacted shortly after the Founding of the country, before administration emerged as a concept distinct from executive action. The concept of "administration" also evolved rapidly between the Interstate Commerce Commission's (ICC) creation in 1887 and the proliferation of administrative agencies during the New Deal.³⁷ The APA is structured based on the distinction between rulemaking and adjudication, which evolved from but is not on all fours with the prototypical due process distinction between

34 See Bremer, *Exceptionalism Norm*, *supra* note 11, at 1355.

35 Petri v. F.E. Creelman Lumber Co., 199 U.S. 487, 497 (1905).

36 Outcomes varied. In some cases, courts applied the APA. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 53 (1950); *Adams v. Witmer*, 271 F.2d 29, 32 (9th Cir. 1958). In others, courts applied the agency's statute instead. See *Gostovich v. Valore*, 153 F. Supp. 826, 827 (W.D. Pa. 1957). The cases sometimes produced substantial judicial disagreement. For example, in a case involving the question of whether antidumping decisions were subject to the APA's publication requirements, the trial court said no, the intermediate appellate court said yes, and the U.S. Court of Customs and Patent Appeals sidestepped the issue by finding that the challenger had received actual notice of the agency's finding. See *United States v. Elof Hansson, Inc.*, 296 F.2d 779, 780–82 (C.C.P.A. 1960).

37 See Bremer, *supra* note 2, at 1233 & n.127.

quasi-legislative and quasi-judicial proceedings.³⁸ To apply the modern conception of administration as crystallized in the APA to the wide variety of earlier administrative structures was more confusing than the APA's drafters apparently recognized. The wide variation in fit between the APA and agency-specific statutes, coupled with Congress's failure to make conforming amendments to agency-specific statutes, created ample room for reasonable disagreement about the APA's application and intended reforming effects.

In addition to these preexisting statutory structures, the APA's reforms faced the powerful force of institutional inertia. Each agency that predated the APA had its own history, culture, and established manner of operations. Where possible, the APA was designed to accommodate this reality. Most notably, the statute establishes only minimum procedural requirements—a floor rather than a comprehensive and exclusive code—that each agency could otherwise tailor to suit its needs. In addition, the APA encouraged but did not require agency heads to delegate adjudicatory functions to hearing officers,³⁹ and it expressly permitted the continued use of specialized hearing officers.⁴⁰ But where the APA's provisions would require *reform*, which is to say change or modification, of existing agency practices, it ran up against perhaps the most powerful force in government: inertia.⁴¹ And for the reasons identified above, there was plenty of legal room available to justify continuation of pre-APA practices.

In light of the various headwinds against reform—the messiness of the APA's creative codification, the failure to amend conflicting pre-APA statutes, and the underestimated force of institutional inertia—it becomes unsurprising that the areas of APA “exceptionalism” are found within the jurisdiction of the oldest and most well-established agencies. For example, scholars have identified tax and patent law as areas of administrative exceptionalism.⁴² These federal regulatory

38 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).

39 See Administrative Procedure Act § 7(a), 5 U.S.C. § 556(b) (2018). This may reflect the need, in practice and principle, to accommodate greater agency head control of policymaking through adjudication by independent regulatory agencies. See 5 U.S.C. § 557(b) (2018) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule . . .”).

40 See 5 U.S.C. § 556(b) (2018).

41 See Bremer, *supra* note 2, at 1232.

42 See, e.g., Bremer, *Exceptionalism Norm*, *supra* note 11, at 1370, 1372–73; Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149, 149, 157 (2016); James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1069, 1081 (2015). See generally Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897 (2014).

functions trace their history back to the nation's Founding, and the relevant agencies' practices were deeply ingrained and poorly fit the APA's conception and structure of administrative action. The Attorney General's Committee on Administrative Procedure did not prepare monographs on the Patent Office or the Immigration and Naturalization Service, both of which oversee areas of remarkable administrative exceptionalism. The Committee's early plan to study the Patent Office was jettisoned,⁴³ and immigration had recently been studied in preparation for a later-completed plan to reorganize the function from the Department of Labor to the Department of Justice.⁴⁴ These decisions provided further room for the belief that the APA was not intended to apply in these regulatory domains. As I've noted elsewhere, there are other longstanding agencies, such as the Veterans' Administration, that for similar reasons proved resistant to the APA's attempt to reform hearing procedures in adjudication.⁴⁵

Finally, the APA could not—and did not—constrain future Congresses from creating nonconforming adjudicatory programs. The first example, which emerged immediately after the APA's adoption, involved deportation hearings. The statutory language created doubt about whether the APA's hearing reforms applied in this content, and the Department of Justice immediately pursued litigation to exploit that uncertainty.⁴⁶ The Supreme Court initially blocked the effort.⁴⁷ But less than a decade after the APA's passage, Congress, with assistance from the Supreme Court, entirely removed deportation hearings from the APA's formal hearing requirements through the Immigration and Nationality Act of 1952 (INA).⁴⁸ The result was to establish something that was not supposed to exist under the APA: an informal adjudicatory hearing.⁴⁹ In a fascinating twist, the same two legislators who

43 See S. DOC. NO. 76-186, pt. 10, at 2 (1940) (Department of Commerce and Bureau of Marine Inspection and Navigation Monograph); 1941 ATTORNEY GENERAL REPORT, *supra* note 6, at 3–4, 4 n.2.

44 See 1941 ATTORNEY GENERAL REPORT, *supra* note 6, at 4 n.2; COMM. ON ADMIN. PROC., U.S. DEP'T OF LAB., IMMIGRATION AND NATURALIZATION SERVICE (1940).

45 See Bremer, *Rediscovered Stages*, *supra* note 5, at 393–94.

46 Briefly, the issue was that the APA's hearing provisions apply when a hearing is "required by statute," see 5 U.S.C. § 554(a) (2018), but the hearing requirement in deportation was read into the statute by the courts to satisfy the requirements of due process, see *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) (quoting *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903)).

47 See *supra* note 27 and accompanying text.

48 Immigration and Nationality Act, ch. 477, § 242(b)(4), 66 Stat. 163, 210 (1952). It was a multibranch effort to chip away at the APA: the executive asked for the legislative exemption, Congress passed the statute, and the Supreme Court interpreted the enactment more broadly than was necessary. See *Marcello v. Bonds*, 349 U.S. 302, 303, 306 (1955); *supra* note 27 and accompanying text.

49 See Bremer, *Exceptionalism Norm*, *supra* note 11 at 1387–88.

had sponsored the APA also sponsored the INA: Senator Pat McCarran and Representative Francis E. Walter.⁵⁰ The episode undermines the widely accepted proposition that the APA “settle[d] long-continued and hard-fought contentions, . . . enact[ing] a formula upon which opposing social and political forces [came] to rest.”⁵¹ It suggests instead that the fighting continued after the APA, undoing the compromise in important respects. And the deportation saga was only the beginning. Since that time, Congress has repeatedly created unique hearing procedures to suit the needs of individual agencies and regulatory programs, sometimes ignoring the APA’s framework entirely.⁵²

II. A PRESCIENT FRAMEWORK FOR RULEMAKING

If the APA failed to reform adjudicatory hearings, it succeeded spectacularly in creating a simple and effective framework for agency rulemaking. Today, the informal notice-and-comment procedure established by § 553 of the APA is uniformly used by agencies across the government. With a few limited exceptions, Congress has refrained from establishing unique rulemaking procedures to suit the needs of individual agencies and regulatory programs.⁵³ Instead, when Congress authorizes an agency to make rules, it typically relies on the APA to supply the applicable procedures. Courts have fleshed out the APA’s procedures with a substantial body of administrative common law, while agencies have developed sophisticated practices within the framework provided by the APA. Presidential administrations also seem to have embraced § 553 as the governing framework for the rule-making process, as evidenced (for example) by the development of an executive review regime that reflects the APA’s structure⁵⁴ and the considerable attention that agencies and presidential administrations devote to improving the notice-and-comment rulemaking process.⁵⁵ In

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

51 *Wong Yang Sung*, 339 U.S. at 40.

52 The patent adjudication scheme created by Congress in the America Invents Act of 2011 is one recent and high-profile example. See generally Bremer, *Exceptionalism Norm*, *supra* note 11, at 1372–81 (examining that scheme in detail).

53 The exceptions involve the much-maligned and little-used hybrid rulemaking procedures imposed on agencies such as the Federal Trade Commission (FTC) and the Occupational Safety and Health Administration (OSHA). Bremer, *Exceptionalism Norm*, *supra* note 11, at 1365.

54 See Exec. Order No. 12,866, 3 C.F.R. 638, 640 (1994), *reprinted as amended* in 5 U.S.C. § 601 (2018).

55 See, e.g., *Broadening Public Engagement in the Federal Regulatory Process*, THE WHITE HOUSE, <https://www.whitehouse.gov/omb/information-regulatory-affairs/broadening-public-engagement-in-the-federal-regulatory-process/> [<https://perma.cc/2MPX-7W44>]; Admin. Conf. of the U.S., 84 Fed. Reg. 2,139, 2,143–45 (Feb. 6, 2019) (adopting Recommendation 2018-6, “Improving Access to *Regulations.gov*’s Rulemaking Dockets”); Exec.

short, the APA's rulemaking regime has become firmly and uniformly established.⁵⁶

The question is, why did the APA succeed so thoroughly in rulemaking?

As in adjudication, the APA's rulemaking provisions were produced through a process of creative codification, but there was far less established law here than there was in adjudication. The agencies' pre-APA statutes rarely addressed rulemaking procedures. And because the Due Process Clause has minimal application to legislative action, the courts had not articulated constitutionally required minimum procedures for agency rulemaking.⁵⁷ Although the goal was to reform the rulemaking process, the APA's drafters were writing on a nearly blank slate. In this context, Congress's failure to make conforming amendments to agency-specific statutes was unproblematic because there was little in those statutes that conflicted with the APA's new framework.

Agency practices in rulemaking were also in a nascent period of development when the APA was enacted. This was in part because there was little law on the subject, leaving agencies with minimal need to "fill in the details." Moreover, when the APA was enacted, adjudication was by far the dominant mode of agency action and policymaking.⁵⁸ Many agency rules were internally focused, "lunch hour" regulations, which attended to the smallest details of an agency's operations and affected the public only indirectly.⁵⁹ These rules were often voluminous and important, but there was little reason or demand for them to be made through any particular process, let alone one that was known to or involved persons outside of the agency. Some agency rules, on the other hand, applied to or more directly affected private parties. In developing such rules, many agencies had begun to use a consultative process that involved the targeted solicitation of views

Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 (2018) (issuing an executive order for "Improving Regulation and Regulatory Review").

56 Some would say it has become "entrenched," although I do not believe that's quite right because Congress *could* change it at any time. See Bremer, *supra* note 2, at 1232.

57 See *Londoner v. City & Cnty. of Denver*, 210 U.S. 373 (1908); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). Later work has suggested greater possibilities for rulemaking due process, but an earlier and more modest vision informed the APA. See, e.g., Ernest Gellhorn & Glen O. Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201 (1981).

58 See Bremer, *Undemocratic Roots*, *supra* note 5, at 94.

59 See *id.* at 98; see also Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683, 694–95 (2021); Jerry Mashaw, *The Rise of Reason Giving in American Administrative Law*, in *COMPARATIVE ADMINISTRATIVE LAW* 268 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed. 2017).

from the known representatives of organized interests.⁶⁰ At most agencies, however, consultation was used inconsistently, on an *ad hoc* basis. Few agencies had yet crystallized their practices or developed procedural regulations to govern the rulemaking process.⁶¹ The APA was inspired by the emerging best practices of rulemaking agencies, but it also incorporated Congress's independent concern with the democratic values of public knowledge and participation. As compared to adjudication, the APA's provisions were more inspiration than either codification or reform.⁶² One consequence is that, as compared to the situation in adjudication, the APA's informal rulemaking requirements did not conflict with as much established law or deeply ingrained agency practice.

Perhaps most critical to the success of the APA's rulemaking provisions was Congress's incredible prescience in establishing the framework several decades before it would really be needed. It was not until the 1960s and '70s—pushed by scholars, courts, and Congress—that agencies shifted from adjudication to rulemaking as the preferred tool for developing administrative policy.⁶³ In rulemaking, then, the APA ran out ahead of both the law and existing agency practice. The lack of intense controversy in 1946 over rulemaking procedures allowed Congress to be more creative, developing a sound if aspirational framework.⁶⁴ Several decades later, when rulemaking became more common and controversial, there was already a framework in place to govern the process. It attracted use, rather than repelling it as seemed to have occurred with the APA's hearing procedures. It helped, too, that the APA's notice-and-comment provisions are skeletal, leaving ample room to accommodate judicial and administrative development of the

60 See Bremer, *Undemocratic Roots*, *supra* note 5, at 102. Other techniques, such as legislative-type hearings, were also used by some agencies. See Bremer, *Rediscovered States*, *supra* note 5, at 418–21.

61 There was such variety that some thought rulemaking was not susceptible to generalization or, therefore, to uniform procedural regulation. See Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259 (1938).

62 As Kenneth Culp Davis said, the APA's "most important idea, notice and comment procedure, was original, not merely declaratory of what had already developed." *Present at the Creation: Regulatory Reform Before 1946*, *supra* note 7, at 521.

63 See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1384–85, 1398–99 (2004) (describing the shift from adjudication to rulemaking). Compare David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922 (1965) (reporting agency reluctance to heed scholars' calls for increased use of rulemaking for policymaking), with Scalia, *supra* note 2, at 376 (describing "the constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking").

64 As I have noted elsewhere, there are only brief mentions of § 553's "democratic" aims, leaving the work of developing a theory of that aspiration to later generations. See Bremer, *Undemocratic Roots*, *supra* note 5, at 119–20. This work is ongoing. *Id.*

rulemaking process as the demand for it emerged and has continued to evolve.⁶⁵

III. THE GROWING THREAT OF A SHALLOW TEXTUALISM

One lesson is particularly clear from my recent work delving into the APA's research foundation: much of the statute's meaning is apparent only if one reads the brief text against the rich context that produced it.⁶⁶ This context includes pre-APA administrative common law, including a complex body of law under the Due Process Clause that was, at the time of the APA's enactment, still developing. It also includes a wide variety of pre-APA statutes and the agency precedents and practices that had developed and crystallized to varying degrees before the APA's enactment. Taken out of this context, the APA's text conveys much less meaning and in some cases is susceptible to serious misinterpretation.⁶⁷ This last danger is particularly acute when the APA is interpreted using background principles or modern context that differs from that which was in the mind of the APA's drafters. Most disturbingly, this can be done implicitly, without intention or awareness, rendering the error invisible and susceptible to unknowing replication.

A striking example of this problem is found in adjudication, where the legal profession forgot that adjudication has a staged structure. This amnesia produced widespread misunderstanding of the APA's adjudication provisions, and particularly the scope of its hearing regime.⁶⁸ As I have documented elsewhere, the APA's intellectual foundation reveals that adjudication is a staged process, in which informal techniques such as inspections, examinations, conferences, correspondence, and negotiation, are used first and are usually sufficient to produce a final resolution of an individual matter with the private party's consent or acquiescence.⁶⁹ This is because the initial, informal stage of the proceeding would almost always reveal undisputed facts with indisputable legal significance.⁷⁰ Only in rare cases would a dispute between the agency and the private party persist at the end of the informal stage of adjudication.⁷¹ In those cases, if there was a hearing

65 Cf. Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 254 (1986).

66 Cf. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

67 Cf. Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1141–42 (2014).

68 Bremer, *Rediscovered Stages*, *supra* note 5, at 421–23.

69 *See id.* at 432.

70 *Id.* at 403.

71 Interestingly, adjudication within agencies still follows this staged structure, and yet administrative law still lost the knowledge. *Id.* at 433. This may suggest that, as a field,

requirement, the agency would elevate the matter to the hearing stage, where quasi-judicial action (i.e., a hearing) would enable a final disposition of the matter.⁷² From this perspective, “formal” and “hearing” are synonymous, and “informal” action plainly entails only nonhearing techniques. The relationship between “formal” and “informal” procedures in rulemaking is quite different: a matter of alternative modes rather than consecutive stages. In rulemaking, the formal mode included a quasi-judicial hearing (subject to the APA’s hearing provisions), while the informal mode could include a quasi-legislative hearing (left unregulated by the APA) or no hearing at all.⁷³ As rulemaking became the more prominent form of agency action, the legal profession improperly applied rulemaking’s modes-based structure onto adjudication.⁷⁴ This created the misimpression that an informal adjudicatory hearing is possible under the APA and more broadly made the APA’s adjudication provisions less coherent. It was a significant contributing factor to the APA’s failure to uniformly govern the procedures observed in adjudicatory hearings.

The gradual loss of knowledge about the APA’s background and context has also affected rulemaking, contributing to the widespread misunderstanding of the Supreme Court’s canonical decision in *United States v. Florida East Coast Railway*.⁷⁵ The case is canonical because it effectively eliminated formal rulemaking. Scholars have long applauded the case for this effect, but have denigrated it for its poor, opaque reasoning.⁷⁶ As I have explained elsewhere, the case becomes coherent when read with knowledge of the principles and practices that informed the APA.⁷⁷ Two of these are especially important for understanding *Florida East Coast Railway*. First, at the time of the APA’s adoption there was a such thing as a quasi-legislative, *informal* hearing, which could be required by statute in rulemaking, but which the APA left unregulated.⁷⁸ Second, and related, the APA’s drafters expected that courts would apply diametrically opposed presumptions when deciding whether a “hearing” requirement in an agency-specific statute required a hearing under the APA.⁷⁹ In adjudication, the “hearing” is presumptively formal and, therefore, subject to the APA’s hearing

administrative law has (paradoxically) become too separated from the day-to-day work of administrative adjudication.

72 *Id.* at 403.

73 Bremer, *Undemocratic Roots*, *supra* note 5, at 79–80.

74 Bremer, *Rediscovered Stages*, *supra* note 5, at 421–22.

75 410 U.S. 224 (1973); *see also* *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

76 Bremer, *supra* note 38, at 79–80.

77 *See id.* at 104–11.

78 *Id.* at 99–100.

79 *Id.* at 102.

provisions. In rulemaking, however, the “hearing” is presumptively informal, subject only to requirements found in the agency’s own statute or imposed as a matter of the agency’s procedural discretion.⁸⁰ Once one recognizes, as the Supreme Court did, that the rulemaking at issue in *Florida East Coast Railway* is a purely quasi-legislative rulemaking with no quasi-judicial dimension,⁸¹ it seems clear that the statutory “hearing” requirement presumptively calls for an informal hearing. In such circumstances, if the agency complies with § 553’s notice-and-comment requirements, it has discharged its procedural obligations under the APA. The Supreme Court could have delivered a clearer opinion in *Florida East Coast Railway*, but it reached the right result.

At the time the APA was adopted—and for decades after—the rich context that supplies so much of the APA’s meaning was well understood within the legal profession. I believe this is why, for example, the Supreme Court does not fully articulate the principles that make its decision in *Florida East Coast Railway* coherent. One rarely explains the propositions that are most fundamental and universally understood—it is unnecessary, probably impossible, and distracting from the points of disagreement that are typically the focus of institutional decision-making processes. In the last several decades, as newer generations have taken responsibility of the relevant legal institutions, knowledge of the APA’s foundational principles has naturally eroded. And those principles may not be clearly articulated in post-APA judicial precedents, which tend to be the primary source of the legal profession’s knowledge about the law.⁸² As the APA’s crucial context is lost, the danger of a shallow and inaccurate textualism increases.

This danger may be present in surprising ways and places, such as with the brief text of § 553, which has so successfully accommodated evolution in administrative governance. Many assume that the brevity of that text alone casts doubt on the law and practice that has developed under § 553.⁸³ What is striking about reading the research that informed the APA, however, is the variation of agency practice that

80 It seems clear that this was the intention of those with the most knowledge and responsibility in negotiating and drafting the APA. But there are comments in the legislative history that suggest some of the less-involved legislators did not understand the point and thought the APA’s hearing provisions would apply any time there was a statutory “hearing” requirement. Bremer, *Undemocratic Roots*, *supra* note 5, at 127 n.320. I’m inclined to think the expert’s view should prevail (perhaps unsurprising, given that I’m an administrative lawyer), but it does present an interesting question of statutory interpretation.

81 There is more context needed to fully explicate this point, but intrigued readers (of which I’m *sure* there are many) will have to find it in Bremer, *supra* note 38.

82 Legal scholarship may supply more of this information, but there are practical limitations on scholars’ working knowledge of older scholarship, such as the limited coverage of law review articles provided in many research databases.

83 See, e.g., GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 401 (9th ed. 2022).

inspired and can be contained in the APA's text, as well as the degree to which pre-APA practices are consistent with current practices under § 553's administrative common law. For example, today it is common for administrative agencies to publish proposed rule text for public comment, even though § 553 requires only the publication of a "[g]eneral notice of proposed rule making."⁸⁴ Some view this as a necessary if unfortunate reaction to overly aggressive judicial review and enforcement of the APA's informal rulemaking requirements.⁸⁵ But even before the APA's adoption, agencies that sought external consultation on a proposed rule often circulated proposed rule text for comment, mostly because it was convenient and produced more useful commentary.⁸⁶ Running in a different direction are modern concerns that the frequency with which agencies invoke the APA's good-cause exception indicates widespread agency noncompliance with the APA's procedures.⁸⁷ Underlying this concern is the view that Congress intended "good cause" to be narrow, extending strictly to emergencies. Read in light of research underlying the APA, however, the legislative history does not clearly support such a restrictive view.⁸⁸ Finally, the development of administrative common law, which is viewed critically by some, seems to be consistent with § 553 as read in context with § 706, and the legislative history further supports the conclusion that Congress anticipated § 553 would be fleshed out by *both* administrative practice *and* judicial precedent.⁸⁹ Indeed, the APA is a statute that was inspired by pre-APA common law and has contributed to the development of post-APA common law. In light of the former, the latter seems natural, and the approach that begins to seem strange is one in which the statutory text is the beginning, end, and totality of the law governing administrative procedure.

There may be ways to mitigate the dangers of misinterpreting the APA as knowledge of its intellectual foundation fades over time. One approach, of course, is to fight fading memories with research and discourse about the rich context that informed the APA. This has been my project over the last several years, and the desire to make such work easier is what compelled me to work with Professor Kathryn Kovacs to publish *The Bremer-Kovacs Collection*, a digital library of the historical

84 5 U.S.C. § 553(b) (2018).

85 See Bremer, *Exceptionalism Norm*, *supra* note 11, at 1362–63.

86 Bremer, *Undemocratic Roots*, *supra* note 5, at 103.

87 See U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 15 (2012).

88 Bremer, *Undemocratic Roots*, *supra* note 5, at 123–24.

89 See *id.*

documents underlying the APA.⁹⁰ Adherence to the traditional tools of the common-law process may also help to facilitate easier retention of legal meaning that was once more consciously understood. For example, adherence to *stare decisis* may ensure that judicial opinions interpreting the APA in times closer to the APA's enactment—and thus by judges more thoroughly steeped in the statute's foundational principles—will continue to have legal effect even as the legal profession's knowledge of that background fades. This may not be enough, though. It is worth considering the possibility that legislative updating of the statute may become necessary to conform the statute to changing foundational commitments and to refresh the connections between the statutory text and the lived realities of the institutions it governs.

CONCLUSION

Acknowledging the rich complexity, mixed record of success, and challenges facing the APA does not undermine the statute's value and importance. To the contrary, it reveals a regime with remarkable depth, sophistication, flexibility, and capacity for structuring the vast and varied expanse of an ever-evolving administrative state. It also emphasizes the necessity of affirmative and ongoing effort to retain the knowledge that informed the statute and makes it coherent. As time passes, however, contemporary administrative realities become more and more different from the administrative realities that informed the APA. One way to bridge the gulf is by embracing administrative common law. The most obvious alternative is for Congress to find the political will and fortitude to forge a new (and likely fierce) compromise. I, for one, would prefer to keep the APA.

90 See THE BREMER-KOVACS COLLECTION: HISTORIC DOCUMENTS RELATED TO THE ADMINISTRATIVE PROCEDURE ACT OF 1946, HeinOnline (database updated 2021); see also Bremer & Kovacs, *supra* note 15 (providing a narrative introduction to the Collection).

